

BILL NO. 1150

ORDINANCE NO. 1064

Sponsor Councilman Taylor

AN ORDINANCE APPROVING THE FORM OF AGREEMENT WITH  
FORTE PAYMENT SYSTEMS, INC. AND AUTHORIZING THE SIGNING THEREOF  
BY THE MAYOR FOR THE CITY OF BLACK JACK, MISSOURI

WHEREAS, Forte Payment Systems, Inc. provides processing services for its customers including Credit Card, Debit Card, and Automated Clearing House processing; and

WHEREAS, the City of Black Jack wishes to provide better convenience to people paying various fees to the City; and

WHEREAS, the City Council believes Forte provides a good range of services at a reasonable cost.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BLACK JACK, ST. LOUIS COUNTY, MISSOURI AS FOLLOWS:

SECTION 1: The City Council hereby approves the Payment Processing Agreement in the form attached hereto as Exhibit A and incorporated herein by reference.

SECTION 2: The Mayor, and City Clerk if required, are hereby authorized to execute the Payment Processing Agreement on behalf of the City.

SECTION 3: This Ordinance shall become effective upon its passage and approval as provided by law.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF BLACK JACK,  
ST. LOUIS COUNTY, MISSOURI, 18TH DAY OF NOVEMBER, 2014.

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Norman C. McCourt, Mayor

ATTEST:

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Karen E. Robinson, MRCC-C/CMC  
City Clerk

APPROVED 18TH DAY OF NOVEMBER, 2014.

APPROVED AS TO LEGAL FORM:

1. 

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Sheldon K. Stock, Special Counsel

## **EXHIBIT A**

### **PAYMENT PROCESSING AGREEMENT**

This Payment Processing Agreement ("Agreement"), including all exhibits and addendums hereto, is made by and between Forte Payment Systems, Inc. ("Forte") a California corporation and the City of Black Jack, Missouri, a municipal corporation ("Agency").

Forte and its affiliates provide payment processing services including Credit Card, Debit Card and Automated Clearing House ("ACH") processing services (the "Services") to Agency who provides services to, or otherwise has a business relationship with, individuals and other entities ("Constituents").

#### **1. Definitions.**

**Account:** Bank Account or Card Account.

**Account Holder:** The owner of the Card or Bank Account to which a Transaction may apply.

**Business Day:** Any day other than Saturday, Sunday or Federal Holidays.

**Card:** Credit Card or Debit Card.

**Chargeback:** The procedure by which an Account Holder attempts to reverse the funding of a Transaction by contacting the Account Issuer to which the Transaction was performed.

**Issuer:** The bank or financial institution which issued the Account to the Constituent.

**Downgrade:** Any transaction that fails to qualify for the best level of Interchange qualification.

**Payment Associations:** MasterCard, Visa, Discover, American Express, NACHA and any applicable debit card networks.

**Payment Processor:** An entity which processes electronic financial transactions, including but not limited to ACH, Credit Card, Debit Card, into the appropriate network for each type of payment, on behalf of merchants.

**Rule:** Operating Rules which are established by the applicable Payment Associations.

**Regulation:** Any applicable Local, State and Federal Law.

**Settlement Account:** A checking or savings account at a financial institution designated by Agency as the account to be debited and credited by Forte or Processor for any amounts owed as a result of any applicable Transactions.

**Transaction:** Electronic request submitted to Forte to affect a Constituent's Account.

**Validation Code:** The 3 or 4 digit security code printed on the signature panel of most Cards or on the top right of American Express Cards.

#### **2. Use License.**

Subject to the terms and conditions of this Agreement, Forte hereby grants to Agency a non-exclusive and non-transferable license to access and use Forte's products and services contracted for and Agency hereby accepts such license and agrees to utilize and access the Services in accordance with the practices and procedures established by Forte. Agency may use the Services (a) for its own internal business purposes and operations, and/or (b) as a service provided to its Constituents, unless otherwise notified by Forte. No license or right to use, reproduce, translate, rearrange, modify, enhance, display, sell, lease, sublicense or otherwise distribute, transfer or dispose of any of Forte's Proprietary Property, as defined in Section 2 below, in whole or in part, is granted except as expressly provided by this Agreement. Neither Agency nor any of its affiliates shall reverse engineer, decompile or disassemble the Proprietary Property. Additionally, nothing in this Agreement shall be

construed to provide Agency with a license of any third-party proprietary information or property.

### **3. Ownership.**

All computer programs, trademarks, service marks, patents, copyrights, trade secrets, know-how, and other proprietary rights in or related to Forte's products and services (the "Proprietary Property"), are and will remain the sole and exclusive property of Forte, whether or not specifically recognized or perfected under applicable law. Forte shall own all rights, title and interest, including all intellectual property rights, in and to any improvements to the existing Forte products or services and/or any new programs, upgrades, modifications or enhancements developed by Forte in connection with rendering any services to Agency (or any of its affiliates), even when refinements and improvements result from Agency's request. To the extent, if any, that ownership in such refinements and improvements does not automatically vest in Forte by virtue of this Agreement or otherwise, Agency hereby expressly transfers and assigns (and, if applicable, shall cause its affiliates to transfer and assign) to Forte all rights, title, and interest which Agency or any of its affiliates may have in and to such refinements and improvements.

### **4. Confidentiality.**

Agency acknowledges that the products, services and information relating to Forte's products and services (including without limitation these Terms and Conditions) contain confidential and proprietary information developed by, acquired by, or licensed to Forte (the "Confidential Information"). Agency will take (and will cause its affiliates to take) all reasonable precautions necessary to safeguard the confidentiality of the Confidential Information. Neither Agency nor any of its affiliates will make any unauthorized use of the Confidential Information or disclose, in whole or in part, the Confidential Information to any individual or entity, except to those of Agency's employees or affiliates who require access for Agency's authorized use of the products or services and agree to comply with the use and nondisclosure restrictions applicable to the Confidential Information. This Section will not apply to Confidential Information that (i) was already available to the public at the time of disclosure, (ii) becomes generally known to the public after disclosure to the other party, through no fault of the other party, or (iii) is disclosed under force of law, governmental regulation or court order. Agency acknowledges that any unauthorized use or disclosure by it or any of its affiliates of the Confidential Information may cause irreparable damage to Forte. As such, if Forte becomes aware of Agency's breach or threatened breach of this Section, Forte may suspend any and all rights granted to Agency under these Terms and Conditions and shall be entitled to injunctive relief, without the need of posting a bond, in addition to all legal or equitable relief that may be available to Forte.

### **5. Term and Termination.**

- 5.1 **Term.** This Agreement shall become effective upon the date this Agreement is executed by both parties and shall have an initial term of three (3) years. Thereafter, this Agreement may be renewed for two (2) additional one year terms upon mutual agreement of the parties.
- 5.2 **Exclusivity.** During the term of this Agreement, Agency shall use Forte as its exclusive provider of all Services.
- 5.3 **Termination.** Either party may terminate this Agreement by providing thirty days' written notice of termination to the other party. Additionally, Forte may immediately

terminate this Agreement without prior notice in the event that (i) there is a material adverse change to Agency or its financial condition; or (ii) Agency experiences excessive chargebacks; or (iii) Agency's systems experiences an actual data security breach that is deemed to be a threat to Forte's internal systems or ability to continue to provide services to other Merchants; or (iv) Agency violates any applicable Law, Rule or Regulation; or (v) termination is deemed necessary by Forte to comply with any applicable Law, Rule or Regulation.

## **6. Transaction Processing**

**6.1 Accepting Transactions.** Forte shall process Credit Card, Debit Card and ACH Transactions on the Agency's behalf on a 24-hour basis. Transactions which are received before the daily designated cut-off time will be originated for settlement through the corresponding Payment Network. Transactions which are received after the designated cut-off time will be included in the next business day's settlement processing.

**6.1.1 Sale Transactions.** If a Transaction is sent to Forte as a sale of goods or services, it will automatically be captured for settlement in time for the next designated cut-off time.

**Auth/Capture Transactions.** If a transaction is sent to Forte for authorization only or for delayed processing, then it will be the responsibility of Agency to submit a corresponding "capture" Transaction within 48 hours of the authorization in order to complete the Transaction process for settlement.

**6.1.2** Transactions which are not captured within 48 hours of Authorization are untimely and may be rejected by Forte.

**6.2 Transaction Format.** Forte is responsible only for processing Transactions which are received and approved by Forte in the proper format, as established by Forte.

**6.2.1 Card Not Present Transactions.** For card-based transactions in which the card is not present, Agency must obtain and include as part of the authorization request the 3 or 4 digit Validation Code and cardholder's billing address information.

**6.3 Merchant Account.** In order to provide transaction processing services, Forte may need to establish one or more merchant accounts on Agency's behalf or require Agency to establish a merchant account with Forte's partner-third party provider of credit card processing.

**6.4 Modifying Transactions.** Agency shall regularly and promptly review all Transactions and shall immediately notify Forte upon discovery of any and all discrepancies between Agency's records, Forte and Agency's bank, or with respect to any Transaction that Agency believes was made erroneously or without proper authorization. At Agency's request, Forte will make reasonable efforts to reverse, modify, void or delete a Transaction after it has been submitted for settlement. All requests must be made in writing (electronic mail will be deemed as "in writing" for these purposes), signed or sent by an individual pre-authorized by Agency to make such requests and delivered to Forte. Agency agrees that Forte will not be held responsible for any losses, directly or indirectly, incurred by Agency or other third parties as a result of Forte's failure to accomplish the request before the Transaction has been processed through the applicable Payment Network, unless such losses are due to Forte's negligence.

**6.5 Delay or Rejection of Transactions.** Forte may delay or reject any Transaction without prior notification to Agency that is improperly formatted, is untimely, is missing

Information, that may cause it to downgrade or if Forte has reason to believe such Transaction is fraudulent or improperly authorized or for any reason permitted or required under the Rules or Regulations. Forte shall have no liability to Agency by reason of the rejection of any such Transaction.

- 6.6 **Returned Items.** Forte shall make available to Agency details related to the receipt of any Transaction that is returned unpaid or Transaction which is charged back and shall credit or charge such returned item to Agency's Settlement Account.
- 6.7 **Chargebacks.** Agency acknowledges and agrees that it is bound by the Rules and Regulations of the Payment Associations with respect to any Chargeback. Agency understands that obtaining an authorization for any sale shall not constitute a guarantee of payment, and such sales can be returned or charged back to Agency like any other item hereunder. In the event a Transaction is charged back for any reason, the amount of such Transaction will be deducted from Agency's designated settlement account or any payment due to Agency.
- 6.8 **Excessive Chargebacks.** Using limits established by Associations as a standard for review, Forte reserves the right to suspend and/or terminate Agency's access to the Services should Agency's chargeback ratio exceed allowable limits in any given period. Forte will make reasonable efforts to provide Agency with notice and a time to cure its excessive chargebacks prior to suspending or terminating Agency's access to the Services. Agency acknowledges and expressly authorizes Forte, in compliance with Payment Association Rules and Regulations, to provide to the Payment Associations and applicable regulatory bodies, Agency's name and contact information as well as transaction details should Agency's chargeback ratio exceed the allowable limits in any given period.
- 6.9 **Resubmitting Transactions.** Agency shall not re-submit any Transaction unless it is returned as (i) Insufficient funds (R01); or (ii) Uncollected funds (R09); or (iii) unless a new authorization is obtained from Constituent.
- 6.10 **Settlement.** Settlement of Agency's funds for Transactions, less any Chargebacks or Returns, to Agency's designated settlement account will occur within 72 hours of Origination excluding weekends and US federal banking holidays. Settlement of Transactions will occur via electronic funds transfer over the ACH Network.
- 6.11 **Reporting.** Forte will make daily Origination and Deposit reports available to Agency on a 24/7 basis through the Forte Internet-based Forte platform.

## **7. Transaction Authorization.**

- 7.1 **Constituent Authorization.** Agency shall obtain authorization from Constituent prior to requesting a Transaction to Constituent's account.
- 7.2 **Retention.** Agency shall retain proof of Constituent's authorization for a period of not less than two (2) years for standard transactions and for a period of five (5) years for health- related transactions from the authorization date or revocation of authorization date and shall provide such proof of authorization to Forte upon request within five (5) business days of the request.
- 7.3 **Revoked Authorization.** Agency shall cease initiating Transactions to a Constituent's account immediately upon receipt of any actual or constructive notice of that Constituent's termination or revocation of authority. Agency may re-initiate Transactions to a Constituent's account only upon receiving new authorization from Constituent.

**8. ACH Settlement Authorization.** Agency authorizes Forte to electronically debit and credit Agency's designated bank account(s) for any amounts owed to or by Agency in accordance to the terms of this Agreement.

**9. Constituent Disputes.**

All disputes between Agency and its Constituent (s) relating to any Transaction processed under this Agreement will be settled by and between Agency and Constituent. Agency agrees that Forte bears no responsibility or involvement in any such dispute.

**10. Compliance with Laws, Rules and Regulations.**

In performing its duties under this Agreement, each party agrees to comply with all applicable Rules, Regulations and Laws. Agency agrees to cooperate and provide information requested by Forte to facilitate Forte's compliance with any applicable Law, Rule or Regulation. Additionally, Agency shall reimburse Forte for any fines or loss of funds imposed on Forte for any violation of the Rules, Regulations or Laws by Agency.

**11. Pricing and Payment.**

11.1 Forte will provide the Services in accordance with the pricing fee schedule(s) attached hereto as Appendix A. Pricing schedules which utilize an Absorbed Fee Model will be billed to the Agency monthly in arrears and will automatically be debited from Agency's designated account via ACH Debit. Pricing schedules which utilize a Service Fee Model will result in a processing fee being charged to the Constituent in the form of a non-refundable service fee which is either (i) added to; or (ii) charged as a separate transaction to the Constituent at the time of payment.

11.2 Pricing schedules which utilize a flat service fee model are calculated based on historical or estimated transactional amount activity by Agency. In the event that experiential transaction activity varies significantly from the historical or estimated amounts, Forte shall have the right to adjust the service fee in accordance to the experiential transaction activity.

11.3 Forte's pricing is subject to the underlying fees established by the Payment Associations and its service providers. As such, in the event Forte experiences an increase in cost for any processing services utilized by Agency during any term of this Agreement, Forte will pass through the increases with no additional markup to Agency. Forte will provide Agency a minimum of thirty (30) days notice of any change or adjustment in fees.

**12. Indemnification.**

Each party bears all responsibility for its own employees' actions while in its employ. Each party shall indemnify and hold the other party harmless from and against any and all claims, demands, actions, losses, damages, liabilities, expenses, expenditures, and costs including but not limited to attorneys' fees and other costs of defense, including settlement costs, that relate to or result from (i) any material breach of this Agreement, including but not limited to a breach of the party's representations and warranties contained herein; or (ii) any alleged violation by the party of any applicable Law, Rule or Regulation.

**13. Limits of Liability.**

13.1 Neither party shall be liable to the other party or to any third party for any special, consequential, incidental or punitive damages of any kind or nature incurred in relation to this Agreement. Forte's maximum liability hereunder for any claims whatsoever shall not

exceed the greater of (i) \$50,000; or (ii) the total amount of all fees paid by Agency to Forte during the three (3) month period preceding the origination of the claim giving rise to liability. The limitations of liability contained in this section shall apply without regard to whether other provisions of the Agreement have been breached or have proven ineffective.

- 13.2 Forte shall not be held responsible for errors, acts or failures to act of others, including, and among other entities, banks, other processors, communications carriers or clearing houses through which Transactions may be originated or through which Forte may receive or transmit information, and no such entity shall be deemed an agent of Forte.

#### **14. Representations and Warranties.**

##### **14.1 Forte's Representations and Warranties.**

- 14.1.1 Forte represents and warrants to Agency that Forte's agreement to provide its products and services to Agency and to perform the Services hereunder does not violate any agreement or obligation between Forte and any third party.
- 14.1.2 To the best of Forte's knowledge, no performance of its obligations hereunder will infringe on any copyright, patent, trade secret or other proprietary right held by any third party.
- 14.1.3 When executed and delivered by Forte, the agreement with Agency will constitute the legal, valid, and binding obligation of Forte, enforceable in accordance with its terms.

##### **14.2 Agency's Representations and Warranties.**

- 14.2.1 Agency's agreement to license Forte's products and services and to engage Forte to perform the Services hereunder does not violate any agreement or obligation between Agency and any third party.
- 14.2.2 To the best of Agency's knowledge, neither any information delivered by Agency to Forte in support of this Agreement nor Agency's performance of its obligations hereunder will infringe on any copyright, patent, trade secret or other proprietary right held by any third party.
- 14.2.3 None of the activities for which Agency has engaged the services of Forte shall violate any international, federal, state, or local law or regulation, including but not limited to laws relating to consumer non-public financial information.
- 14.2.4 When executed and delivered by Agency, the agreement with Forte will constitute the legal, valid, and binding obligation of Agency, enforceable in accordance with its terms.

#### **15. Service Policy.**

Except as otherwise specifically provided herein, Forte's products and services are provided hereunder "As Is" without warranty of any kind. Agency acknowledges and understands that Forte does not warrant that the Services will be uninterrupted or error free and that Forte may occasionally experience delays or outages due to disruptions that are not within Forte's control. Any such disruption, not caused by Forte, shall not be considered a breach of this Agreement by Forte. Forte shall use its best efforts to remedy any such interruption in service as quickly as possible.

#### **16. Force Majeure.**



Neither party shall be liable for, or be considered in breach of or default under the Agreement on account of any delay or failure to perform its obligations hereunder as a result of any causes or conditions that are beyond such party's reasonable control and that such party is unable to overcome through the exercise of commercially reasonable diligence. If any force majeure event occurs, the affected party shall give prompt written notice to the other party and shall use all commercially reasonable efforts to minimize the impact of the event.

**17. Assignment.**

The rights granted under this Agreement shall not be assigned by either party without the prior written consent of the other party, which shall not be unreasonably withheld.

**18. Choice of Law and Venue.**

19.1 This Agreement shall be governed by and construed in accordance with the internal laws of the State of Missouri.

19.2 The exclusive venue for any actions or claims arising from or related to this Agreement shall be in the appropriate state or federal court located in St. Louis County, Missouri.

**19. Amendment.**

Except as otherwise provided for herein, the terms and conditions of this Agreement shall not be modified or amended except in writing, signed by the parties hereto and specifically referring to this Agreement.

**20. Publicity.**

Neither party shall use the other party's name, logo or service marks in conjunction with a press release or advertisement without first obtaining written approval.

**21. Notice.**

Any notice required to be given by either party hereunder, shall be in writing and delivered personally to the other designated party, or sent by any commercially reasonable means of receipted delivery, addressed, to that party at the address most recently provided in writing. Either party may change the address to which notice is to be sent by written notice to the other under any provision of this paragraph.

Notices to Forte  
Forte Payment Systems  
500 W. Bethany  
Suite #200  
Allen, TX 75013  
Attn: General Counsel

Notices to Agency  
City of Black Jack, Missouri  
12500 Old Jamestown Road  
Black Jack, MO 63033  
Attn: Pat Grubb  
Director of Finance and  
Administration

**22. Headings.**

The headings contained in this Agreement are for convenience of reference only and shall not affect the meaning of any provision of this Agreement.

**23. Severability.**

Should any term, clause or provision herein be found invalid or unenforceable by a court of competent jurisdiction, such invalidity shall not affect the validity or operation of any other term, clause or provision and such invalid term, clause or provision shall be construed to most closely reflect the original intent of the parties.

**24. Entire Agreement; Waiver; Counterparts.**

This Agreement constitute the entire understanding of the parties, and revoke and supersede all prior agreements between the parties and are intended as a final expression of their agreement. Either party's waiver of any breach of any provision of this Agreement shall not be deemed a waiver of any subsequent breach of same or other provision. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective organizations, have executed this Agreement as of the date set forth below.

Forte Payment Systems ("Forte")  
By:

Name:  
Title:  
Date:

City of Black Jack, Missouri ("Agency")  
By:

Name: Norman C. McCourt  
Title: Mayor  
Date: