

# Punchey Software Terms and Conditions

*Last Updated: March 30, 2019*

Thank you for choosing Punchey for your business. When you use our products and services you're agreeing to our terms, so please read this Software Services Agreement carefully as they contain important information regarding your legal rights and obligations. Certain capitalized words below are defined in Section 15 (Definitions).

Punchey provides online business management software services designed specifically for small and medium sized businesses ("Software Service"). You can access our Software Service via the client login page on our Website and through our Apps.

These Software Services Agreement ("Agreement") apply to any use of and access to our Software Service, Website or Apps (collectively, "Services") by you and your Affiliates. By accessing or using the Services (or enabling an Affiliate to access or use the Services), you are indicating that you have read this Agreement and agree to be bound by its terms. If you do not agree with all of the terms of this Agreement, you may not access or use any Services.

This Agreement is effective ("Effective Date") on the earlier of (a) the date you accept this Agreement by clicking an "I Agree" button or otherwise indicate that you accept this Agreement (including through an Order Form), or (b) the date you (or an Affiliate) first access or use the Services.

## **1. General Terms.**

When you use our Services, you are entering into a legal agreement and you agree to all of these terms.

- **Agreement.** This Agreement is a binding legal agreement between you and the applicable Punchey Entity indicated in Section 14.4 below (“**Punchey**”, “**we**”, “**us**” or “**our**”). If you enter into this Agreement on behalf of a company or other legal entity, you represent and warrant that you have the legal authority to bind that entity and its Affiliates to this Agreement, and all references to “**you**” and “**your**” in this Agreement are referring to that entity. You and Punchey are also sometimes referred to in this Agreement individually as a “**Party**” and collectively as the “**Parties**”.
- You also agree to our Privacy Policy.
- Our [Privacy Policy](#) explains how we collect and use information that’s submitted to the Services. By using the Services, you are indicating that you’ve read the [Privacy Policy](#) and agree to its terms.
- This Agreement covers Apps that allow you to access our software like the Punchey business app, but it doesn’t cover the Punchey App.
- This Agreement applies to any use of the Services, whether in connection with a paid subscription or a free trial. For clarity, this Agreement does not apply to use of the Punchey App. That has a separate User Agreement, which is accessible through the app. In addition, if you (or any third party on your behalf) uses our APIs, you will be subject to the applicable API terms set forth on our Website and any other terms designated by Punchey.
- Certain additional terms apply if you are entering information that originates in the European Economic Area.
- We continuously strive to improve our products and services, and as our business evolves, this agreement may change. This section describes how we can change the agreement.
- **Changes to the Agreement.** We may, in our sole discretion, make changes to this Agreement from time to time. Any changes we make will become effective when we post a modified version of the Agreement to our Website, and we agree the changes will not be retroactive. If we make any material changes to the Agreement, we’ll also notify you within the Software Service or by sending you an email. If you continue using the Services after any changes, it means you have accepted them. If you do not agree to any changes, you must stop using

the Services, and you can terminate your account by emailing [support@Punchey.com](mailto:support@Punchey.com). It is your obligation to ensure that you read, understand and agree to the latest version of the Agreement that's posted on our Website. The legend at the top of the Agreement indicates when it was last changed.

- Additional terms apply to certain products that we provide.
- **Supplemental Terms.** Your use of, and participation in, certain Services may be subject to additional terms ("**Supplemental Terms**") and such Supplemental Terms will either be listed in this Agreement or will be presented to you for your acceptance when you sign up to use the supplemental Service. If this Agreement is inconsistent with the Supplemental Terms, the Supplemental Terms will control with respect to the service with which it applies.

## 2. Services.

Our software will meet the uptime requirements described in our SLA.

- **Access and Service Levels.** Punchey will make the Services to which you have subscribed available to you, subject to the terms and conditions of this Agreement. During the Subscription Term, the Software Services will meet the service levels specified in the Service Level Agreement ("SLA").
- We may temporarily suspend your access for things like scheduled maintenance, or if a natural disaster occurs. We may also change or discontinue particular features or functions of our Services at any time.
- **Changes to Services.** Notwithstanding Section 2.1, in addition to our rights set forth in Section 8.4, we reserve the right to suspend any Services (a) during planned downtime as provided in the SLA, (b) in connection with a Force Majeure event (as described in Section 14.9), or (c) if we believe any malicious software is being used in connection with your account. In addition, we reserve the right to change, suspend or discontinue any features, components or functions of the Services at any time. If we make any material changes to the Software Service, we'll notify you within the Software Service or by sending you

an email. Notwithstanding the above, we have no obligation to update or enhance any Services or to produce or release new versions of any Services.

- We aren't responsible for any third party products that are integrated with or used in connection with the Services.
- **Third Party Offerings.** Although the Services may allow you to access or use Third Party Offerings, they are not "Services" under this Agreement and are not subject to any of the warranties, service commitments or other obligations with respect to Services hereunder. The availability of any Third Party Offerings through the Services does not imply Punchey's endorsement of or affiliation with the provider. Punchey does not control Third Party Offerings and will have no liability to you or Affiliates in connection with any Third Party Offerings. Punchey has no obligation to monitor or maintain Third Party Offerings, and may disable or restrict access to any Third Party Offerings at any time. By using or enabling any Third Party Offering, you are expressly permitting Punchey to disclose Your Data or other information to the extent necessary to utilize the Third Party Offering. YOUR USE OF THIRD PARTY OFFERINGS IS AT YOUR OWN RISK AND IS SUBJECT TO ANY ADDITIONAL TERMS, CONDITIONS AND POLICIES APPLICABLE TO SUCH THIRD PARTY OFFERINGS (SUCH AS TERMS OF SERVICE OR PRIVACY POLICIES OF THE PROVIDERS OF SUCH THIRD PARTY OFFERINGS).
- Your base subscription fees include our standard support services. You may also purchase Professional Services for an additional fee.
- We are not responsible for products or services from companies we recently acquired until we test and improve those products or services.
- This describes how we leverage our optional marketing services to drive business to you. Participation in marketing services is voluntary, and you may sign up through our software. If you choose to participate, you agree to pay any related fees.
- We are not responsible for any damages resulting from your use of any trial or beta services.
- **Trial and Beta Services.** Punchey may in its sole discretion offer trial services or beta services from time to time at no charge. Any trial or beta services are provided "AS IS" with no warranties of any kind. Punchey may discontinue any

trial or beta services at any time, with or without notice and without any further obligations to you. Punchey will have no liability for any harm or damages suffered by you or any third party in connection with any trial or beta services.

- Additional terms apply to the purchase of a payment terminal device.
- **Payment Terminal Terms.** Additional terms specific to the use of Payment Terminals apply and are hereby incorporated by reference into this Agreement as if set forth fully herein.
- Additional terms apply to the purchase of professional services.
- **Professional Services Terms.** Additional terms specific to the procurement of Professional Services apply and are hereby incorporated by reference into this Agreement as if set forth fully herein.

### 3. Your Responsibilities.

You are responsible for making sure that your Affiliates and End Users comply with the terms of this agreement and applicable laws.

- **Liability for Affiliates and End Users.** You are responsible for all activity occurring under your account, including, but not limited to, your staff, employees, consultants, advisors, and/or independent contractors. You will ensure that your Affiliates and End Users comply with all of the provisions of this Agreement and any applicable local, state, national and foreign laws, including those related to data privacy and transmission of personal data, at all times while using the Services. Any reference in this Agreement to your “access” or “use” of Services (or similar phrase) is deemed to include access or use by Affiliates and End Users, and any act or omission of an Affiliate or End User that does not comply with this Agreement will be deemed a breach of this Agreement by you.
- These are things you promise to do in connection with using the Services.
- **Data; Unauthorized Access; Maintaining Networks.** You will: (a) have sole responsibility for the accuracy and quality of Your Data and for ensuring that your collection and use of Your Data complies with applicable laws, including those

related to data privacy and transmission of personal data; (b) prevent unauthorized access to, or use of, the Services, and notify Punchey promptly of any unauthorized access or use; and (c) have sole responsibility for obtaining, maintaining and paying for any hardware, telecommunications, Internet and other services needed to use the Services.

- These are things you promise not to do in connection with using the Services.
- **Restrictions on Use.** You and your Affiliates will not: (i) submit any infringing, obscene, defamatory, threatening, or otherwise unlawful or tortious material to the Services, including material that violates privacy rights; (ii) interfere with or disrupt the integrity or performance of the Services or the data contained therein; (iii) attempt to gain access to the Services or related systems or networks in a manner not permitted by this Agreement; (iv) post, transmit or otherwise make available through or in connection with the Services any virus, worm, Trojan horse, Easter egg, time bomb, spyware or other harmful computer code, files, scripts agents or programs; (v) restrict or inhibit any other person or entity from using the Services; (vi) remove any copyright, trademark or other proprietary rights notice from the Services; (vii) frame or mirror any portion of the Services, or otherwise incorporate any portion of the Services into any product or service; (viii) systematically download and store Services content; or (ix) use any robot, spider, site search/retrieval application or other manual or automatic device to retrieve, index, “scrape,” “data mine” or otherwise gather Services content, or reproduce or circumvent the navigational structure or presentation of the Services. Notwithstanding subsection (ix) above, and subject to compliance with any instructions posted in the robots.txt file located in the root directory of any Website, Punchey grants to the operators of public search engines permission to use spiders to copy materials from the Website for the sole purpose of (and solely to the extent necessary for) creating publicly available, searchable indices of such materials, but not caches or archives of such materials. Punchey reserves the right to revoke these permissions at any time and without notice.
- You are liable if any Cardholder Data is mishandled under your account.
- **Cardholder Data.** You are solely responsible for any liability resulting from your or any Affiliate’s handling of Cardholder Data. You agree that you and Affiliates will comply with PCI DSS anytime the Services are used to process credit cards.

- You will ensure all user names and passwords are kept confidential.
- **User Names and Passwords.** Punchey may reject or require that you change any user name or password under your account. User names and passwords are for internal business use only and may not be shared with any third party, including any competitor of Punchey. You, and not Punchey, are responsible for any use or misuse of user names or passwords associated with your account.
- **Dual Consent for Phone Call Recordings.** Your account provides a telephone number from which to make outbound phone calls. Calls are automatically logged in your account. At your option, you have the ability to turn on call recording whereby outbound calls from your Punchey connected telephone number are recorded. NOTE: some states require dual consent in recorded telephone calls, meaning, both the caller and the person being called need to know the call is being recorded. If you utilize outbound call recording, you agree to take full responsibility of adhering to federal and state laws. Further, you indemnify

## 4. Fees and Payment.

- **Software Services Fees.** Fees for the subscribed Software Services (“Subscription Fees”) are set forth on our website at <https://www.Punchey.com/pricing> (or such other URL as specified by Punchey including but not limited to: [detailpropos.com/pricing](https://detailpropos.com/pricing), [salonpropos.com/pricing](https://salonpropos.com/pricing), [groompropos.com/pricing](https://groompropos.com/pricing), [medispapro.com/pricing](https://medispapro.com/pricing), [tattoopro.io/pricing](https://tattoopro.io/pricing), [acupro](https://acupro.com)), as may be updated by Punchey from time to time, or as otherwise stated on an Order Form.
- **Additional SMS & Phone Fees (if applicable):**  
Should you opt in to additional services, Punchey reserves the right to pass through charges from its telephony provider, Twilio Inc. All fees are disclosed here: <https://www.twilio.com/sms/pricing/us>

- **New Merchant Account supplemental terms and fees:**

If you create a New Merchant Account with Punchey, you will be entering into a separate and additional Merchant Services Agreement with Punchey, Inc. As noted above this is considered a Supplemental Term. This agreement can be found here: <https://live.punchey.com/merchanttermsofservice>

- **Existing Merchant Account Third Payment Gateway Fees**

If you decide not to use a New Merchant Account provided by Punchey, and instead you choose to integrate an Existing Merchant Account to accept credit and debit payments via the software you may incur additional charges to authorize these payments. Punchey may pass through these authorization charges and bill to your account on your bill cycle.

- **E-Check Merchant Account processing Fees:**

If you wish to accept ACH and eCheck payments via the software, our Partner, CheckCommerce, Inc. will contract with you directly. That said, we will handle billing for these fees in the amount of 0.60% per transaction + \$.10, unless otherwise negotiated.

This describes our fees and your payment obligations. All fees are non-refundable and must be paid in advance.

- **Payment Terms.** You agree to pay Punchey the Subscription Fees and any other applicable fees stated on an Order Form or otherwise specified in this Agreement. All payment obligations under this Agreement are non-cancelable and all fees paid are non-refundable. Unless otherwise stated on an Order Form, fees must be paid in advance of each billing period. You will provide Punchey with valid and updated credit card information or another form of payment acceptable to Punchey. If you provide credit card information, you represent that you are authorized to use the card and you authorize Punchey to charge the card for all payments hereunder. By submitting payment information, you authorize Punchey to provide that information to third parties for purposes of facilitating payment. You agree to verify any information requested by Punchey for purposes of acknowledging or completing any payment.



- **Overdue Charges.** Any amounts not received by the applicable due date may accrue late interest at 1.5% of the outstanding balance per month, or the maximum interest permitted by applicable law, whichever is less, plus costs of collection. Any amount not received by Punchey within thirty (30) days after the applicable due date will be deemed a material default under this Agreement, and Punchey will be entitled to either suspend the Services or terminate the Agreement in accordance with Section 8.2.
- **Changes in Fees.** Upon notice to you, Punchey may increase any fees specified in an Order Form, provided the increase will not become effective until the expiration of the current Subscription Term. Punchey may increase any fees that are not specified in an Order Form at any time, with or without notice to you.
- **Payment Errors.** If you believe a payment has been processed in error, you must provide written notice to Punchey within thirty (30) days after the date of payment specifying the nature of the error and the amount in dispute. If notice is not received by Punchey within such thirty (30) day period, the payment will be deemed final.
- **Taxes.** Fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including, for example, value-added, sales, use or withholding taxes, assessable by any jurisdiction (collectively, "Taxes"). You are responsible for paying all Taxes associated with purchases and transactions under this Agreement. If Punchey is legally required to pay or collect any Taxes on your behalf, Punchey will invoice you and you will pay the invoiced amount. For clarity, Punchey will be solely responsible for taxes assessed on Punchey based on its income.

## 5. Intellectual Property Rights.

This describes our intellectual property rights in the Services.

- **Punchey Intellectual Property.** Punchey owns all right, title and interest in and to the Services, the Punchey Data and Aggregated Data, including, without

limitation, all intellectual property rights therein. Subject to the limited rights expressly granted to you under this Agreement, Punchey reserves all rights, title and interest in and to the Services, the Punchey Data and Aggregated Data, including, without limitation, all related intellectual property rights. Punchey's service marks, logos and product and service names, including, without limitation, Punchey, the Enso logo, and Love Your Business (the "**Punchey Marks**") are owned by Punchey. You agree not to display or use any Punchey Marks in any manner without Punchey's express prior written permission. Any trademarks, service marks and logos associated with a Third Party Offering may be the property of the third party provider, and you should consult with their trademark guidelines before using any of their marks.

- You are only allowed to use the Services in accordance with this agreement and for internal business purposes.
- **License Grant to You.** Subject to the terms and conditions of this Agreement, Punchey hereby grants to you a limited, non-exclusive, non-transferable, non-sublicenseable, revocable license and right to use the Services set forth in an Order Form, during the Subscription Term and solely for your internal business purposes. You will not: (a) modify, copy or create any derivative works based on the Services; (b) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share, offer in a service bureau, or otherwise make the Services available to any third party, other than to Affiliates and End Users as permitted herein; (c) reverse engineer or decompile any portion of the Services, including but not limited to, any software utilized by Punchey in the provision of the Services; (d) access or use (or allow a third party to access or use) the Services for competitive analysis or to build any competing products or services; (e) copy any features, functions, integrations, interfaces or graphics of the Services; or (f) otherwise use or exploit the Services in any manner not expressly permitted by this Agreement.
- You grant us a license to use your feedback, trademarks and logos in connection with providing the Services and for general marketing purposes.
- **License Grant to Punchey.** You hereby grant to Punchey and its affiliates a worldwide, perpetual, irrevocable, transferable, sublicensable, royalty-free license (a) to modify, copy, distribute and incorporate into the Services (without

attribution of any kind) any suggestions, enhancement request, recommendations, proposals, correction or other feedback or information provided by you, Affiliates or End Users relating to the Services or Punchey's business; and (b) to use your business name(s), trademarks, service marks or logos (collectively, "Your Marks") in connection with providing the Services and for marketing and promotional purposes in connection with Punchey's business. Punchey agrees that any use by Punchey of any of Your Marks will inure solely to the benefit and goodwill of your business. Other than those rights specifically granted to Punchey herein, all right, title and interest in and to Your Marks are expressly reserved by you.

## 6. Data Ownership and Use.

You own all data you provide to us, but you also grant us a license to use it for certain purposes, for example, to improve our products or to provide you with complementary products of our partners.

- **Your Data.** As between you and Punchey, you own all right, title and interest in Your Data. You hereby grant to Punchey a nonexclusive, worldwide, assignable, sublicensable, fully paid-up and royalty-free license and right to copy, distribute, display and perform, publish, prepare derivative works of and otherwise use Your Data for the purposes of providing, improving and developing Punchey's products and services and/or complementary products and services of our partners. You represent and warrant to Punchey that you have all rights necessary to grant the licenses in this Section 6.1, and that your provision of Your Data through and in connection with the Services does not violate any applicable laws or rights of any third party.
- This describes our rights in data that we collect through independent sources, like the Punchey App.
- **Punchey Data.** Notwithstanding Section 6.1, all right, title and interest in any data or information collected by Punchey independently and without access to,

reference to or use of any of Your Data, including, without limitation, any data or information Punchey obtains about End Users through the Punchey App (whether the same as Your Data or otherwise), will be solely owned by Punchey (collectively, “**Punchey Data**”).

- We will own all Aggregated Data.
- **Aggregated Data.** You authorize Punchey to aggregate or anonymize Your Data or other data in connection with the Agreement, and Punchey will own all Aggregated Data. You agree that nothing in this Agreement will prohibit Punchey from utilizing Aggregated Data for any purpose, provided such Aggregated Data does not reveal any personally identifying information about you or any End Users.
- Our Privacy Policy covers how we collect and use personal information.
- **Personal Information.** Our Privacy Policy governs how we collect and use personal information that is submitted through the Services. By accessing or using the Services, you agree to that you have read and accept our Privacy Policy. Without limitation, You acknowledge and agree that Punchey may process Your Data for the purpose of providing the Services and related functions, such as billing and customer or End User support, as well as to send direct marketing communications to your representatives’ or End Users, data science and product or service improvement and reporting. You represent and warrant that You are authorized to process Your Data and make such data available to Punchey for uses as set out in the Agreement and Privacy Policy, including through appropriate notice, consent and by Your referring individuals to our Privacy Policy (notwithstanding Punchey’s ability and right, to which You agree, to request consent, and provide notice and its Privacy Policy separately to individuals).
- You must notify us if you are subject to HIPAA and sign a BAA agreement.
- **HIPAA.** The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) imposes rules to protect certain personal health information or “PHI” as that term is defined under HIPAA. If you or any Affiliate is subject to HIPAA, prior to accessing or using the Services you must notify Punchey and enter into a Business Associate Agreement (“**BAA**”) in the form provided by Punchey. You are solely responsible for determining whether you or any Affiliates are subject to

HIPAA. You may send notice and request a BAA by emailing [privacy@Punchey.com](mailto:privacy@Punchey.com).

- We have controls in place to prevent outside parties from stealing or accessing Your Data.
- **Protection and Security.** During the Subscription Term, Punchey will maintain administrative, physical and technical safeguards designed for the protection and integrity of Your Data. Punchey will maintain PCI DSS compliance for the portions of the Services that store and process Cardholder Data.
- We will notify one another if either of us becomes aware that Your Data has been compromised.
- **Unauthorized Disclosure.** If either Party believes that there has been a disclosure of Your Data in a manner not authorized under this Agreement, such Party will promptly notify the other Party. Additionally, each Party will reasonably assist the other Party in remediating or mitigating any potential damage, including any notification which should be sent to individuals impacted or potentially impacted by such unauthorized disclosure.
- We are not responsible for resolving or intervening in any dispute over Your Data.
- **Data-Related Disputes.** You are solely responsible for resolving disputes regarding ownership or access to Your Data, including those involving any current or former owners, co-owners, employees or contractors of your business. You acknowledge and agree that Punchey has no obligation whatsoever to resolve or intervene in such disputes.

## 7. Confidential Information.

This describes the confidentiality obligations we have to one another under the agreement.

- A Party will not disclose or use any Confidential Information of the other Party except: (a) as reasonably necessary to perform its obligations or exercise any rights granted pursuant to this Agreement; (b) with the other Party's prior written

permission; or (c) to the extent required by law or order of a court or other governmental authority or regulation. Each Party agrees to protect the other Party's Confidential Information in the same manner that it protects its own Confidential Information of like kind, but in no event using less than a commercially reasonable standard of care. Confidential Information will not include any information that: (a) is or becomes generally known to the public without breach of any obligation owed to the disclosing Party; (b) was known to a Party prior to its disclosure by the other Party without breach of any obligation owed to the other Party; (c) was independently developed by a Party without breach of any obligation owed to the other Party; or (d) was or is received from a third party without breach of any obligation owed to the other Party. For clarity, nothing in this Section 7 will restrict Punchey with respect to Punchey Data or Aggregated Data.

## 8. Term, Termination and Suspension.

We can each end this Agreement anytime by providing 30 days' advance notice.

- **Term.** Unless otherwise specified in an Order Form, the term of this Agreement will be month to month ("**Subscription Term**"). The Subscription Term commences on the Effective Date and will automatically renew on a monthly basis until either Party terminates in accordance with this Agreement. Either Party may terminate the Agreement at any time, for any reason or no reason, by providing notice to the other Party at least thirty (30) days before the end of the relevant Subscription Term. Unless otherwise specified in an Order Form, Subscription Fees during any automatic renewal term will revert to the current pricing in effect at the time such renewal term commences.
- We have the right to end the Agreement immediately if you breach it.
- **Punchey's Right to Termination for Cause.** Punchey may terminate this Agreement, effective immediately upon notice to you, if you or an Affiliate are in material breach of this Agreement. In the event of a termination pursuant to this

Section 8.2, in addition to other amounts you may owe Punchey, you must immediately pay any unpaid Subscription Fees associated with the remainder of the Subscription Term. In no event will any termination relieve you of your obligation to pay any fees payable to Punchey for the period prior to the effective date of termination.

- **Your Right to Termination for Cause.** You may terminate this Agreement free of charge effective immediately upon notice to us for cause. Cause is defined as the following:
  - The Software Service does not meet 99.9% uptime in any monthly period.
  - You're unable to authorize credit card transactions through the Software Service or any Punchey connected credit card terminal for 24 consecutive hours.
  - You were offered an initial 30-day trial period and after evaluation of the software have determined the software is not suitable for your business.  
(NOTE: You must terminate within 30 days of signing this agreement.)
- **Your Right to Termination without Cause.** While Punchey would appreciate any opportunity to correct and address your concerns, you may cancel this agreement with 30 days written notice by completing our Termination of Service Form. Termination will be effective after we both receive your Termination of Service Form and you have ceased using our products and services for a period of 30 days.
- **Termination Process & Submissions:**
  - For a termination to be valid, you must submit the **Termination of Service Form**. For convenience this form is provided at the bottom of this agreement.
  - If any free POS hardware has been provided it must be returned in like new condition with packaging to our warehouse within 15 days of termination or you will be charged the retail price of the free hardware provided.

This describes what will occur and the rights that apply when the Agreement is terminated.

- **Rights on Termination or Expiration.** Upon termination or expiration of this Agreement (a) all Order Forms will automatically terminate and be of no force or

effect; (b) you will have no rights to continue use of the Services and will cease accessing and/or using the Services; and (c) except as specified in the following paragraph, Punchey will have no obligation to maintain your Services account or to retain or forward any data to you or any third party, except as required by applicable law.

- For a period of no greater than thirty (30) days following a notice of termination, Punchey will make Your Data available to you through Punchey's standard web services. Upon request by you within thirty (30) days following the termination date of this Agreement, and provided that you have paid Punchey all amounts owed under this Agreement, Punchey will make Your Data available to you. After such thirty (30) day period, Punchey will have no obligation to retain or provide Your Data, except as required by applicable law. If at any time during the Subscription Term you require Punchey's assistance in retrieving Your Data, additional fees may apply.
- The following will survive any expiration or termination of this Agreement: the Introduction and Sections 1, 2.3, 2.6, 3, 4 (other than Section 4.1), 5, 6, 7, 8.2, 8.3, 9.1, 9.3, 10, 11, 12, 13, 14 and 15.
- We have the right to suspend or terminate the Services at any time if we detect harmful or illegal activity under your account.
- **Right to Terminate or Suspend Services.** We may suspend or terminate the Services (or any portion thereof) at any time without notice if we believe (a) that any activity or use of Services in connection with your account violates this Agreement, the intellectual property rights of a third party or applicable laws, or is otherwise disruptive or harmful to Punchey or any third party, (b) that we are required to do so by law, or (c) where the Parties do not agree on the use of a sub-processor.

## 9. Warranties & Disclaimer.

You are responsible for keeping your account contacts and other account information up to date, and you must notify us if anything changes.



- **Accuracy of Your Account Information.** You agree to provide Punchey with complete and accurate account information, including your legal company name, street address, e-mail address, and such other contact information as may be requested by Punchey. You are responsible for keeping your account information up to date, and you agree to promptly notify Punchey in writing if any information changes.
- We promise that the software will generate reports and perform functions as generally described on our Website.
- **Warranty of Functionality.** Punchey warrants to you that during a Subscription Term: (a) the subscribed Software Service will perform materially in accordance with the functionality described in the Documentation applicable to such Software Service; and (b) such functionality will not be materially decreased. Your sole and exclusive remedy for a breach of this warranty will be that Punchey will use commercially reasonable efforts to modify the applicable Services to achieve the functionality described above. If Punchey is unable to restore such functionality, you may terminate the Agreement by providing written notice to Punchey, and you will be entitled to receive a pro-rata refund of any pre-paid fees. Punchey will have no obligation with respect to a warranty claim under this Section 9.2 unless notified by you in writing no later than thirty (30) days after the first instance of any material functionality problem. This warranty will only apply if the applicable subscribed Services have been utilized in accordance with this Agreement and applicable laws. For clarity, this warranty will not apply to any trial or beta services.
- This is our disclaimer of legal liability for the quality, safety, or reliability of our Services.
- **DISCLAIMER.** EXCEPT AS EXPRESSLY PROVIDED IN SECTION 9.2 ABOVE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, Punchey MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION ANY WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH

RESPECT TO THE SERVICES AND/OR RELATED DOCUMENTATION. Punchey DOES NOT WARRANT THAT YOUR USE OF THE SERVICES WILL BE SECURE, TIMELY, ERROR-FREE OR UNINTERRUPTED, OR THAT THE SERVICES ARE OR WILL REMAIN UPDATED, COMPLETE OR CORRECT, OR THAT THE SERVICES WILL MEET YOUR REQUIREMENTS OR THAT THE SYSTEMS THAT MAKE THE SERVICES AVAILABLE (INCLUDING WITHOUT LIMITATION THE INTERNET, OTHER TRANSMISSION NETWORKS, AND YOUR LOCAL NETWORK AND EQUIPMENT) WILL BE UNINTERRUPTED OR FREE FROM VIRUSES OR OTHER HARMFUL COMPONENTS. EXCEPT AS PROVIDED IN SECTION 9.2, THE SERVICES AND ANY PRODUCTS AND THIRD PARTY MATERIALS ARE PROVIDED ON AN “AS IS” AND “AS AVAILABLE” BASIS AND SOLELY FOR YOUR USE IN ACCORDANCE WITH THIS AGREEMENT. ALL DISCLAIMERS OF ANY KIND (INCLUDING IN THIS SECTION AND ELSEWHERE IN THIS AGREEMENT) ARE MADE ON BEHALF OF BOTH Punchey AND ITS AFFILIATES AND THEIR RESPECTIVE SHAREHOLDERS, DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, REPRESENTATIVES, CONTRACTORS, LICENSORS, SUPPLIERS AND SERVICE PROVIDERS (COLLECTIVELY, THE “**Punchey PARTIES**”).

## 10. Indemnification.

If we are sued by another party as a result of something you’ve done, you’ll cover the costs.

- You agree to indemnify, defend, and hold harmless the Punchey Parties from and against any and all third party claims alleged or asserted against any of them, and all related charges, damages and expenses (including, but not limited to, reasonable attorneys’ fees and costs) arising from or relating to: (a) any actual or alleged breach by you, an Affiliate or End User of any provisions of this Agreement; (b) any access to or use of the Services by you, an Affiliate or End User; (c) any actual or alleged violation by you, an Affiliate or End User of the

intellectual property, privacy or other rights of a third party; and (d) any dispute between you and another party regarding ownership of or access to Your Data.

## 11. Limitations and Exclusions of Liability.

These are the limits of legal liability we may have to you.

- Punchey EXPRESSLY DISCLAIMS ANY AND ALL LIABILITY AND WILL NOT BE RESPONSIBLE FOR ANY DAMAGES OR LOSS CAUSED, OR ALLEGED TO BE CAUSED, BY THE TRANSMISSION OF CARDHOLDER DATA PRIOR TO ITS ENCRYPTION AND RECEIPT BY SERVER(S) OWNED OR CONTROLLED BY Punchey. THE EXCLUDED DAMAGES WILL INCLUDE, WITHOUT LIMITATION, DAMAGES RESULTING FROM FRAUD, EMBEZZLEMENT, THEFT, IDENTITY THEFT, OR INVASION OF PRIVACY.
- TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL THE Punchey PARTIES' AGGREGATE LIABILITY, COLLECTIVELY, FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR OTHERWISE, EXCEED THE SUBSCRIPTION FEES ACTUALLY PAID BY YOU DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE INCIDENT. ALL LIMITATIONS OF LIABILITY OF ANY KIND (INCLUDING IN THIS SECTION AND ELSEWHERE IN THIS AGREEMENT) APPLY WITH RESPECT TO BOTH Punchey AND THE Punchey PARTIES.
- IN NO EVENT WILL ANY Punchey PARTIES HAVE ANY LIABILITY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, HOWEVER CAUSED, OR FOR ANY LOST PROFITS, LOSS OF USE, DATA OR OPPORTUNITIES, COST OF DATA RECONSTRUCTION, COST OR PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, WHETHER IN CONTRACT, TORT OR OTHERWISE, ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THE SERVICES OR THIRD PARTY OFFERINGS, INCLUDING BUT NOT LIMITED TO THE USE OR INABILITY TO

USE THE SERVICES, ANY INTERRUPTION, INACCURACY, ERROR OR OMISSION, EVEN IF Punchey, ITS LICENSORS OR SUBCONTRACTORS HAVE BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES.

- THE FOREGOING EXCLUSIONS OR LIMITATIONS MAY NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

## **12. Export Controls.**

You promise to comply with any applicable export control laws and that you are not subject to any U.S. trade restrictions or sanctions.

- You will comply with all applicable export laws and restrictions and regulations of the US Department of Commerce, the US Department of Treasury Office of Foreign Assets Control, or other United States or foreign agency or authority, and you will not use the Services to export, or allow any export or re-export in violation of any such restrictions, laws or regulations. You represent and warrant to Punchey that you are not a prohibited party or located in, under the control of, or a national or resident of any restricted country, and that you will otherwise comply with all applicable export control laws. If you reside outside the United States, then in addition to complying with the foregoing, you will comply with any relevant export control laws in your local jurisdiction.

## **13. Intellectual Property Policy.**

Any information and data submitted to the Services must not violate the intellectual property rights of third parties.

- Punchey respects the intellectual property rights of others and will investigate and respond to notices of alleged infringement that are properly submitted to support@punchey.com

## 14. Miscellaneous.

California law applies to this Agreement.

- **Governing Law.** This Agreement will be governed by and interpreted in accordance with the internal laws of the State of California without regard to conflicts of laws principles. The U.N. Convention on the International Sale of Goods will not apply.
- In the unlikely event we end up in a legal dispute, you agree we will first attempt to resolve it through this informal process.
- **Mandatory Informal Dispute Resolution.** If you have any dispute with Punchey arising out of or relating to this Agreement, you agree to notify Punchey in writing with a brief, written description of the dispute and your contact information, and Punchey will have thirty (30) days from the date of receipt within which to attempt resolve the dispute to your reasonable satisfaction. If the Parties are unable to resolve the dispute through good faith negotiations over such thirty (30) day period under this informal process, either Party may pursue resolution of the dispute in accordance with the arbitration agreement below.
- If we can't resolve a dispute after following the process above, then we must resolve through arbitration and not in court.
- **Arbitration Agreement.** ALL DISPUTES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND Punchey, WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION OR ANY OTHER LEGAL THEORY, THAT ARE NOT RESOLVED PURSUANT TO SECTION 14.2 ABOVE WILL BE RESOLVED THROUGH FINAL AND BINDING ARBITRATION BEFORE A

NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY, AND Punchey AND YOU EACH HEREBY WAIVE THE RIGHT TO TRIAL BY A JURY. YOU AGREE THAT ANY ARBITRATION UNDER THIS AGREEMENT WILL TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED AND YOU ARE AGREEING TO GIVE UP THE ABILITY TO PARTICIPATE IN A CLASS ACTION. The arbitration will be administered by the American Arbitration Association under its Commercial Arbitration Rules and Mediation Procedures (currently accessible at [www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG\\_004130](http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130)) as amended by this Agreement. Any arbitration hearing will be held in San Luis Obispo County, California. The applicable governing law will be as set forth in Section 14.1 (provided that with respect to arbitrability issues, federal arbitration law will govern). The arbitrator's decision will follow the terms of this Agreement and will be final and binding. The arbitrator will have authority to award temporary, interim or permanent injunctive relief or relief providing for specific performance of this Agreement, but only to the extent necessary to provide relief warranted by the individual claim before the arbitrator. The award rendered by the arbitrator may be confirmed and enforced in any court having jurisdiction thereof.

- The location of your business determines which Punchey Entity you are contracting with.
- **Punchey Entity.** The table below sets forth the Punchey entity you have entered into this Agreement with ("**Punchey Entity**") depending on where you are domiciled:

<b>If you are domiciled in:</b>	<b>The Punchey Entity is:</b>
---------------------------------	-------------------------------

<ul style="list-style-type: none"> <li>• United States and its territories, and all other countries</li> </ul>	<ul style="list-style-type: none"> <li>• Punchey, Inc., a Delaware corporation</li> </ul>
--	---

- **Entire Agreement.** This Agreement, together with any Order Forms and any terms and policies that are incorporated into this Agreement by reference (including by reference to a URL), constitute the entire agreement and supersede any prior agreements between you and Punchey with respect to the subject matter hereof. In the event of a conflict between an Order Form and this Agreement, the Order Form will control. This Agreement supersedes and replaces all prior and contemporaneous agreements, proposals or representations, written or oral, between Punchey, on the one hand, and you or any Affiliate, on the other hand.
- **Waiver and Severability.** No waiver of any provision of this Agreement by Punchey will be effective unless in writing and signed by Punchey. No waiver by either Party of any breach or default hereunder will be deemed to be a waiver of any preceding or subsequent breach or default. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision will be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement will remain in effect.
- **Assignment.** You may not assign, delegate or transfer this Agreement in whole or in part, without Punchey's prior written consent. Punchey may assign, transfer or sublicense any or all of Punchey's rights or obligations under this Agreement without restriction.
- This explains how we can send each other notices in connection with this Agreement.
- **Notices.** Any notices provided by Punchey under this Agreement may be delivered to you within the Services or to the email address(es) we have on file for your account. You hereby consent to receive notice from Punchey through the foregoing means, and such notices will be deemed effective when sent if on a business day, and if not sent on a business day then on the next business day. Except as otherwise specified in the Agreement, any notices to Punchey under

this Agreement must be delivered via first class registered U.S. mail, overnight courier, to Punchey, Inc., Attn: Punchey Customer Support, 4051 Broad Street, Suite 220 San Luis Obispo, CA 93401, with a copy to Punchey, Inc., Attn: Punchey Legal Department, 4051 Broad Street, Suite 220 San Luis Obispo, CA 93401.

- We are not liable for things that are out of our control like natural disasters.
- **Force Majeure.** Neither Party will be liable for any failure or delay in performance under this Agreement (other than for delay in the payment of money due and payable hereunder) for causes beyond that Party's reasonable control and occurring without that Party's fault or negligence, including, but not limited to, acts of God, acts of government, flood, fire, civil unrest, acts of terror, strikes or other labor problems (other than those involving Punchey's or your employees, respectively), computer attacks (by government/nation entities or otherwise) or malicious acts, such as attacks on or through the Internet, any Internet service provider, telecommunications or hosting facility. Dates by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.
- **Electronic Communications and Signatures.** You agree to the use of electronic communication in order to enter into agreements and place orders, and to the electronic delivery of notices, policies and records of transactions initiated or completed through the Services. Furthermore, you hereby waive any rights or requirements under any laws or regulations in any jurisdiction that require an original (non-electronic) signature or delivery or retention of non-electronic records, to the extent permitted under applicable law.
- **Relationship of the Parties.** This Agreement does not, and will not be construed to, create any partnership, joint venture, employer-employee, agency or franchisor-franchisee relationship between you and Punchey.

## 15. Definitions.



For the purposes of this Agreement, the following capitalized terms will have the meanings set forth for each of them below:

**“Affiliate”** means any entity that directly or indirectly controls, is controlled by, or is under common control with you, and that has been designated to receive Services under this Agreement. “Control” for purposes of this definition means the power to direct or cause the direction of the management and policies of the subject entity, whether through equity ownership, a credit arrangement, franchise agreement or other contractual arrangement. “Affiliate” also includes any of your business locations and any Franchisees that have been designated to receive Services under this Agreement.

**“Aggregated Data”** means anonymized or aggregated data derived by or through the operation of the Services that is created by or on behalf of Punchey and that does not reveal any personally identifying information.

**“API”** means Punchey’s application programming interface that is described at <https://developers.Punchey.com> (or such other URL as specified by Punchey), as may be updated by Punchey from time to time, and any subsequent application programming interfaces that are developed and made available by Punchey to interact with or otherwise be used in connection with the Services.

**“Apps”** means any mobile applications through which Punchey makes the Software Service available, including Punchey business app and Punchey branded mobile app. “Apps” excludes the Punchey App.

**“Cardholder Data”** means credit card numbers, expiration dates, billing addresses, and cardholder names as entered by End Users and you. Cardholder Data is a subset of End User Data.

**"Confidential Information"** means (a) any software utilized by Punchey in the provision of the Services and its respective source code; (b) each Party's business or technical information, including but not limited to the Documentation, information relating to software plans, designs, costs, prices and names, business opportunities, personnel, research, development or know-how that is designated by the disclosing Party as "confidential" or "proprietary" or the receiving Party knows or should reasonably know is confidential or proprietary; and (c) any special pricing or other non-standard terms agreed to by the Parties in an Order Form or other separate written document.

**"Documentation"** means Punchey's online user guides, documentation, and help and training materials, as may be updated by Punchey from time to time, accessible at [www.Punchey.com](http://www.Punchey.com), and any other materials provided by Punchey as part of the Services.

**"End User"** means a business or individual that schedules or purchases products or services from you through the Services or otherwise interacts with you through the Services.

**"End User Data"** means all data, information or other material about an End User that you, an Affiliate or End User provides or submits to the Services. End User Data may include Cardholder Data and such portions of Your Data that relates to specific End Users.

**"Franchisee"** means any party that is bound by a franchise agreement with you, and that you have designated to receive Services under this Agreement. Franchisees are bound by the terms of this Agreement as if they were an original party hereto.

**"HIPAA"** means the Health Insurance Portability and Accountability Act, as amended and supplemented.

**“Marketing Services”** means Punchey’s online marketing platform, which allows consumers to locate Punchey subscribers and evaluate, review and book their services, directly through the Punchey App and through our partner applications.

**“Punchey App”** means the consumer-facing, downloadable mobile app made available by Punchey and known as the “Punchey App” (and its successor products), which allows consumers to use their mobile devices to find, book and pay for the services of participating Punchey subscribing businesses.

**“Order Form”** means a separate ordering document, online sign up form, invoice or other documentation that specifies the Services purchased hereunder, the applicable fees, and other terms as agreed to between the Parties. If an Order Form indicates that any Affiliates or Franchisees will be receiving Services hereunder, each of them will be bound by the terms of this Agreement as if they were an original party hereto.

**“Existing Merchant Account”** means an account provided from a separate institution that enables you to collect payments via credit and debit cards. These institutions must be compatible with the software in order to process transactions through the software. These institutions will handle funding your bank account for customer purchases and any chargebacks or dispute resolutions that may arise from these purchases.

**“New Merchant Account”** means an account provided by Punchey, Inc. that enables you to collect payments via credit and debit cards. Punchey, Inc. will handle funding your bank account for customer purchases and any chargebacks or dispute resolution that may arise from these purchases.

**“PCI DSS”** means the requirements of the Payment Card Industry Data Security Standard, as detailed on <https://www.pcisecuritystandards.org/>, and as may be updated from time to time.

**“Professional Services”** means Punchey’s supplemental, fee-based technical support services described at <https://www.Punchey.com/> (or such other URL as specified by Punchey), as may be updated by Punchey from time to time.

**“Privacy Policy”** means the Punchey Privacy Policy accessible at <https://www.punchey.com/privacy> (or such other URL as specified by Punchey), as may be updated by Punchey from time to time.

**“Recently Acquired Offerings”** currently include those from, or branded with, FitMetrix, Inc., Frederick Labs LLC, Booker Software, Inc., and other applicably designated acquisitions which we make you aware.

**“Services”** means the Software Services, the Website and the Apps. “Services” excludes Third Party Offerings and the Punchey App.

**“Software Service”** is defined in the Introduction.

**“Third Party Offerings”** means any third party products, applications, websites, implementations or services, including loyalty programs, that the Services link to, or that interoperate with or are used in conjunction with the Services.

**“Website”** means [www.Punchey.com](http://www.Punchey.com) and any other websites through which Punchey makes the Software Service available.

**“Your Data”** means any data, information or material provided or submitted or made available by you and Affiliates to the Services. Your Data may include End User Data and Cardholder Data (and Your or their representative’s data), but excludes Aggregated Data.

# Request for Termination of Service Form

Scan and E-mail Completed Request to the following:

[support@punchey.com](mailto:support@punchey.com)

If you have questions, please call our Customer Care Specialist at 855.786.2439

<b>Merchant Name:</b>
<b>Service to Terminate:</b>  <input type="checkbox"/> Software Subscription <input type="checkbox"/> Credit Card Merchant Account <small>(You can no longer accept cards)</small> <input type="checkbox"/> ACH eCheck Account <input type="checkbox"/> Marketing or Advertising Services <input type="checkbox"/> Website Hosting <input type="checkbox"/> OTHER: Please specify: _____
<b>Reason for Termination of Service:</b>
<b>Effective Termination Date:</b>
<b>Requested By:</b>

**Position in the Company:**

---

**Signature of Authorized User**

**Date**

Note: The service termination request will not be completed unless the merchant completes all pertinent information above and signature is verified by Punchey, Inc. personnel. Thank you for your cooperation.