

## **MACHOVY MERCHANT SERVICE AGREEMENT**

These Machovy Merchant Service Agreement Standard Terms & Conditions together with a Merchant Service Agreement Order Form (each an “Order Form”) entered into by the Machovy Entity (“Machovy”) and Merchant (each as specified on the Order Form, and each a “Party” and together the “Parties”) are collectively referred to herein as the “Agreement.”

### **1. Nature of Services**

This Agreement relates to the placement of marketing and promotion services by Merchant with Machovy. Machovy will promote and authorize third parties to promote a Voucher for the Merchant Product with the particular Deal characteristics identified in the Order Form, in accordance with this Agreement. The Merchant is the “issuer” of the Voucher for its Deal. Machovy acts as the seller of record for the Voucher on behalf of Merchant, but the Merchant is ultimately the provider of the Merchant Product and is the obligor with regard to the Voucher.

### **2. Machovy Responsibilities**

a. Deal Creatives. Machovy may use Merchant Content to prepare one or more promotional creatives for the particular Deal (“Deal Creatives”), in its discretion, which may include a Deal page and other content hosted on the Machovy.com website, Machovy affiliate website(s), other websites platforms, or other media platforms or outlets offered by third parties with whom we have a distribution relationship (“Promotion Channels”), an email creative to be distributed to potential purchasers of the Deal Voucher, and other creatives for online and other promotion of the Deal. Deal Creatives will be provided to Merchant for prior approval (which approval may be made by email), not to be unreasonably withheld or delayed. Merchant agrees and acknowledges that Deal Creative shall be deemed to be approved if Machovy has not received contrary instructions from Merchant within 72 hours. Once a Deal Creative has been approved or has been deemed to be approved, Machovy shall have the right to use and promote other Deal Creatives that are substantially similar to the approved Deal Creative (e.g., Deal Creatives that have been reformatted).

#### **b. Promotion.**

i. Machovy may offer and promote the Merchant product or service identified in the Order Form (the “Merchant Product”) through one or more of the Promotion Channels on the terms and conditions described in the Order Form (the “Deal”), including the price to be paid by the purchaser (the “Paid Value”).

ii. The scheduled time periods that each Deal is marketed and offered as a Deal promoted within one of the Machovy-designated verticals (e.g., Daily Deals, etc.) (“Offer Periods”) will be designated solely by Machovy. Offer Periods are subject to scheduling change or cancellation in the sole discretion of Machovy. Machovy will endeavor to notify Merchant in advance of an Offer Period, however, Machovy provides no guarantee that it will provide advance notice of Offer Periods or changes to a planned Offer Period. Following the initial general Offer Period, unless Merchant notifies Machovy prior to the Offer Period that it does not wish to participate in the additional

promotion, Merchant agrees and acknowledges that if the Maximum Vouchers to be Sold as indicated in the Initial Order Form or subsequent Insertion Orders is not reached by the end of the Offer Period, Machovy shall have the right to continue to promote the Deal through one or more of its Promotion Channels at such later dates, in its discretion, until it reaches the Maximum Vouchers to be Sold. If Merchant has indicated that there is no cap on the Maximum Vouchers to be Sold in the Initial Order Form or subsequent Insertion Orders, Machovy shall have the right to sell up to twenty-five percent (25%) of the purchased Vouchers from the Offer Period through its Promotion Channels at later dates. Merchant shall send any notice electing not to participate in the additional promotions set forth in the immediately preceding sentences to the Production Contact identified in the Initial Order Form or subsequent Insertion Orders.

iii. Vouchers. Machovy and its third party Promotion Channels will provide each purchaser of a Deal (each a “Purchaser”) a numbered Voucher which specifies both the Paid Value and the Promotional Value associated with the Deal (each a “Voucher”). Within one business day following the end of the Offer Period, Machovy will provide Merchant with the names of all persons having the right to redeem the Vouchers and the corresponding Voucher numbers.

iv. Additional Orders. The Order Form attached hereto is the “Initial Order Form”. From time to time, the parties may decide in their discretion to promote additional Deals, subject to the parties’ execution one or more written “Insertion Orders” which shall be substantially in the form of the Order Form, with regard to such additional Deals, which shall incorporate these Standard Terms & Conditions by reference.

### **3. Merchant Responsibilities**

a. Issuer. Merchant agrees and acknowledges that Machovy and its third party Promotion Channels market, and Machovy is the seller of record for, the Deal on behalf of Merchant, but that Merchant remains the issuer of the Vouchers, the provider of the Merchant Product and the obligor with regard to the Voucher. Accordingly Merchant agrees that it, and not Machovy or its Promotion Channels, is solely responsible to fulfill the Deal and provide the Merchant Product to the individual redeeming each Voucher in accordance with this Agreement.

b. Fulfillment. Merchant agrees to honor and fulfill all Vouchers sold for the Deal in accordance with the terms of the Deal, the standard Machovy Terms and Conditions posted on <http://www.machovy.com/terms>, this Agreement, and any applicable laws. Merchant agrees to accept Vouchers in any form presented for redemption that has been approved by Machovy, including, without limitation, a physical printout of the Voucher or by displaying the Voucher on a mobile device such as a smartphone at the point of service. Merchant agrees that in fulfilling the Voucher, it will not require any payments or impose any conditions that were not disclosed to the Purchaser in the terms of the Voucher. Merchant shall not treat Voucher holders differently from other paying customers in the scheduling (e.g., use of blackout dates and times) or delivery of services, except as expressly set forth in the Deal. Vouchers for a specified value or discount shall be redeemable for goods or services priced at the same level and on the same terms as other paying customers. For Deals that require advance scheduling, Merchant shall use its best efforts to accommodate the scheduling request of the Voucher holder. Except as otherwise expressly set forth in the Deal, if the Voucher holder contacts Merchant prior to the applicable Expiration Date for the

purpose of scheduling service thereafter, the customer shall get the full benefit of the Promotional Value.

c. Merchant Content. Merchant may be asked to provide a logo, photograph, or other marketing materials (“Merchant Content”) to be used to market the Merchant Product. Merchant hereby grants Machovy a non-exclusive, perpetual, irrevocable, royalty-free and worldwide license to reproduce, use, display, perform, distribute, adapt, reformat, and create derivative works (as Deal Creatives) based upon some or all of the Merchant Content for the purpose of developing, distributing, and otherwise promoting a Deal through its Promotion Channels as Machovy deems appropriate (including by sublicensing the foregoing rights to its Promotion Channels). Merchant will not provide any Merchant Content for which it cannot grant the licenses described in this paragraph.

d. Redemption Data. Merchant shall collect and provide to Machovy on a regular basis, no less frequently than monthly, a list of the serial numbers of redeemed Vouchers. Merchant shall provide this information by using Machovy’s Merchant Center through which Merchant can record such data.

e. Non-redeemed vouchers. Any and all payments for vouchers issued but not redeemed shall be held in escrow by Machovy indefinitely, regardless of the expiration date thereof.

#### **4. Fees and Payment**

a. Marketing Fee. In consideration for fulfilling its obligations under this Agreement, Machovy will be entitled to retain the Marketing Fee set forth in the Order Form on all payments received from Purchasers of the Vouchers. Merchant authorizes Machovy to deduct its Marketing Fee from the Merchant Payment made pursuant to Section 4(b). The Marketing Fee shall have been earned upon the promotion of the Deal.

b. Merchant Payment. Subject to Merchant’s performance of all of its obligations under this Agreement, Machovy shall remit to Merchant all payments received from Purchasers of Vouchers minus the Marketing Fee and the Credit Card Processing Fee for the Deal Promotion specified in the Order Form (the ‘Merchant Payment’). Unless otherwise agreed by the Parties in writing, the amounts due to Merchant shall be paid to Merchant, upon Merchant’s request, with a one dollar (\$1.00) transfer fee per each request. Notwithstanding any other provision herein, there will be no payment due or made prior to the redemption of said vouchers as provided herein in Paragraph 3(d). Subject to the preceding, Merchant Payment shall be as follows: (negotiated, agreed upon rate as defined in Paragraph c herein%) of the Merchant Payment owed, less any returns and refunds, will be transferred to the Merchant Account within ten (10) business days after any request pursuant to this Paragraph.

c. Negotiated, Agreed upon Rate. Merchant shall suggest the applicable percentage acceptable for any and all voucher agreements payable to (retained by) Machovy subject to acceptance by the latter. Said rate, upon acceptance by Machovy, shall be the applicable rate utilized in Paragraph b herein.

d. Taxes. Merchant will be solely responsible for collecting and remitting any value added, use or sales taxes owed to federal, state, or local taxing authorities in connection with the sale or redemption of Vouchers. Merchant acknowledges that Machovy will report to the Internal Revenue Service the total amount of payments Merchant receives each calendar year if a Merchant's Deal generates more than twenty-thousand dollars (\$20,000) in revenue and two-hundred (200) or more Vouchers sold.

e. Scheduling Merchant understands that the success of the Deal is dependent upon coordination in promotion planning. To ensure the success of the Deal, Merchant agrees that it will not promote or authorize the promotion of the same or similar Deal online, including without limitation on any other daily deal or flash sale website upon the later of the date of notice of the Offer Period or the date fifteen days prior to the Offer Period start date and continue until the later of the date thirty (30) days following the date of notice or the date fifteen (15) days following the end of the Offer Period ("Quiet Period"). If a scheduled Offer Period needs to be rescheduled due to actions within the sole control of Merchant, including failure to honor the Quiet Period, then Machovy may in its discretion increase the Marketing Fee by up to 10% of the Paid Value for Vouchers sold.

## **5. Refunds**

Merchant agrees that Machovy, including its Promotion Channels, shall have the right to refund the Paid Value to any Purchaser who is dissatisfied with the Merchant Product (which may include, without limitation, scheduling or use thereof), provided that Machovy also refunds the Marketing Fee associated with such purchase. In such cases, if the refund occurs before payment in full of the Merchant Payment has been made to Merchant, the refunded fees (not including any refunded Marketing Fees) will be set-off against amounts owed to the Merchant. If the Merchant has already been paid the Merchant Payment in full, it agrees promptly to repay to Machovy the amount of refunded fees (not including any refunded Marketing Fees). In Machovy's sole discretion, in lieu of repayment for a refunded Voucher, Machovy shall be entitled to resell or otherwise transfer the Voucher to an alternative user for use in accordance with the terms of such Voucher.

## **6. Representations and Warranties**

a. General. Each Party hereby represents and warrants that (a) it has the authority to enter into this Agreement and to fully perform its obligations hereunder, (b) this Agreement does not and will not conflict with any of the Party's other obligations to any third parties, and (c) it complies and will comply with applicable laws and regulations.

b. Additional Warranties. Merchant additionally represents and warrants that: (a) it will provide the Merchant Product in a safe, professional, and reputable manner, (b) neither the Merchant Content nor the Merchant Product infringes or misappropriates any third party copyright, trademark, right of publicity, moral right, trade secret, or other proprietary right, (c) it has all valid federal, state, and local licenses and or permits required to conduct its business and perform the Deal, (d) it will comply with applicable federal and state laws related to offering, promotion, sale or redemption of the Vouchers, including those related to deceptive trade practices, unclaimed property liability or obligations to consumers associated with Vouchers that have not been redeemed, alcohol related service and discounting, and expiration of Vouchers, gift cards, gift certificates, and coupons, (e) all

advertising claims related to its Promotion is truthful, accurate, and adequately substantiated, and (f) it is registered for sales and use tax collection purposes in all states which Merchant's good and services will be provided pursuant to the terms of the Voucher. Merchant acknowledges that the Deal terms will state both in the Deal Creatives and on the printed Voucher that the Promotional Value of the Voucher expires after a stated Expiration Date, and that the Paid Value does not expire or expires on a later date, as permitted or required by law. Merchant is responsible for ensuring that information printed on the Voucher complies with applicable state and federal laws relating to gift certificates, and Merchant is responsible for enforcing expiration of the Vouchers only in accordance with applicable federal and state laws. In addition, if a Purchaser redeems a Voucher for less than the Paid Value, federal and state laws may require that the Merchant, upon request, provide the Purchaser or holder of a Voucher cash redemption equal to the difference between the Paid Value and the amount redeemed. Merchant, and not Machovy or its Promotion Channels, is responsible to comply with any cash redemption requirements.

c. Deal Value Warranties. Merchant additionally represents and warrants that: (a) it will not charge a higher price for its goods or services to Machovy Voucher holders, (b) the general public price is no lower than the stated Deal Value, (c) it will not arbitrarily inflate prices on its website or at its location due to the Promotion, and (d) the Deal Promotional Value identified in the Order Form or any subsequent Insertion Order is a true discount and the Merchant Product will not be available on any other website for free or at a better value.

## **7. Indemnification**

a. Indemnity Merchant shall indemnify, defend, and hold harmless Machovy, its directors, officers, employees, agents, and third party Promotion Channels from and against any and all claims, demands, causes of action, or liabilities, and expenses, including reasonable attorney's fees, to the extent arising out of a Deal, Voucher, Merchant Content, Merchant Product or the fulfillment thereof, and/or any breach or alleged breach of any Merchant obligation, representation, or warranty under this Agreement.

b. Process. Machovy must notify Merchant promptly in writing of any claim for indemnification hereunder, and provide, at Merchant's expense (to the extent of out-of-pocket expenses only), all reasonably necessary assistance, information and authority to allow Merchant to control the defense and settlement of such claim, provided that the failure of Machovy to promptly inform Merchant of any claim shall not excuse Merchant of its obligations under this Section except to the extent such failure materially prejudices Merchant. Notwithstanding the foregoing, Merchant shall not enter into any settlement of the defense of such action, other than with respect to the payment of monies, without Machovy's prior written consent, which consent shall not be unreasonably withheld or delayed. Machovy may participate at its expense in the defense and/or settlement of any such action with counsel of its choosing and at its sole expense.

## **8. Limitation of Liability**

NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES (EVEN IF THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), ARISING FROM BREACH OF THIS AGREEMENT, OR ARISING FROM ANY OTHER PROVISION OF

THIS AGREEMENT, SUCH AS, BUT NOT LIMITED TO, LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS (COLLECTIVELY, "DISCLAIMED DAMAGES"). MACHOVY'S CUMULATIVE LIABILITY RELATED TO DIRECT DAMAGES WILL BE LIMITED TO THE MARKETING FEES RECEIVED BY LIVING SOCIAL RELATED TO THE DEAL SET FORTH IN THE ORDER FORM. THESE LIMITATIONS SHALL NOT APPLY TO ANY INDEMNIFICATION OBLIGATION.

## **9. Term**

a. Term. This Agreement shall commence on the Effective Date and continue for one (1) year.

## **10. Miscellaneous**

a. Confidentiality. The terms of this Agreement are to be treated by Merchant and Machovy as confidential, provided that Machovy may disclose such terms as necessary to its third party Promotion Channels to enable them to market, distribute, or promote Deals. The Deal, Paid Value, Promotional Value, and Offer Period are also to be treated by Merchant as confidential until the Deal has been publicly promoted by Machovy or its Promotion Channels. Merchant agrees not to disclose any such confidential information to any third party, other than its legal, tax, and accounting advisors who are bound by a duty of confidentiality or as required by applicable law.

b. Entire Agreement. This Agreement is the entire agreement of the Parties with respect to the subject matter hereof, and supersedes any and all prior agreements and/or understandings, whether written or oral. This Agreement shall not be modified except by a written agreement dated subsequent hereto signed on behalf of each Party by their duly authorized representatives.

c. Notices. All notices and requests in connection with this Agreement will be deemed given as of the day they are received either by facsimile, messenger, delivery service, or in the Mail, postage prepaid, certified or registered, return receipt requested, and addressed to a Party at the address specified in the Order Form or such other address as a Party may designate pursuant to this notice provision.

d. Waiver. No waiver of any term or condition hereof shall be effective unless in writing and signed by the authorized representative of the Party against whom such waiver is asserted. Any waiver shall be specifically limited to its terms, and shall not be deemed applicable to subsequent like circumstances.

e. Non-Disparagement. Merchant agrees that during the Term of this Agreement and for one additional year after termination of this Agreement, Merchant will not make disparaging, degrading, or otherwise negative remarks about Machovy, its officers, directors, affiliates, or its business practices, strategies or plans.

f. Governing Law. This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania, without application of principles of conflicts of law.

g. Attorneys' Fees. In the event of litigation hereunder, the prevailing party, in addition to its remedies shall be entitled to reasonable legal fees.

h. Assignment. Machovy may assign this Agreement to (i) any of its subsidiary companies, or (ii) a successor entity in connection with a change of control or acquisition of substantially all of its Deals business without notice to Merchant.

i. Counterparts. This Agreement may be executed in one or more counterparts, which may be exchanged by facsimile or other electronic means, each of which shall be deemed an original and which together shall constitute one and the same agreement.

**Authorization & E-Signing**

I represent that I am a duly authorized representative of Merchant and that my act of e-signing this document shall be a binding commitment of Merchant under the terms of this Machovy Merchant Service Agreement Order Form and Standard Terms & Conditions.

---

(Signature)

**Business User**

---

(Title)

---

(Legal Business Name)

---

Business Type (Individual/Sole Proprietor, Corporation, LLC)

---

(Social Security/Employer Identification Number)