Merchant e-Solutions Merchant Referral Program Agreement

This Merchant e-Solutions Merchant Referral Program Agreement (the “Agreement”) is made and entered into as of ____________________________ (“Effective Date”), by and between Merchant e-Solutions, Inc., a Delaware corporation, having its principal place of business at 3400 Bridge Parkway, Suite 100, Redwood City, CA 94065 (“MES”), and ____________________________, a ____________ corporation, having its principal place of business at ____________________________, (“Company”).

WHEREAS, Company provides ____________________________________________________ and related services to business customers that are, or may become, interested in applying for Merchant Processing Services for Credit Card and Debit Card transactions; and

WHEREAS, MES is engaged in the business of offering merchant accounts and related credit and debit card Merchant Processing Services to Merchants; and

WHEREAS, Company wishes to market MES’ merchant account and related merchant processing and reporting services to its current and prospective customers; and MES wishes to contract with Company to offer MES’s credit and debit card processing services.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledge, the parties hereby agree as follows:

1. DEFINITIONS

1.1. "Association" shall mean a card association such as Visa U.S.A. Inc. or MasterCard International Incorporated that promulgates Operating Rules and operates an interchange system for exchanging Charges and Credit Vouchers among merchants, acquirers, and card issuers. In the case of ATM or debit cards, an Association shall also include Debit Networks.

1.2. "Business Day" shall mean any day when banks are generally open for business in the ordinary course.

1.3. "Credit Card" shall mean any valid Visa® or MasterCard®, American Express, Discover Card/NOVUS card brands, Diners Club, Carte Blanche or JCB card that is used to access a line of credit to pay for goods or services or obtain cash.

1.4. "Debit Card" shall mean any valid card that is used to access deposit accounts to pay for goods or services or obtain cash.

1.5. "Debit Networks" shall mean the telecommunications and processing system used by member banks to allow their Cardholders to purchase goods and services using the member bank’s proprietary Debit Card at a point-of-sale.

1.6. "Merchant" shall mean any Company business customer that is a candidate to become, or that does become, an MES Merchant.

1.7. "Merchant Agreement" shall mean an agreement between MES and an MES Merchant that specifies the terms and conditions under which MES will provide Merchant Processing Services to the Merchant.
1.8. "MES Merchant" shall mean a business establishment referred by Company to MES under this Agreement that has executed a Merchant Agreement with MES after being approved by MES under its underwriting guidelines.

1.9. "Merchant Processing Services" shall mean services provided to businesses accepting Credit Cards and/or Debit Cards issued under the Associations’ Operating Rules including, without limitation, credit and underwriting, merchant account setup, authorization and processing, capture and settlement, merchant accounting, customer service, chargeback and retrieval, risk management, merchant reporting and portfolio management.

1.10. "MES Technology" shall mean the MES system that manages the bankcard process and handles the online reporting of Credit Card transactions with web-based payment processing information consolidated from authorization and settlement systems.

1.11. "Operating Rules" shall mean relevant portions of operating regulations, operating manuals, official rules, bulletins, notices and similar documents issued by Associations or MES.

1.12. "Term" shall have the meaning set forth in Section 10.

2. AGREEMENT

2.1. MES and Company hereby agree to cooperate and assist each other in a referral program in accordance with the terms of this Agreement.

3. COMPANY’S DUTIES

3.1. Company shall refer Merchants to MES for Merchant Processing Services. Company shall direct the Merchant to an online “splash page” where the Merchant may fill out a call back form, or provide the Merchant with MES’s toll free phone number to reach the MES sales group.

3.2. Company shall use commercially reasonable efforts to sell the MES Merchant Processing Services to Company’s current and prospective customers. Company shall pay all costs of sales and marketing of the MES Merchant Processing Services, unless otherwise agreed upon in writing.

4. MES’s DUTIES

4.1. MES shall underwrite all Merchant referrals from Company as more fully described in the section captioned Underwriting Guidelines. If the Merchant is approved, MES shall establish a merchant account number and execute a Merchant Agreement with the Merchant that includes each relevant Credit Card or Debit Card type. The Merchant’s obligations under the merchant processing agreement will run exclusively to MES.

4.2. MES will establish pricing for each merchant account.

4.3. MES will provide all Merchant Processing Services to Merchants.

4.4. MES may deploy Merchant terminal equipment or Internet payment gateway services in conjunction with a merchant account. In the event the Merchant has acceptable terminal equipment, MES will download appropriate terminal software. In the event the Merchant has acceptable gateway services, MES will provide merchant account details sufficient to configure a gateway for operability.

5. FINANCIAL CONSIDERATIONS

5.1. MES and Company agree that Company’s compensation is defined in Schedule A. All compensation to Company under the Merchant Referral Program shall cease upon termination of this Agreement.

6. UNDERWRITING GUIDELINES

6.1. MES will own the Merchant Agreement. Because MES owns the Merchant Agreement and the risk and liability under the Merchant Agreement, MES will solely determine the underwriting guidelines and approvals for the Merchants to be served by the MES Merchant Processing Services. Company shall represent to potential Merchants that a referral by Company is not a guarantee that MES will provide Merchant Processing Services to such Merchants and that such services will only be provided by MES in the event MES approves the Merchant’s application and the Merchant enters into a Merchant Agreement acceptable to MES.

6.2. MES will not approve Merchants in the following categories: Adult Entertainment, Bail and Bond Payments, Cruise Lines, Horoscopes/Psychic Services, Gambling or Lotteries, Pawn Shops, Multi-level Marketing Companies. This list may be changed by MES at any time.

6.3. MES will have the right to cancel any Merchant Agreement between MES and an MES Merchant for any reason including, without limitation, the Merchant’s nonpayment, excess chargebacks or fraud risk or as directed by one of the Associations. Company shall notify MES of any cancellation of services between Company and any MES Merchant.
7. PAYMENT

7.1. All payments due under this Agreement for any month shall be due and payable by the 20th day of the next succeeding month, beginning the month after the Effective Date hereof. If any such payment date falls on a day that is not a Business Day, the payment shall be made on the next succeeding Business Day. All payments due and payable by MES under this Agreement shall be made by ACH transfer in U.S. dollars to Company’s account at:

Bank Name: ____________________________
Account Name: __________________________
Account Number: _________________________
ABA/Routing Number: ______________________

or such other bank account as Company may from time to time indicate by proper notice hereunder.

8. REPRESENTATION AND WARRANTIES BY COMPANY

8.1. Company represents and warrants that it has the right and authority to enter into this Agreement.

8.2. Company represents and warrants that in its performance hereunder it shall comply with the bylaws and operating regulations of the Associations and applicable federal and state regulations and standards of industry or professional conduct.

9. REPRESENTATION AND WARRANTIES BY MES

9.1. MES represents and warrants that it has the right and authority to enter into this Agreement.

9.2. MES represents and warrants that in its performance hereunder it shall comply with the bylaws and operating regulations of the Associations applicable and federal and state regulations standards of industry or professional conduct.

10. TERM AND RENEWAL

10.1. This Agreement shall become effective as of the Effective Date and shall continue in full force and effect for three (3) years (“Initial Term”). The Agreement shall thereafter automatically renew for successive two year terms (the “Renewal Terms,” or collectively with the Initial Term, the “Term”), unless terminated by either party by written notice, ninety (90) days prior to the end of the Initial Term of the beginning of the next Renewal Term.

11. WARRANTY; DISCLAIMER

EXCEPT AS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTIES TO ANY PERSON OR ENTITY WITH RESPECT TO ANY INFORMATION, CONTENT OR OTHER MATERIALS PROVIDED OR MADE AVAILABLE BY IT HEREUNDER AND DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT.

12. LIMITATION OF LIABILITY

EXCEPT AS OTHERWISE PROVIDED HEREIN, NEITHER PARTY SHALL BE LIABLE OR OBLIGATED TO THE OTHER UNDER ANY SECTION OF THIS AGREEMENT OR UNDER CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL OR EQUITABLE THEORY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, LOST PROFITS, OR LOST DATA.
IN NO EVENT SHALL THE PARTIES’S LIABILITY EXCEED THE AMOUNTS PAID UNDER THIS AGREEMENT DURING THE MOST RECENT SIX-MONTH PERIOD. THIS SECTION SHALL NOT APPLY TO ANY BREACH OF SECTION 16 “CONFIDENTIAL INFORMATION” UNDER THIS AGREEMENT.

13. INDEMNIFICATION

Each party (the "Indemnitor") shall defend or settle at its expense any claim or suit, including without limitation any proceeding, investigation or claim (an “Action”) brought by a third party against the other party, each of its affiliates, directors, officers, agents and employees (the "Indemnitee") to the fullest extent permitted by law arising out of or in connection with a third party claim: (a) that the information, content or other materials or services provided or made available by the Indemnitor or the use thereof as specifically authorized by the Indemnitor, infringe any patent, copyright or trademark rights of any third party, or are a misappropriation of any third party’s trade secret, or contain any libelous, defamatory, or disparaging materials; or (b) related to any breach by Indemnitor of its obligations, representations and warranties under this Agreement. Subject to the Section of this Agreement captioned Limitation of Liability, the Indemnitor shall indemnify and hold harmless the Indemnitee from and against any and all damages, costs, liabilities and attorneys’ fees, incurred in defending and/or resolving such Action; provided that (a) the Indemnitor is promptly notified in writing of such Action, (b) the Indemnitor shall have the sole control of the defense and/or settlement thereof, (c) the Indemnitee furnishes to the Indemnitor, within a reasonable time, information available to the Indemnitee for such defense, and (d) the Indemnitee cooperates in any defense and/or settlement thereof as long as the Indemnitor pays all of the Indemnitee’s reasonable out of pocket expenses and attorneys’ fees.

14. PROPRIETARY RIGHTS

14.1. MES and its respective licensors and third party information and content providers retains all rights, title and interest in and to all of the information, content, data, designs, materials and all copyrights, patent rights, trademark rights and other proprietary rights thereto provided or licensed by MES as described in this Agreement, including all such rights in the MES Technology or in any and all modifications or derivative works of the MES Technology, including but not limited to any upgrades or enhancements thereof. Except as expressly provided herein, no other right or license is granted under this Agreement. All rights not expressly granted hereunder by a party are expressly reserved to such party and its licensors and information and content providers.

15. TERMINATION

15.1. Termination for Cause. This Agreement may be terminated by either party for cause as follows:

15.1.1. Upon ninety (90) days prior written notice if the other party shall be in breach or default of any material provision of this Agreement; provided however that the breaching party may avoid termination if, before the end of such ninety (90) day period, the breaching party cures such breach; or

15.1.2. Effective immediately and without notice if the other party ceases to do business, or otherwise terminates its business operations, except as a result of an assignment, as permitted under the terms and conditions of this Agreement; or

15.1.3. Effective immediately and without notice if the other party shall fail to promptly secure or renew any license, registration, permit, authorization or approval for the conduct of its business in the manner contemplated by this Agreement or if any such license, registration, permit, authorization or approval is revoked or suspended and not reinstated within sixty (60) days; or

15.1.4. Effective immediately and without notice if the other party becomes insolvent or seeks protection under any bankruptcy, receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against the other (and not dismissed within ninety (90) days).
15.1.5. Effective immediately if either party exits the business in which it engages under this Agreement, or it is informed by any Association that the activities contemplated under this Agreement violate any Association Rules or By-Laws.

15.2. Effect of Termination:

15.2.1. Upon termination of this Agreement at any time, for any reason, each party shall immediately return to the other party (or certify as destroyed) all Confidential Information of the Disclosing Party (defined below) as defined herein (including all copies thereof) then in its possession or custody or control.

15.2.2. All provisions of this Agreement which by their nature must survive termination in order to achieve the fundamental purposes of this Agreement, including without limitation the sections entitled Financial Considerations, Limitation of Liability, Indemnification, Proprietary Rights, Confidential Information and General shall survive any termination or expiration of this Agreement.

16. CONFIDENTIAL INFORMATION

Each party (“Receiving Party”) agrees to keep confidential and not disclose or use except in performance of its obligations under this Agreement, confidential or proprietary information related to the other party’s (“Disclosing Party”) technology or business that the Receiving Party learns in connection with this Agreement and any other information received from the other, including without limitation, names and expertise of employees and consultants, all information relating to customers and customer transactions and other technical, business, financial, customer and product development plans, forecasts, strategies and information, all of the foregoing, “Confidential Information”. Neither party shall disclose the terms of this Agreement to any third party without the prior written consent of the other party. Each party shall use reasonable precautions to protect the other’s Confidential Information and employ at least those precautions that such party employs to protect its own confidential or proprietary information. “Confidential Information” shall not include information the Receiving Party can document (a) is in or (through no improper action or inaction by the Receiving Party or any affiliate, agent or employee) enters the public domain (and is readily available without substantial effort), or (b) was rightfully in its possession or known by it prior to receipt from the Disclosing Party, or (c) was rightfully disclosed to it by another person without restriction, or (d) was independently developed by it by persons without access to such information and without use of any Confidential Information of the Disclosing Party. Each party, with prior written notice to the Disclosing Party, may disclose such Confidential Information to the minimum extent possible that is required to be disclosed pursuant to a court order or subpoena, provided that reasonable measures are taken to guard against further disclosure, including without limitation, seeking appropriate confidential treatment or a protective order, or assisting the other party to do so.

17. ATTORNEYS’ FEES

The prevailing party, as determined by the court or arbitrators, shall be entitled to recover from the other party its attorneys’ fees, costs and necessary disbursements actually incurred (including allocated fees and costs for in-house legal services), in connection with such action or proceeding.

18. ASSIGNMENT

Neither this Agreement nor any rights, licenses or obligations hereunder, may be assigned by either party without the prior written consent of the non-assigning party, provided such approval shall not be unreasonably withheld or denied. Notwithstanding the foregoing, MES may assign this Agreement to any acquirer of all or of substantially all of such party’s equity securities, assets or business related to the subject matter of this Agreement without the prior approval of the other party. Any attempted assignment in violation of this Agreement shall be
void and without effect. Subject to the foregoing, this Agreement will benefit and bind the parties’ successors and assigns.

19. GENERAL

19.1. Relationship of the Parties. The parties hereto expressly understand and agree that each party is an independent contractor in the performance of each and every part of this Agreement and is solely responsible for all of its employees and agents. Neither party nor its agents or employees are the representatives of the other party for any purpose and neither party has the power or authority as agent, employee or any other capacity to represent, act for, bind or otherwise create or assume any obligation on behalf of the other party for any purpose whatsoever.

19.2. Force Majeure. A party shall not be liable for nonperformance or delay in performance (other than obligations regarding payment of money or confidentiality) caused by any event beyond the reasonable control of such party including, but not limited to, wars, hostilities, acts of terrorism, civil commotion, national emergency, strikes, fire, flood, earthquake, force of nature, explosion, embargo, or any other Act of God, or any law, proclamation, regulation, ordinance, or other act or order of any court, government or governmental agency.

19.3. Notices. Notices under this Agreement shall be sufficient only if in writing and personally delivered, delivered by a major commercial rapid delivery courier service or mailed, postage or charges prepaid, by certified or registered mail, return receipt requested to a party at its addresses set forth on the first page above or as amended by notice pursuant to this Section.

19.4. Construction. The parties acknowledge and agree that this Agreement has been drafted and prepared through the efforts and negotiation of both parties and the rule of construction that any vague or ambiguous terms are to be construed against the party drafting such terms shall not be applied to either party to this Agreement.

19.5. Applicable Law. This Agreement shall be governed by and construed under the laws of the State of California and the United States without regard to conflicts of laws provisions thereof.

19.6. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior discussions, documents, agreements and prior course of dealing, and shall not be effective until signed by both parties.

19.7. Amendment and Waiver. Except as otherwise expressly provided herein, any provision of this Agreement may be amended or modified and the observance of any provision of this Agreement may be waived (either generally or any particular instance and either retroactively or prospectively) only upon the written agreement of authorized representatives of each of the parties. The failure of either party to enforce its rights under this Agreement at any time for any period shall not be construed as a waiver of such rights.

19.8. Exclusivity. Company understands that MES has other similar contractual relationships with other financial institutions and business customers, and will continue to develop such relationships.

19.9. Severability. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be unenforceable, such provisions shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable.

19.10. Publicity and Press Releases. Any press releases or publicity relating to this Agreement shall be approved by both parties and no publicity shall be released without such prior written approval, unless otherwise required by law.

19.11. Headings. Headings and captions are for convenience only and are not to be used in the interpretation of this Agreement.

19.12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but both of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by duly authorized representatives of the parties effective as of the Effective Date.
Schedule A

COMPENSATION FOR REFERRALS

MES and Company agree that Company will receive as compensation hereunder a one-time referral fee of $100.00 per approved, activated and transacting MES Merchant referred by Company under the terms of this Agreement.