



MASTER SERVICES AGREEMENT

1. Term, Suspension and Termination

(a) **Term.** The term of Shopgate service shall commence on the Effective Date of the Order Form ("Order Form") and continue in effect for the period of time specified in the that document.. Thereafter, this Agreement shall automatically renew for successive terms equal in duration to the Initial Term (each, a "Renewal Term"), subject to payment of all applicable fees by Merchant, unless either party gives written notice of non-renewal to the other party within the number of days before the conclusion of the Initial Term or applicable Renewal Term specified in the Order Form for discontinuing non-renewal. The fees due during any applicable Renewal Term are subject to increase, and Shopgate will provide reasonable notice to Merchant of any such upcoming increase in fees.

(b) **Suspension.** Shopgate reserves the right to suspend: (i) Merchant's access to or use of the Mobile Store and Platform in the event of an Emergency Security Issue; provided, however, that Shopgate will make commercially reasonable efforts to limit suspension to the minimum extent and duration necessary to eliminate the Emergency Security Issue; (ii) Merchant's access to or use of the Mobile Store and Platform in the event that Merchant fails to make any payment when due under this Agreement; and (iii) access to or use of the Mobile Store or Platform by Merchant or any user who violates any terms of service, acceptable use policies, end user license agreements or other guidelines instituted by Shopgate or its licensors and service providers. Such suspension shall be without prejudice to any other rights or remedies available to Shopgate under this Agreement or applicable law.

(c) **Termination.** Notwithstanding anything to the contrary, this Agreement may be terminated as follows: (i) by the non-breaching party upon a material breach of this Agreement by the other party, which breach is not cured within thirty (30) days after receipt of written notice from the non-breaching party; or (ii) by either party in the event the other party becomes insolvent or bankrupt; becomes the subject of any proceedings under bankruptcy, insolvency or debtor's relief law; has a receiver or manager appointed; makes an assignment for the benefit of creditors; or takes the benefit of any applicable law or statute in force for the winding up or liquidation of such party's business.

(d) **Events Upon Termination.** Upon termination of this Agreement for any reason: (i) all rights granted by the parties under this Agreement shall immediately terminate; (ii) Merchant shall immediately cease all access to and use of the Mobile Store and Platform and all distribution of the Mobile Apps, including removal of the Mobile Apps from all app stores; and (iii) each party shall immediately cease all use of the other party's Confidential Information (as defined in Section 9(a)) and return or destroy all copies of such Confidential Information that are within its custody or control.

(e) **Survival.** The following sections of this Agreement shall survive termination of this Agreement for any reason: 1(d) {Events Upon Termination}; 1(e) {Survival}; 2 {Fees and Taxes}; 5 {Merchant Responsibilities}; 6 {Intellectual Property}; 7 {Representations and Warranties}; 8 {Indemnification}; 9 {Confidential Information}; 10 {Disclaimer of Warranties}; 11 {Limitation of Liability}; and 12 {Miscellaneous}.

2. Fees and Taxes

(a) **Fees.** Payments are made in accordance with the Agreement. Payment terms for services beyond the monthly product (maintenance and licensing) fees are outlined in the Order Form that references this Agreement. All fees are non-refundable, even where access to the Mobile Store or Platform is suspended pursuant to Section 1(b). Any payment not received from Merchant when due shall incur interest at the rate of one and a half percent (1.5%) per month or the maximum rate permitted by law, whichever is less.

(b) **Payment.** All payments are executed via ACH or wire transfer or checking account. Any other payment methods must be negotiated prior to contract signing.

(c) Taxes. Any and all amounts payable hereunder by Merchant are exclusive of any value added, sales, use, excise or other similar taxes (collectively, "Taxes"). Merchant shall be solely responsible for paying all applicable Taxes. If Shopgate has the legal obligation to collect any Taxes, Merchant shall promptly reimburse Shopgate upon invoice. If Merchant is required by law to withhold any taxes from its payments to Shopgate, Merchant shall provide Shopgate with an official tax receipt or other appropriate documentation to support such payments and take reasonable steps to minimize such payments.

3. Grant of Rights

(a) Grant. During the term of this Agreement and subject to Merchant's compliance in all material respects with the terms and conditions of this Agreement, Shopgate hereby grants Merchant a limited, non-exclusive, non-sublicensable right and license to: (a) provide Admin Users with access to the Platform only in executable, machine-readable, object code form and only as necessary for Admin Users to design, optimize, update and manage the Mobile Store; (b) distribute the Mobile Apps to End Users through the Apple App Store and Google Play store and grant End Users the right to install and use the Mobile Apps only in executable, machine-readable, object code form; and (c) make the Mobile Site accessible to End Users.

(b) Hosting. All content for the Mobile Store must be hosted on the Platform or other servers within the custody or control of Shopgate. We will make the Hosted Service available to you pursuant to this Agreement, at the rates set out in the Order Form. As part of the Hosted Service, we will take all reasonable measures to keep uptime at or above 99.9% (ninety-nine and nine tenths percent). If, due to our error, our hosted servers are down more than .1% (one tenth of one percent) in a given month, you will be entitled to receive a 25% (twenty-five percent) credit for that month. If, due to our error, our hosted servers are down more than .5% (one half of one percent) in a given month, you will be entitled to receive a 50% (fifty percent) credit for that month. If, due to our error, our hosted servers are down more than 1% (one percent) in a given month, you will be entitled to receive a 100% (one hundred percent) credit for that month. In no event will you be entitled to a refund for downtime caused by regular maintenance (normally conducted during the hours of 9 p.m. – 4 a.m., Central Time), or a Force Majeure. In no event will you be entitled to a refund for downtime caused by 3rd party applications (payment processors, shopping cart systems, et al) that are integrated externally to the Shopgate platform. In no event will you be entitled to a refund for downtime caused by Merchant user error using the Merchant Admin panel.

(c) Changes. Shopgate reserves the right to make modifications or improvements to or add or remove features from the Mobile Store or Platform from time to time.

4. Services

(a) Included Feature Set. Shopgate will provide Merchant with the selected services identified in the Order Form.

(b) Mobile App Submission. Shopgate will submit the Mobile Apps to app stores under Merchant's accounts with the app stores and assist Merchant in obtaining approval from the app store operators for distribution of the Mobile Apps in such stores. Shopgate does not guarantee that the Mobile Apps will be accepted by the app store operators for distribution of the Mobile Apps in such stores.

(c) Additional Services. In the event that the parties execute a Statement of Work specifying Additional Services that Shopgate will provide to Merchant, Shopgate will provide such Additional Services to Merchant. Each Statement of Work shall be governed by the terms and conditions of this Agreement and shall become part of the Agreement when executed. Except to the extent a provision in a Statement of Work expressly states that it takes precedence over the terms and conditions of this Agreement, the terms and conditions of this Agreement shall take precedence in the event of any conflict between this Agreement and any Statement of Work.

5. Merchant Responsibilities

(a) Restrictions. Merchant shall not itself or permit any other party to: (i) download, reproduce, modify, translate, adapt or create derivative works based upon the Mobile Store or Platform, except as expressly permitted under Section 2; (ii) reverse engineer, decode, decompile, disassemble or otherwise attempt to access or derive the source code or architectural framework of the Mobile Store or Platform; (iii) access the Mobile Store or Platform for purposes of developing, marketing, selling or distributing any product or service that competes with or includes features substantially similar to the Mobile Store, Platform or any other products or services offered by Shopgate; (iv) sell, loan, rent, lease or sublicense access to the Mobile Store or Platform as part of a service bureau or similar fee-for-service purpose; or (v) use the Mobile Store or Platform in any way that violates this Agreement; any terms

of service, acceptable use guidelines or other policies instituted by Shopgate or its licensors and service providers; or any applicable laws or regulations.

(b) Operation of Mobile Store. Merchant is solely responsible for: (i) the operation of the Mobile Store, including its contents, products and services; (ii) the offering for sale, sale, delivery and return of any products or services through the Mobile Store; and (iii) any claims relating to the operation of the Mobile Store, including any claim relating to consumer protection, products liability or violation of any applicable law or regulation.

(c) Contact Information. Within the Mobile Store, Merchant shall conspicuously list Merchant's contact information, including Merchant's name, physical address, telephone number and email address. Merchant shall update such information to keep it true, accurate and complete.

(d) Mobile App Submission. Merchant shall provide all information and assistance reasonably requested by Merchant in connection with submitting the Mobile Apps to app stores and obtaining approval from the app store operators for distribution of the Mobile Apps in such stores. Merchant shall solely be responsible for: (i) ensuring the accuracy of any information regarding Merchant or the Mobile Apps provided by Shopgate on behalf of Merchant in connection with the app submission process; and (ii) complying with any app submission guidelines and other policies instituted by the app store operators.

(e) Protection. Merchant shall protect the confidentiality of Credentials and not share Credentials with any other party. Merchant shall solely be responsible for all activities undertaken using Merchant Facilities. In the event that Merchant becomes aware of any unauthorized use of the Mobile Store or Platform through use of Merchant Facilities, Merchant shall promptly give written notice to Shopgate of such unauthorized use and make reasonable efforts to eliminate such unauthorized use. Merchant shall at all times implement appropriate security policies and procedures and access control methodologies to safeguard access to the Mobile Store and Platform through Merchant Facilities. All such measures shall comply with prevailing industry standards but in no case consist of less than reasonable care.

(f) Policies. In addition to the terms and conditions of this Agreement, access to and use of the Mobile Store and Platform shall comply with any terms of service, acceptable use policies, end user license agreements and other guidelines instituted by Shopgate or its licensors and service providers.

(g) Additional Terms. Merchant shall solely be responsible for implementing appropriate terms of use, end user license agreements and terms and conditions of sale for the Mobile Store ("Additional Terms"). The Additional Terms shall impose no obligations on Shopgate with respect to End Users or any other parties and further advise that: (i) the Additional Terms are concluded between End Users and Merchant, not Shopgate; and (ii) Merchant is solely responsible for the operation of the Mobile Store, including its contents, products and services, any claims relating to the operation of the Mobile Store, including any claim relating to consumer protection, products liability or violation of any applicable law or regulation. Merchant shall condition each End User's access to and use of the Mobile Store on acceptance of the Additional Terms.

(h) Privacy Policy. Merchant shall solely be responsible for implementing a privacy policy for the Mobile Store that complies with all applicable laws and regulations, gives all required notices, and obtains all required consents with respect to: (i) Merchant's collection, processing, storage, transmission, use and disclosure of any data; and (ii) Shopgate's collection, processing, storage, transmission, use and disclosure of any data as necessary under this Agreement or as otherwise permitted under Shopgate's [Privacy Policy](#).

(i) Technical Requirements. Merchant and its users shall be solely responsible for obtaining, configuring and maintaining any hardware, network connectivity and third-party software required to access the Mobile Store and Platform, including computers, mobile devices, operating systems, web browsers and storage devices.

(j) Third-Party Integrators. In the event that Merchant engages any third-party integrator to provide any extensions or services in connection with the Platform or Mobile Store, Merchant acknowledges and agrees that: (i) Shopgate is not responsible for any such extensions or services, or any degradation to the performance or availability of the Platform or Mobile Stores attributable to such extension or services; and (ii) as between Merchant and Shopgate, Merchant is solely responsible for any such extensions or services.

6. Intellectual Property

(a) Responsibility for Content. All information, data, text, sound, photographs, graphics, videos, messages and other materials accessible through the Mobile Store and Platform, whether publicly posted or privately transmitted ("Content"), are the sole responsibility of the person from whom such Content originated.

Merchant acknowledges and agrees that: (i) Merchant and its users, and not Shopgate, are entirely responsible for all Content that Merchant and its users upload, post, email, transmit or otherwise make available through the Mobile Store or Platform (“Merchant Content”); and (ii) Merchant and its users are solely responsible for giving all required notices and obtaining all necessary consents, including any required permissions from third-party Intellectual Property rights holders, before submitting Content through or to the Mobile Store or Platform.

(b) Shopgate Ownership. Merchant acknowledges and agrees that, as between Shopgate and Merchant, Shopgate and its licensors own all rights, title and interest (including all Intellectual Property) in and to the Mobile Store and Platform, including all modifications, improvements and derivatives thereof, except with respect to any Merchant Content submitted for use in the Mobile Store or Platform.

(c) Merchant Ownership. Shopgate acknowledges and agrees that, as between Merchant and Shopgate, Merchant and its licensors own all rights, title and interest (including all Intellectual Property) in and to Merchant Content. During the term of this Agreement, Merchant hereby grants Shopgate and its service providers a worldwide, royalty-free, non-exclusive, sublicensable, transferable license to use, distribute, transmit, reproduce, modify, adapt, create derivative works from, publicly perform and publicly display Merchant Content as necessary for Shopgate to provide the services to Merchant and its users contemplated by this Agreement.

(d) Feedback. If Merchant or any of its users elects to provide or make available to Shopgate any suggestions, comments, ideas, improvements or other feedback relating to an App or the Platform (“Feedback”), Shopgate shall be free to use, disclose, reproduce, have made, modify, license, transfer and otherwise utilize and distribute Feedback in any manner, without credit or compensation to Merchant or its users.

(e) Intellectual Property Notices. Merchant shall not remove, obscure or modify in any way any Intellectual Property notices or other notices or disclaimers that appear within the Mobile Store or Platform.

(f) Reservation of Rights. Each of the parties reserves all rights not expressly granted under this Agreement.

7. Representations and Warranties

Shopgate and Merchant each represents and warrants to the other that: (a) it has the necessary power and authority to enter into this Agreement; (b) the execution and performance of this Agreement have been authorized by all necessary corporate or institutional action; (c) entry into and performance of this Agreement will not conflict with any provision of law or the certificate of incorporation, bylaws or comparable organizational documents of such party; (d) no action by any governmental organization is necessary to make this Agreement valid and binding upon such party; and (e) it possesses all governmental licenses and approvals necessary to perform its obligations under this Agreement.

8. Indemnification

(a) Shopgate Indemnification. Merchant shall have no liability and Shopgate shall indemnify, defend and hold Merchant harmless against any loss, damage, cost, liability and expense (including reasonable attorneys’ fees) to the extent arising from any action or claim of a third party (collectively, “Losses”) asserting that use of the Mobile Store or Platform by Merchant, Admin Users or End Users infringes the Intellectual Property of such third party; provided, however, that Shopgate shall have no obligation to indemnify Merchant from any Losses to the extent they arise from: (i) use of such materials in any manner that does not comply in all material respects with the terms and conditions of this Agreement; any terms of use, acceptable use policies, end user license agreements or other guidelines instituted by Shopgate or its licensors and service providers; or any applicable laws or regulations; (ii) use of such materials in combination with any hardware or software not provided or approved by Shopgate; (iii) modifications to such materials not made or authorized by Shopgate; or (iv) any materials provided by Merchant or uploaded, posted or otherwise transmitted through or to the Mobile Store or Platform by Merchant or its users, including Merchant Content. In the event that the Mobile Store or Platform becomes the subject of a Loss or threat of Loss pursuant to this Section 9(a), or Shopgate reasonably determines that any part of such materials is likely to become the subject of a Loss or threat of Loss pursuant to this Section 9(a), Shopgate may, at its sole discretion: (1) procure for Merchant a license as necessary for Merchant to exercise the rights granted by Shopgate under this Agreement; (2) modify or replace such materials to avoid infringement, provided, however, that such materials as modified or replaced retain materially the same or better features and functions; or (3) terminate this Agreement and provide a pro rata refund of the fees paid by Merchant to Shopgate for services under this Agreement that have not been provided.

(b) Merchant Indemnification. Shopgate shall have no liability and Merchant shall indemnify, defend and hold Shopgate harmless against any Loss to the extent arising from: (i) Merchant’s breach of this Agreement; (ii)

any dispute between Merchant and its users; (iii) any dispute between Merchant and any app store with respect to such store's app submission, review or approval process, or distribution of the Mobile Apps; and (iv) any violation of applicable laws or regulations by Merchant or its users.

(c) Procedure. The indemnified party shall: (i) give the indemnifying party prompt written notice of any Loss or threat of Loss; provided, however, that failure of the indemnified party to give such prompt written notice shall not relieve the indemnifying party of any obligation to indemnify pursuant to this Section 9, except to the extent the indemnifying party has been prejudiced thereby; (ii) cooperate fully with the indemnifying party, at the indemnifying party's expense, in the defense or settlement of any Loss or threat of Loss; and (iii) give the indemnifying party sole and complete control over the defense or settlement of any Loss or threat of Loss; provided, however, that any settlement must include a complete release of the indemnified party without requiring the indemnified party to make any payment or bear any obligation.

9. Confidential Information

(a) Definition. "Confidential Information" means information identified in good faith by either party as being confidential or proprietary, or information that, under the circumstances, should reasonably be understood to be confidential or proprietary. Confidential Information shall include Credentials, the terms and conditions of this Agreement, the source code and architectural framework of the Mobile Store and Platform, information relating to future releases of the Mobile Store or Platform and pricing information and business plans provided by either party.

(b) Non-Disclosure. Each party agrees that it will use the Confidential Information provided by the other party only as necessary to exercise its rights and discharge its obligations under this Agreement and for no other purpose without the prior written consent of the disclosing party. Neither party shall disclose to a third party Confidential Information of the other party. To maintain in confidence the Confidential Information of the disclosing party, the receiving party shall use the same degree of care as it uses to protect the confidentiality of its own Confidential Information of like nature, but no less than a reasonable degree of care. The foregoing obligations shall not apply to any Confidential Information that: (i) can be demonstrated to have been publicly known at the time of the disclosing party's disclosure of such Confidential Information to the receiving party; (ii) becomes part of the public domain or publicly known, by publication or otherwise, not due to any unauthorized act or omission by the receiving party; (iii) can be demonstrated to have been independently developed or acquired by the receiving party without reference to or reliance upon such Confidential Information; (iv) is provided to the receiving party by a third party who is under no obligation to the disclosing party to keep the information confidential; or (v) is required to be disclosed by law; provided, however, that the receiving party shall take reasonable actions to minimize such disclosure and promptly notify the disclosing party, to the extent permitted by law, so that the disclosing party may take lawful actions to avoid and/or minimize such disclosure.

10. DISCLAIMER OF WARRANTIES

ALL PRODUCTS AND SERVICES PROVIDED UNDER THIS AGREEMENT ARE PROVIDED "AS IS," "AS AVAILABLE" AND "WITH ALL FAULTS." SHOPGATE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, DISCLAIMS ALL WARRANTIES AND REPRESENTATIONS (EXCEPT AS SET FORTH IN SECTION 8), EXPRESS OR IMPLIED, INCLUDING: (A) THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE; AND (B) ANY WARRANTY WITH RESPECT TO THE QUALITY, ACCURACY, CURRENCY OR COMPLETENESS OF THE PRODUCTS AND SERVICES PROVIDED UNDER THIS AGREEMENT, OR THAT USE OF SUCH PRODUCTS AND SERVICES WILL BE ERROR-FREE, UNINTERRUPTED, FREE FROM OTHER FAILURES OR WILL MEET MERCHANT OR ITS USERS' REQUIREMENTS. THE SECURITY MECHANISMS INCORPORATED IN THE MOBILE STORE AND PLATFORM HAS INHERENT LIMITATIONS. MERCHANT IS SOLELY RESPONSIBLE FOR DETERMINING THAT THE MOBILE STORE AND PLATFORM ADEQUATELY MEET ITS REQUIREMENTS.

11. LIMITATION OF LIABILITY

OTHER THAN IN CASES OF GROSS NEGLIGENCE, WILLFUL MISCONDUCT, A BREACH OF SECTION 10, OR A PARTY'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 9: (A) IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY LOST PROFITS OR INCIDENTAL, INDIRECT, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, INCLUDING DAMAGES ARISING FROM ANY TYPE OR MANNER OF COMMERCIAL, BUSINESS OR FINANCIAL LOSS OCCASIONED BY OR RESULTING FROM ANY USE OF OR INABILITY TO USE THE PRODUCTS AND SERVICES PROVIDED UNDER THIS AGREEMENT, SUCH AS ANY MALFUNCTION, DEFECT OR FAILURE OF THE MOBILE STORE OR PLATFORM OR ITS DELIVERY VIA THE INTERNET, EVEN IF SUCH PARTY HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE; AND (B) IN NO

EVENT SHALL SHOPGATE'S AGGREGATE LIABILITY UNDER THIS AGREEMENT EXCEED THE AMOUNT OF FEES RECEIVED BY SHOPGATE FROM MERCHANT UNDER THIS AGREEMENT DURING THE THEN-APPLICABLE INITIAL TERM OR RENEWAL TERM.

12. Export Control

Merchant shall comply with all applicable export, re-export and import laws and regulations of any applicable jurisdiction, including the Export Administration Regulations administered by the U.S. Commerce Department's Bureau of Industry and Security, the International Traffic in Arms Regulations administered by the U.S. State Department's Directorate of Defense Trade Controls, U.S. trade and economic sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control and associated laws and regulations ("Export Control Laws"). Without limiting the generality of the foregoing sentence, Merchant shall not, directly or indirectly, offer for sale, sell or deliver any products or services in violation of Export Control Laws, and Merchant shall perform all undertakings (including obtaining any necessary export license or other governmental approval) prior to exporting or re-exporting any products or services covered by Export Control Laws.

13. Miscellaneous

(a) Independent Contractors. The relationship between Shopgate and Merchant established by this Agreement is solely that of independent contractors. Neither party is in any way the partner or agent of the other, nor is either party authorized or empowered to create or assume any obligation of any kind, implied or expressed, on behalf of the other party, without the express prior written consent of such other party.

(b) Notice. All notices, demands and other communications ("Notices") to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and sent to the parties according to the contact information provided below, or such other contact information as either party shall notify the other in accordance with this Section 14(b):

To Shopgate

Shopgate
2222 Rio Grande, Suite 300
Austin, TX 78705
Attn:
E-mail:

To Merchant

Merchant's physical address, fax number or email address
as specified in the Order Form.

Notices shall be deemed to have been given (i) if personally delivered by hand, when delivered (with written confirmation of receipt), (ii) if sent by a internationally-recognized overnight courier service, when received (as shown in the records of the courier), (iii) if mailed by U.S. first-class certified mail, return receipt requested, five business days after being mailed, or (iv) if sent by email or other form of electronic transmission, when receipt is acknowledged by an affirmative act of the party receiving notice.

(c) Publicity. Merchant shall not issue any press release or other public announcement relating to this Agreement or its relationship with Shopgate without the prior written consent of Shopgate. Shopgate reserves the right to withhold such approval in its sole discretion.

(d) Assignment. Merchant may not assign this Agreement, or assign or delegate any right or obligation hereunder, by operation of law or otherwise without the prior written consent of Shopgate. Shopgate may assign this Agreement, or assign or delegate any right or obligation hereunder, by operation of law or otherwise without the prior written consent of Merchant. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

(e) Interpretation. For the purposes of this Agreement: (i) the words "such as," "include," "includes" and "including" shall be deemed to be followed by the words "without limitation;" (ii) the word "or" is not exclusive; and (iii) the words "herein," "hereof," "hereby," "hereto" and "hereunder" refer to this Agreement as a whole. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted.

(f) Entire Agreement. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof and supersedes all previous or contemporaneous oral or written negotiations or agreements with respect to such subject matter.

(g) Amendment. This Agreement may not be amended except in a writing executed by an authorized representative of each party.

(h) Severability. If any provision of this Agreement shall be held to be invalid or unenforceable under applicable law, then such provision shall be construed, limited, modified or, if necessary, severed to the extent necessary to eliminate its invalidity or unenforceability, without in any way affecting the remaining parts of this Agreement.

(i) Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the laws of the United States of America and the State of Texas, without regard to conflict of laws principles. The United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement.

(j) Jurisdiction. The parties agree that any action, proceeding, controversy or claim between them arising out of or relating to this Agreement (collectively, an "Action") shall be brought only in a court of competent jurisdiction in Austin, Travis County, Texas, and each hereby submits to the personal jurisdiction and venue of such courts and waives any objection on the grounds of venue, forum *non-conveniens* or any similar grounds with respect to any Action.

(k) No Waiver. The failure of either party to require strict performance by the other party of any provision hereof shall not affect the full right to require such performance at any time thereafter, nor shall the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself. Any waiver of the provisions of this Agreement, or of any breach or default hereunder, must be set forth in a written instrument signed by the party against which such waiver is to be enforced.

(l) Force Majeure. Neither party shall be liable for any failure to perform under this Agreement to the extent due to any act of God, fire, casualty, flood, war, strike, lock out, failure of public utilities, injunction or any act, exercise, assertion or requirement of any governmental authority, epidemic, destruction of production facilities, insurrection or any other cause beyond the reasonable control of the party invoking this provision.

(m) Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

14. Definitions

(a) "Additional Services" means any services in addition those set forth in Section 3(a) that Shopgate will provide to Merchant pursuant to a Statement of Work agreed to and signed by the parties.

(b) "Admin Users" means persons designated by Merchant as requiring administrator access to the Platform to design, optimize, update and manage the Mobile Store.

(c) "Credentials" means any user accounts, passwords and other authentication credentials associated with use of the Mobile Store and Platform by Merchant, Admin Users or End Users.

(d) "Downtime" is the number of hours in the month the merchant's customers are not able to make purchases through the App divided by the total number of hours in a month. Shopgate reserves the right to schedule maintenance activities outside the merchant's standard operating hours. These maintenance hours do not count against uptime / downtime nor do downtime issues caused by 3rd party systems outside the Shopgate platform such as payment processors or shopping cart systems.

(e) "Emergency Security Issue" means any: (i) use of the Mobile Store or Platform by Merchant, Admin Users or End Users in violation of the terms and conditions of this Agreement that disrupts or is reasonably likely to disrupt the availability of the Platform to other users; or (ii) access to or use of the Platform by any unauthorized third party through use of any Merchant Facilities.

(f) "End Users" means Merchant's end users who access or use the Mobile Store.

(g) "Intellectual Property" means all rights associated with patents and inventions; copyrights, mask works and other works of authorship (including moral rights); trademarks, service marks, trade dress, trade names, logos and other source identifiers; trade secrets; software, databases and data; and all other intellectual property and industrial designs.

(h) “Merchant Facilities” means Credentials and any account, hardware, system or other facility within Merchant’s custody or control.

(i) “Mobile App” means any iOS or Android mobile app created for Merchant pursuant to this Agreement for use by End Users to shop for and purchase products and services from Merchant.

(j) “Mobile Site” means any mobile website created for Merchant pursuant to this Agreement for use by End Users to shop for and purchase products and services from Merchant.

(k) “Mobile Store” means, collectively, the Mobile Apps and Mobile Site.

(l) “Order Form” means the order form signed by the parties and attached hereto setting forth the services to be provided by Shopgate pursuant to this Agreement.

(m) “Platform” means Shopgate’s online platform for use in designing, optimizing, updating, hosting and managing mobile shopping websites and apps, including the Mobile Store.

(n) “Statement of Work” means a statement of work executed by the parties pursuant to this Agreement, specifying the Additional Services that Shopgate will provide to Merchant, period for performance, deliverables (if any), and applicable fees.

(o) “Uptime” is the number of hours in the month the merchant’s customers are able to make purchases through the App divided by the total number of hours in a month. Shopgate reserves the right to schedule maintenance activities outside the merchant’s standard operating hours. These maintenance hours do not count against uptime / downtime.