



Service Level Agreement

This Service Level Agreement (this “Agreement”) is made and entered into, by and between Upendo Ventures, LLC, a California limited liability company (“Upendo”) and the person or company to whom is being licensed (“Client”), on the date you originally purchase, download, install, access, use, or receive the service (the “Effective Date”).

BY PURCHASING, ACCESSING OR USING UPENDO SUPPORT OR ON-LINE DOCUMENTATION (“DOCUMENTATION”), YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO BE BOUND BY THIS AGREEMENT, DO NOT ACCESS OR USE THE SOFTWARE OR SERVICES PROVIDED.

Client and Upendo desire that Upendo provide Client with Services (as defined below) pursuant to this Agreement. Now, therefore, in consideration of the mutual promises set forth in this Agreement, Upendo and Client agree as follows:

1. Services

- A. **Services.** Subject to and conditioned on Client’s and its Authorized Users’ (defined below) compliance with the terms and conditions of this Agreement, Upendo will make available to Client and its Authorized Users, during the Term (as defined below), Upendo’s proprietary support services (“Services”) in accordance with the terms and conditions of this Agreement. Specifically, Upendo will: (a) host and operate the Services for remote electronic access and use of the Services by Client and its Authorized Users; and (b) use commercially reasonable efforts to make the Services available 24 hours a day, 7 days a week, every day of the year, except for: (i) planned or scheduled downtime; or (ii) downtime or degradation due to a Force Majeure Event (as defined below) or any other circumstances beyond Upendo’s reasonable control, including Internet service provider failure or delay, Client’s or any Authorized User’s use of third party materials, misuse of the Services, or use of the Services other than in compliance with the express terms of this Agreement; or (iii) any suspension or termination of Client’s or any Authorized Users’ access to or use of the Services as permitted by this Agreement.

Services include, but are not limited to the following:

- a. **Trial.** Upendo grants Client a limited, royalty-free, non-exclusive, non-transferable and revocable license solely to install or use the software provided to you solely for the purpose of evaluating whether you desire to purchase a license to use the Software (“Trial”). Evaluation excludes development of code, integration with other systems and software, proofs of concept projects, and building of a production website.
- b. **Cloud.** Upendo grants Client a limited, royalty-free, non-exclusive, non-transferrable and revocable license to install and use the software on a server of Upendo’s choosing, provided Client is compliant with the terms and conditions of this Agreement (“Cloud”).
- c. **Support Services.** Upendo grants Client a limited, royalty-free, non-exclusive, non-transferrable and revocable license to access and use the Services outside of the Cloud, provided Client is compliant with the terms and conditions of this Agreement (“Support”).
- d. **Support Applications.** Upendo grants Client a limited, royalty-free, non-exclusive, non-transferrable and revocable license to access and use additional software provided by Upendo used to enhance the Services provided by Upendo, provided Client is compliant with the terms and conditions of this agreement (“Support Application”).



- B. **Changes.** Upendo reserves the right, in its sole discretion, to make any changes to the Services or to any and all materials or content provided or made available pursuant to the Services, including all software, documentation and any and all other information, data, documents, materials, works and other content, devices, methods, processes, and other technologies and inventions (collectively, “Upendo Materials”) or any feature of the Upendo Materials, respectively, that it deems necessary or useful: (a) to maintain or enhance (i) the quality or delivery of the Services or the Upendo Materials, (ii) the competitive strength of or market for the Services or the Upendo Materials, or (iii) the Services, or the Upendo Materials’ cost efficiency or performance; or (b) to comply with applicable laws, rules or regulations (collectively, “Laws”).
- C. **Authorization.** Subject to and conditioned on Client’s payment of Fees (as defined below) and compliance with all other terms and conditions of this Agreement, Upendo hereby authorizes the access and use, solely during the Term, of the Services and such Upendo Materials as Upendo may supply or make available to Client, solely for Client’s internal business purposes (“Permitted Use”) by Client and the authorized users (“Authorized Users”) as described in this Agreement.

Client and its Authorized Users will access the Services and the Upendo Materials solely in accordance with the terms and conditions of this Agreement, the Upendo Materials, and those Services platform Terms and Conditions, which will be available in each case prior to accessing the Services software (“T&Cs” or “Terms of Service”). The authorization set forth in this Section 1(C) is non-exclusive and non-transferable. Client is solely and exclusively responsible for any breach by its Authorized Users of this Agreement, of any terms contained in the Upendo Materials or of the T&Cs.

- D. **Additional Usage Restrictions.** Neither Client nor any Authorized User may: (i) modify, reverse engineer, disassemble, decompile the Services or Upendo Materials or otherwise attempt to access or determine the source code of the Services or Upendo Materials; (ii) copy, or reproduce the Services or Upendo Materials in any way, in whole or in part (including any feature, function or user interface), or frame or mirror any part of the Services or Upendo Materials; (iii) create any derivative work based on the Services or Upendo Materials; (iv) sell, resell, distribute, license, rent or lease the Services or Upendo Materials, or any part thereof; (v) use Services or Upendo Materials to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights; (vi) use Services or Upendo Materials to store or transmit code, files, scripts, agents or programs intended to do harm, including, for example, viruses, worms, time bombs and Trojan horses (“Malicious Code”); (vii) interfere with or disrupt the integrity or performance of Services or Upendo Materials; (viii) attempt to gain unauthorized access to the Services or Upendo Materials or their related systems or networks; (ix) permit direct or indirect access to or use of the Services or Upendo Materials in a way that circumvents a contractual usage limit; (x) access any Services or Upendo Materials in order to build a competitive product or service, or in order to monitor their availability, performance or functionality, or for any other benchmarking or competitive purposes; or (xi) use Services or Upendo Materials in any way that violates this Agreement, any Laws or the rights of third parties.
- E. **Partner Terms.** In addition to any terms or conditions governing acceptable usage in this Agreement, Client will comply with the Acceptable Use Policies of our Partner, Applied Innovations Corp.
- F. **Client Responsibilities.** Client will (i) be solely and completely responsible for Authorized Users’ compliance with this Agreement, (ii) be solely and completely responsible for the accuracy, quality and legality of any and all data, information, content or other materials submitted by Client or its Authorized Users into the Services (collectively, “Client Data”) and the means by which Client acquired Client Data, and (c) not upload, store or otherwise make available on the Services any Client Data that contains Malicious Code, that violates any Laws or third party rights, including, without limitation, any third party intellectual property rights, or that is otherwise



infringing, libelous, threatening, harassing, obscene, defamatory or otherwise unlawful or tortious.

- G. **Access Credentials.** Client and each Authorized User may be issued a user name, identification number, password, license or security key, security token, PIN or other security code, method, technology or device used, alone or in combination, to verify an individual's identity and authorization to access and use the Services ("Access Credentials").

i. Client has and will retain sole responsibility for: (A) the security and use of Client's and its Authorized Users' Access Credentials; and (B) all access to and use of the Services and Upendo Materials directly or indirectly by or through Client's systems or its or its Authorized Users' Access Credentials, with or without Client's knowledge or consent, including all results obtained from, and all conclusions, decisions and actions based on, such access or use.

ii. Client will employ all physical, administrative and technical controls, screening and security procedures and other safeguards necessary to (A) prevent unauthorized access to or use of Services and Upendo Materials, and will notify Upendo promptly of any such unauthorized access or use, (B) securely administer the distribution and use of all Access Credentials and protect against any unauthorized access to or use of the Services or Upendo Materials, and (C) control the content and use of Client Data.

- H. **Removal of Client Data.** If Upendo receives information or reasonably believes that Client Data may violate this Agreement, Laws or third-party rights, Upendo may so notify Client and, in such event, Client will promptly (but not to exceed one business day) remove such Client Data from the Services or modify such Client Data in order to resolve the potential violation. If Client does not take required action in accordance with this Section 1(H), Upendo may unilaterally disable and delete the applicable Client Data.

2. Support Services

- A. **Designated Persons.** During the Term, each party will maintain within its organization a designated person to serve as such party's primary point of contact for day-to-day communications, consultation and decision-making regarding the Services. Each designated person will be responsible for providing all day-to-day consents and approvals on behalf of such party under this Agreement. Each party will ensure its designated person has the requisite organizational authority, skill, experience and other qualifications to perform in such capacity. If either party's designated person ceases to be employed by such party or such party otherwise wishes to replace its designated person, such party will promptly name a new designated person by written notice to the other party.
- B. **Configuration.** Promptly upon execution of this Agreement, the parties will cooperate with one another in good faith in order to coordinate configuration of the Services with and into Client's systems.
- C. **Support Services.**
During the Term, Upendo will provide Client with the customer support described in **Appendix 1** of this Agreement (any configuration, training and such customer support, collectively, "Customer Support").
- D. **Professional Services.** For the avoidance of doubt, any services not specifically described in Appendix 1 or this Agreement, including, without limitation, any custom application/solution development and related integration and application support, is subject to and is provided by Upendo or its services partners and will be documented in a Statement of Work (SOW).

3. Term and Termination

- A. **Term.** The Initial Term (defined below), together with each Renewal Term (defined below), if any, will be referred to as the "Term". The term of this Agreement will commence upon the Effective Date and will terminate on the date that is 1 year thereafter for Support Services and 1 month for the Cloud (the "Initial Term"). The Term will automatically renew for successive one-year renewal terms (each, a "Renewal Term") at the expiration of the Initial Term and each



Renewal Term, if any, unless either party delivers written notice to the other party of its intention not to renew the Term at least sixty (60) days prior to the expiration of the Initial Term or then-current Renewal Term. Trial term will be fourteen (14) calendar days from the Effective Date. Renewal terms are not guaranteed to Client, and may be provided by and at Upendo's sole discretion.

- B. **Termination.** A party may terminate the Term: (i) immediately, by providing the other party with written notice, if such other party is in material breach of this Agreement that is not capable of cure or (if capable of cure) is not cured within thirty (30) days of receipt of written notice, or (ii) if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.
- C. **Refund or Payment upon Termination.** If the Term is terminated by Client in accordance with the preceding paragraph, Upendo will refund Client any prepaid Fees covering the remainder of the Term after the effective date of termination (which will be prorated, if necessary). If the Term is terminated by Upendo in accordance with the preceding paragraph, Client will pay any unpaid fees covering the remainder of the Term after the effective date of termination. In no event will termination relieve Client of its obligation to pay any Fees payable to Upendo for the period prior to the effective date of termination.
- D. **Suspension of Services.** Upendo may, directly or indirectly and by any lawful means, suspend or otherwise deny Client's or any Authorized User's access to or use of all or any part of the Services or Upendo Materials without incurring any resulting obligation or liability, if: (i) Client fails to pay any amount when due under this Agreement, and such failure continues more than five (5) days after Upendo's delivery of written notice thereof; (ii) Upendo believes, in its sole discretion, that Client or any Authorized User: (x) has failed to comply with any term of this Agreement; (y) has accessed or used the Services or Upendo Materials beyond the scope of the authorization granted or for a purpose not authorized under this Agreement or in any manner that does not comply with any instruction or requirement of the Upendo Materials or the T&Cs; or (z) Client or any Authorized User is, has been, or is likely to be involved in any fraudulent, misleading or unlawful activities; or (iii) the Term is terminated or expires. This Section 3 does not limit any of Upendo's other rights or remedies whatsoever, including any rights or remedies at law, in equity or under this Agreement. Upendo reserves the right to impose a reconnection fee in the event it provides Client with access to the Services or Upendo Materials after suspension pursuant to this Section 3.
- E. **Delivery of Client Data Post-Termination.** In the event the Term expires or is terminated other than as a result of Client's breach, if Client requests in writing within thirty (30) calendar days of the effective date of termination, then Upendo will make available to Client a file or files of the Client Data then stored on the Services. Customer acknowledges and agrees that Upendo has no obligation to retain Client Data and may delete any and all Client Data on the 31st day after termination or expiration.
- F. **Survival.** The following provisions of this Agreement, as well as any other provision which, by its terms, should reasonably be expected to survive expiration or termination of the Term, will survive expiration or termination of the Term: 3(E), 5 through 10 (inclusive), and 13 through 16 (inclusive).

4. Fees

- A. **Fees.** In consideration of the Services and the Customer Support, Client will pay all fees specified in [Appendix 2](#) ("Fees") on the terms and conditions set forth in [Appendix 2](#). Except as otherwise set forth in this Agreement or specified in [Appendix 2](#), (i) Fees are based on Services purchased and not actual usage, (ii) payment obligations are non-cancelable and Fees paid are non-refundable, and (iii) quantities purchased cannot be decreased during the Term.
- B. **Overdue Charges.** If any invoiced amount is not received by Upendo by the due date, then without limiting Upendo's rights or remedies, those charges will accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by Law, whichever is lower. Upendo will not exercise its rights under this Section 4 to the extent Client is disputing Fees reasonably and in good faith and is cooperating diligently to resolve the dispute.



- C. **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 whatsoever (collectively, “Taxes”). Client is responsible for paying all Taxes associated with its purchase of the Services. If Upendo has the legal obligation to pay or collect Taxes for which Client is responsible under this Section 4, Upendo will invoice Client and Client agrees to pay that amount unless Client provides Upendo with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, Upendo is solely responsible for taxes assessable against it based on its income, property and employees.
- D. **Fee Increases.** Upendo may increase Fees (i) as a result of Client’s addition of Resources in the system, or (ii) upon 60 calendar days’ prior written notice to Client. In each case, Appendix 2 will be deemed amended accordingly.
- E. **Future Functionality.** Client’s purchase of the Services is not contingent on the delivery of any future functionality or features, or dependent on any oral or written public comments made by Upendo regarding future functionality or features.
- F. **By Instance.** Cloud and Support Fees are charged on a per instance basis (“Instance”). A Support Instance is defined per domain name, per server. Each additional domain name and/or server added in the Client environment is an additional Instance and requires an additional Fee. Cloud Instances are defined only by the number of domain names the Client site responds to. Each domain name added to the Cloud environment is an additional Instance and requires an additional Fee. Domain names being used only for redirecting to another domain are not considered to be an additional Instance.

5. Proprietary Rights and Licenses

- A. **Reservation of Rights.** Nothing in this Agreement grants any right, title or interest in or to (including any license under) any intellectual property rights in or relating to, the Services, Upendo Materials or Upendo or its affiliates’ name, logo, marks, or other intellectual property, whether expressly, by implication, estoppel or otherwise. All right, title and interest in and to the Services, the Upendo Materials and such intellectual property are and will remain with Upendo or its licensors (as applicable).
- B. **Client Data.** As between Client and Upendo, Client Data will remain the sole and exclusive property of Client.
- C. **License of Client Data.** Client grants Upendo, its licensors and its hosting providers a worldwide, limited-term license to host, copy, transmit and display Client Data as necessary for Upendo to provide the Services in accordance with this Agreement. Additionally, Upendo may utilize Client Data on an aggregated and anonymous basis for its business purposes.
- D. **License to Use Feedback.** Client grants to Upendo a worldwide, perpetual, irrevocable, transferable and royalty-free license to use and incorporate into the Services or Upendo Materials any suggestion, enhancement request, recommendation, correction or other feedback provided by Client or Authorized Users relating to the operation of the Services or the Upendo Materials.

6. Confidentiality

- A. **Confidential Information.** As used in the Agreement, the term “Confidential Information” means any and all confidential or proprietary information of the Disclosing Party (as defined below), whether oral or written, including, without limitation, documents, reports, analyses, data, studies, drawings, samples, suppliers, customers, pricing, pricing techniques, copyright, trademark and patent applications, marketing and sales techniques and plans, projections, technology, methods, procedures, software (including all documentation and code), hardware and system designs, architectures and protocols, trade secrets, know-how, and observations, and other disclosures pertaining to, based on, or containing, directly or indirectly, in whole or in part, any of the Disclosing Party’s confidential or proprietary information, whether or not marked as “confidential” and whether disclosed by the Disclosing Party to the Receiving Party before, on or after the date of this Agreement. “Confidential Information” also includes the terms, but not the



existence, of this Agreement. “Disclosing Party” means the party disclosing the Confidential Information. “Receiving Party” means the party receiving the Confidential Information.

- B. **Duty of Confidentiality.** The Receiving Party will (i) hold and treat as strictly confidential all Confidential Information of the Disclosing Party, (ii) use such Confidential Information for the sole purpose of performing under or exercising its rights under this Agreement, (iii) take all steps necessary or appropriate to protect the confidentiality of such Confidential Information and to assure compliance with this Agreement by its officers, directors, employees, contractors, agents and representatives, and (iv) restrict disclosure of such Confidential Information to those of its (and its affiliates’, in the case of Upendo) officers, directors, employees, professional advisors, contractors, agents and representatives for the sole purpose of performing pursuant to this Agreement (“Permitted Disclosees”) and who are subject to confidentiality obligations at least as protective as those set forth in this Agreement. Without limiting the foregoing, the Receiving Party will use the same procedures and degree of care to avoid disclosure or unauthorized use of the Confidential Information as it uses to protect its own similar information, but in no event less than a reasonable degree of care. Each party will be responsible for any breach of this Agreement arising from any act or omission of its Permitted Disclosees.
- C. **Exceptions.** The restrictions set forth in Section 6(B) will not apply to information that (i) is known to the Receiving Party at the time of communication to the Receiving Party as evidenced by the written records of the Receiving Party, (ii) has become publicly known through no wrongful act of the Receiving Party, (iii) has been rightfully received from a third party authorized to make such communication without restriction, (iv) has been independently developed by the Receiving Party as evidenced by written records of the Receiving Party, (v) has been approved for release by written authorization of the Disclosing Party, or (vi) is required by Law to be disclosed, provided that if the Receiving Party will provide the Disclosing Party prompt notice of such requirement to allow the Disclosing Party reasonable opportunity to object to and take necessary legal action to prevent such disclosure, cooperates with the Disclosing Party, at the Disclosing Party’s expense, to maintain the confidentiality of such information, and complies with any protective order imposed on disclosure of such information.
- D. **Return or Destruction of Confidential Information.** Upon expiration or termination of the Term, if the Disclosing Party requests it, the Receiving Party will, at its option, either return to the Disclosing Party or certify destruction of, any and all copies of the Disclosing Party’s Confidential Information in the possession of the Receiving Party, its employees or agents.

7. Representations and Warranties

- A. **By Both Parties.** Each party represents and warrants to the other that (i) it is duly organized, validly existing and in good standing as a corporation or other entity under the Laws of the jurisdiction of its incorporation or other organization; (ii) has the full right, power and authority to enter into and perform its obligations and grant the rights, licenses, consents and authorizations it grants or is required to grant under this Agreement; (iii) the execution of this Agreement by its representative whose signature is set forth at the end of this Agreement has been duly authorized by all necessary corporate or organizational action of such party; and (iv) when executed and delivered by both parties, this Agreement will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms.
- B. **By Client.** If Client is accepting this agreement on behalf of another party, company, or other legal entity, Client represents and warrants that Client has full authority to bind that party, company, or legal entity to this agreement, and all reference to Client will be deemed to include such party, company, or legal entity.
- C. **By Upendo.** Upendo warrants to Client that Upendo will perform the Services using personnel of required skill, experience and qualifications and in accordance with generally recognized industry standards for similar services. For any breach of an above warranty, Client’s exclusive remedies are those described in the “Termination” and “Refund or Payment upon Termination” paragraphs in Section 3.



- D. **DISCLAIMER OF WARRANTIES.** EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN THIS SECTION 7, ALL SERVICES AND UPENDO MATERIALS ARE PROVIDED "AS IS" AND UPENDO HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHER, AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE OR TRADE PRACTICE. WITHOUT LIMITING THE FOREGOING, UPENDO MAKES NO WARRANTY OF ANY KIND THAT THE SERVICES OR UPENDO MATERIALS, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET CLIENT'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEM OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE OR ERROR FREE. ALL THIRD-PARTY MATERIALS (AS DEFINED BELOW) ARE PROVIDED "AS IS" AND ANY REPRESENTATION OR WARRANTY OF OR CONCERNING ANY THIRD PARTY MATERIALS IS STRICTLY BETWEEN CLIENT AND THE THIRD-PARTY OWNER OR DISTRIBUTOR OF THE THIRD-PARTY MATERIALS.

8. Mutual Indemnification

- A. **Indemnification by Client.** Client will defend Upendo and its affiliates and licensors and their respective officers, directors, employees, agents, representatives, shareholders, and attorneys against any and all claims, demands, suits or proceedings made or brought against Upendo by a third party arising out of or in connection with Client Data, Client's use of the Services or the Upendo Materials in breach of this Agreement, or a violation of Client's representations and warranties under this Agreement, and will indemnify Upendo from any damages, reasonable attorney fees and costs finally awarded against Upendo as a result of, or for any amounts paid by Upendo under a court-approved settlement of, such claim, demand, suit or proceeding.
- B. **Indemnification by Upendo.** Upendo will defend, Client against any and all claims, demands, suits or proceedings made or brought against Client by a third party arising out of or in connection with any claim alleging that the use of the Services in accordance with this Agreement infringes a United States, patent, trademark or copyright of a third party, and will indemnify Client from any damages, attorney fees and costs finally awarded against Client as a result of, or for amounts paid by Client under a court-approved settlement of, such claim, demand, suit or proceeding. In the event that (i) the Services are held by a court of appropriate jurisdiction to infringe the aforementioned intellectual property rights and the use of the Services deliverables are enjoined, or (ii) Upendo concludes that the Services infringe the rights of a third party, Upendo will, if possible on commercially reasonable terms, at its own expense and option: (I) procure for Client the right to continue to use the Services in accordance with this Agreement, (II) replace the infringing components of the Services with other components with the same or similar functionality, or (III) suitably modify the Services so that they are non-infringing. If, in Upendo's sole discretion none of the foregoing options are available on commercially reasonable terms, (A) Upendo may terminate the Term, and (B) in such case, refund all Fees paid in the previous three (3) months. This Section 8 states Upendo's sole liability to, and Client's exclusive remedy against, Upendo for any type of claim described in this Section 8.
- C. **Limitation.** Notwithstanding the provisions of Section 8(B), Upendo assumes no liability for (i) infringements arising from combinations of the Services or the Upendo Materials with non-Upendo software or hardware, non-Hotcakes Commerce software, including any of Client's products, software or hardware, (ii) extensions or modifications to the Services or the Upendo Materials made by any party other than Upendo, or (iv) trademark infringements involving any marking or branding not applied by Upendo or involving any marking or branding applied at the request of Client.
- D. **Indemnification Procedures.** The indemnified party will give the indemnifying party (i) prompt written notice of the claim, except that failure to provide such notice will not excuse the indemnifying party's indemnification obligations under this Section 8, except to the extent materially prejudiced as a result of such failure; (ii) sole control of the defense of the claim with counsel chosen by the indemnifying party (who will be reasonably acceptable to the



indemnified party) and settlement of the claim (with settlement terms subject to indemnified party's reasonable approval); and (iii) information and assistance, at the indemnifying party's expense, as the indemnifying party may reasonably request.

9. Limitation on Liability

- A. **EXCLUSION OF DAMAGES.** IN NO EVENT WILL UPENDO OR ANY OF ITS LICENSORS, SERVICE PROVIDERS OR SUPPLIERS BE LIABLE UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY AND OTHERWISE, FOR ANY: (i) LOSS OF PRODUCTION, USE, BUSINESS, REVENUE OR PROFIT OR DIMINUTION IN VALUE; (ii) IMPAIRMENT, INABILITY TO USE OR LOSS, INTERRUPTION OR DELAY OF THE SERVICES OR CLIENT DATA, (iii) LOSS, DAMAGE, CORRUPTION OR RECOVERY OF CLIENT DATA, OR BREACH OF CLIENT DATA OR SYSTEM SECURITY, OR (iv) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED OR PUNITIVE DAMAGES, REGARDLESS OF WHETHER SUCH PERSONS WERE ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.
- B. **CAP ON MONETARY LIABILITY.** IN NO EVENT WILL THE COLLECTIVE AGGREGATE LIABILITY OF UPENDO AND ITS LICENSORS, SERVICE PROVIDERS AND SUPPLIERS UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER, UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY AND OTHERWISE, EXCEED THE AMOUNTS PAID BY CLIENT TO UPENDO UNDER THIS AGREEMENT DURING THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO THE CLAIM. THE FOREGOING LIMITATION APPLIES NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

10. Export and Local Laws

- A. By using the Services or the Upendo Materials, Client represents and warrants that neither Client nor its Authorized Users is located in, under the control of, or a national or resident of an Embargoed Country or Designated National. Client will comply strictly with all applicable export laws and assume sole responsibility for obtaining any necessary licenses to export or re-export.
- B. The Services use software and technology that may be subject to United States export controls administered by the U.S. Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, and other U.S. agencies and the export control regulations of the European Union and Canada. Client acknowledges and agrees that the Services will not be used, and none of the underlying information, software, or technology may be transferred or otherwise exported or re-exported to countries as to which the United States, Canada and/or the European Union maintains an embargo (collectively, "Embargoed Countries"), or to or by a national or resident thereof, or any person or entity on the U.S. Department of Treasury's List of Specially Designated Nationals or the U.S. Department of Commerce's Table of Denial Orders (collectively, "Designated Nationals"). The lists of Embargoed Countries and Designated Nationals are subject to change without notice.
- C. Client acknowledges that the Services may use encryption technology that is subject to licensing requirements under the U.S. Export Administration Regulations, 15 C.F.R. Parts 730-774 and Council Regulation (EC) No. 1334/2000.
- D. Upendo and its licensors make no representation that the Services or Upendo Materials are appropriate or available for use outside the United States of America, Canada and/or the European Union. If Client uses the Services or Upendo Materials from outside the United States of America, Canada and/or the European Union, Customer is solely responsible for compliance with all applicable laws, including without limitation export and import regulations of other



countries. Client agrees that the Services and the Upendo Materials will not be used for nuclear activities, chemical or biological weapons or missile projects, unless specifically authorized by the United States or the Canadian government or the appropriate European body for such purposes.

11. Assignment; Change in Control

This Agreement may not be assigned by Client without the prior written approval of Upendo. Upendo may assign this Agreement to a parent, or affiliate, an acquirer of assets, or a successor by merger. Any purported assignment in violation of this Section 11 will be void.

12. Force Majeure

Except for a party's payment obligations under this Agreement, each party will be excused from performance of its obligations for any period and the time of performance will be extended as reasonably necessary under the circumstances, to the extent that such party is prevented from performing, in whole or in part, its obligations under this Agreement, as a result of acts of God, any governmental authority, war, civil disturbance, court order, labor dispute or any other cause beyond its reasonable control, including hurricanes, inclement weather, and failures or fluctuations in electrical power, heat, light, telecommunication equipment or lines or any other equipment (each, a "Force Majeure Event"). Notwithstanding the foregoing, in no event will a party be excused from its obligations to protect Confidential Information pursuant to Section 6.

13. Third Party Beneficiaries

- A. Except as set forth in this Agreement, this Agreement is for the sole benefit of the parties and their respective permitted successors and permitted assigns and nothing in this Agreement is intended to or will confer upon any other person any legal or equitable right, benefit or remedy of any nature whatsoever, under or by reason of this Agreement.
- B. The Services or Upendo Materials may contain software, components, information or other material licensed to Upendo from third party licensors ("Third Party Materials"). The licensors of Third Party Materials are intended third party beneficiaries of those provisions of this Agreement relating to the Third Party Materials and these licensors may enforce these provisions directly against Client, including by terminating Client's right to use the Third Party Materials.

14. Reporting.

- A. **Right to Audit.** Upendo retains the right to audit Client's Instances of the Software, including but not limited to number of installations, to ensure that you are compliant with the terms set herein and the payments required for the Software. Should an audit be requested by Upendo, Client agrees to make Client systems and staff available and accessible, to the extent necessary to conduct and complete the audit process.
- B. **License Audits.** Client agrees to report to Upendo as required, the number, type, and dates for all Instances of the Software in writing, within (10) business days from the day of the request by Upendo. Any license audit processes performed by your Client will be at the Clients expense.

15. Notices

Unless otherwise set forth in this Agreement, all notices, demands, requests or other communications which may be or are required to be given, served, or sent by any party to any other party pursuant to this Agreement will be in writing and will be hand delivered, sent by certified mail, return receipt



requested, sent by widely-recognized national or international delivery courier service or sent via e-mail with confirmed answer back, addressed as set forth below or at such other address indicated by a party, in writing. Documents delivered by hand will be deemed to have been received upon delivery; documents sent by e-mail will be deemed to have been received when the answer back is received; documents sent by certified mail, or courier service will be deemed to have been received upon their receipt, or at such time as delivery is refused by the addressee upon presentation.

To Upendo: Upendo Ventures, LLC
548 Market Street #65401
San Francisco, CA 94104
E-Mail Address: [support@upendoventures.com]
ATTN: [Upendo Ventures Legal Department]

Either party may change the address for notice by notifying the other parties of such change in accordance with this Section 15.

16. Miscellaneous

- A. **Governing Law and Dispute Resolution.** This Agreement will be governed by, and construed and enforced in accordance with the laws of the State of California without regard to conflict of law principles. Any civil action or legal proceeding arising out of or relating to this Agreement will be brought solely and exclusively in the courts of record of the State of Florida in San Mateo County or the United States District Court, Northern District of California, and each party consents to the jurisdiction of such court in any such civil action or legal proceeding and waives any objection to the laying of venue of any such civil action or legal proceeding in such court.
- B. **Jury Waiver.** IN ANY CIVIL ACTION, COUNTERCLAIM, OR PROCEEDING, WHETHER AT LAW OR IN EQUITY, WHICH ARISES OUT OF, CONCERNS, OR RELATES TO THIS AGREEMENT, ANY AND ALL TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, THE PERFORMANCE OF THIS AGREEMENT, OR THE RELATIONSHIP CREATED BY THIS AGREEMENT, WHETHER SOUNDING IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, TRIAL WILL BE TO A COURT OF COMPETENT JURISDICTION AND NOT TO A JURY. EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY. ANY PARTY MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS AGREEMENT WITH ANY COURT, AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES TO THIS AGREEMENT OF THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY. NEITHER PARTY HAS MADE OR RELIED UPON ANY ORAL REPRESENTATIONS TO OR BY ANY OTHER PARTY REGARDING THE ENFORCEABILITY OF THIS PROVISION. EACH PARTY HAS READ AND UNDERSTANDS THE EFFECT OF THIS JURY WAIVER PROVISION. EACH PARTY ACKNOWLEDGES THAT IT HAS BEEN ADVISED BY ITS OWN LEGAL COUNSEL AND OTHER ADVISORS WITH RESPECT TO THE TRANSACTIONS, RIGHTS AND OBLIGATIONS GOVERNED BY THIS AGREEMENT AND SPECIFICALLY WITH RESPECT TO THE TERMS OF THIS SECTION 16.
- C. **Severability and Interpretation.** If any provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability will not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the parties will negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible. The parties intend this Agreement to 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.
- D. **Relationship of the Parties.** The relationship of the parties as a result of this Agreement and performance under this Agreement is that of independent contractors and no agency, partnership, joint venture, employee-employer or franchiser-franchisee relationship is intended or created by this Agreement.



- E. **Amendment.** This Agreement may be modified by Upendo at any time.
- F. **Publicity.** Client agrees that Upendo may identify Client as a paying customer of the Services.
- G. **Enforcement Costs.** If any civil action, arbitration or other legal proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any provision of this Agreement, the successful or prevailing party or parties will be entitled to recover reasonable attorneys' fees, court costs, sales and use taxes and all expenses even if not taxable as court costs (including, without limitation, all such fees, taxes, costs and expenses incident to arbitration, appellate, bankruptcy and post-judgment proceedings), incurred in that proceeding, in addition to any other relief to which such party or parties may be entitled. Attorneys' fees will include, without limitation, paralegal fees, investigative fees, administrative costs, sales and use taxes and all other charges billed by the attorney to the prevailing party (including any fees and costs associated with collecting such amounts).
- H. **Counterparts.** This Agreement may be executed in counterparts, each of which will be deemed an original, and a complete set of which, when taken together, will constitute one and the same document. Confirmation of execution by electronic transmission of a facsimile or .pdf signature page will be binding, and each party irrevocably waives any objection that it has or may have in the future as to the validity of any such electronic transmission of a signature page.
- I. **Entire Agreement.** This Agreement, each of its Appendices, the T&Cs and any other terms expressly incorporated into this Agreement by reference represent the entire understanding and agreement between the parties with respect to the subject matter of this Agreement, and supersede all other negotiations, understandings and representations (if any) made by and between such parties, whether orally or in writing.



APPENDIX 1

Customer Support

1. Service Agreement

1.1. Service Scope

The following services are covered by Customer Support;

- Web support via our support module(s)
- Monitored e-mail support & telephone
- Remote assistance using Remote Desktop and a Virtual Private Network where available
- Monthly system health check
- Upgrades of Hotcakes Commerce software and CMS software (excluding third party/custom software or hardware, and any updates requiring the creation, update, or review of any programming code)

1.2. Client Requirements

Client responsibilities and/or requirements in support of this Agreement include:

- Payment for all support costs at the agreed interval.
- Availability of client representative(s) when resolving a service related incident or request.
- Maintain Software updates to be no more than two (2) release versions behind the current commercially and generally available release.
- Providing the following information upon initial contact when opening a support case or reporting a problem:
 - a) Software version;
 - b) URL (Page) of the website where error occurred;
 - c) Screenshot of the website (Page) of the error or where error occurred;
 - d) Error text when applicable;
 - e) Steps to reproduce the error; and
 - f) Such other information as Upendo may require to reproduce and correct the error.

1.3. Service Assumptions

Assumptions related to in-scope services and/or components include:

- Upendo will use commercially reasonable efforts to resolve errors by providing a workaround or fix, or a specific action plan for how the error will be addressed, and an estimate of how long it will take to rectify the error.
- All support calls and e-mails will be logged into Upendo's support system. Upendo will assign a priority level to an error upon confirmation of the error.

Limitations. Upendo will have no obligation to provide Customer Support:

- a) if the Services has been modified by anyone other than Upendo;
- b) if the Services are being interfered with, or the error is caused by, any hardware or third party software, or if the Services are being run on a third party platform not expressly approved for Client's version of the Services;
- c) for any non-Upendo or non-Hotcakes' computer programs, technology or hardware;
- d) for any portion of the Services for which Upendo has provided a fix or workaround which has not been applied; or
- e) for any development work being performed during or on evaluation software.



Priority Levels. Support inquiries will be prioritized based upon the time it was received and its severity, as described below:

- a) **High.** An error occurs in the software or hosting environment that causes substantial downtime of the Services, or which causes substantial data corruption, or which otherwise renders the Software unusable. Errors given this priority have no viable workaround.
- b) **Medium.** An error occurs in the software or hosting environment that results in the loss of critical functionality of the maintained Services, but for which a workaround is available; or non-critical functionality or interface issues for which there is no workaround.
- c) **Low.** An error occurs in the software or hosting environment that can be avoided or detoured with reasonable effort or general questions regarding the Services.

1.4. Hosting Environment Availability

99.95% Network Uptime Guarantee

Upendo agrees that our Cloud will be available 99.95% of the time in a given month, excluding scheduled maintenance. This includes functioning of our network infrastructure, including routers, switches and cabling (“Network”). It excludes software running on your server. Should a Network outage occur, Client will be credited 5% of Client’s monthly fee for every 30 minutes of downtime (up to, but not exceeding 100% of one monthly payment). Credit will be applied toward Client’s next account invoice. The Credit cannot exceed the amount paid to Upendo by the Client for 1 month of service, regardless of the amount due. Network downtime exists if your server is unable to transmit and receive data and a support inquiry is opened for the incident in our ticketing system.

Client must notify us of the intent to claim credit within (3) three days of the beginning of the event for which seek credit. Client must be current on all Fees due at the time of the event, and when the credit may be applied, and in compliance with all contracts between Client and Upendo.

This uptime guarantee does not apply to events outside of the control of Upendo. While it is impossible to identify all events that may be outside of Upendo’s control, excluded events include, but are not limited to, acts of God, shortages of supplies, denial of service attacks, software bugs, or any other circumstance beyond the actual control of Upendo.

1.5. Network Access & Security

Network Access. Upendo and/or its Partner(s) will perform reasonable measures to protect the hosted services against unauthorized network access and related security measures Upendo takes to protect its customers.

- a) SSL certificate support (certificates are to be purchased and provided by Client).
- b) A redundant architecture and/or enterprise level Upendo servers provided by Dell Corporation.
- c) Each Upendo server is configured with a switched one hundred (100) Mbps Fast Ethernet connection.
- d) Upendo connects to multiple Internet backbones through OC3 lines, within a major telecommunications hub.

Data Security. All customer data is located on secure servers or directories that require access authentication. Upendo and/or its Partner(s):

- a) Installs third-party, anti-virus software on its front-end SMTP servers which are utilized for the Exchange service. This software is configured to check all messages coming into and leaving the Exchange server (Messages sent between mailboxes on the server are



not scanned) for viruses according to the virus-detecting heuristics provided with the software. As a part of the Anti-virus software service, these heuristics are regularly updated. If a virus is detected, the message is deleted. No notification is sent to either recipient or sender of the message.

- b) Employs RAID techniques to ensure the integrity of the data on its servers.
- c) Perform full tape backups on a weekly basis and incremental backups daily. All customer data is backed up to tape using a LTO2 tape library. Tapes are stored in an off-site location on a weekly basis. Nightly incremental backups are retained for two (2) weeks. Weekly backups are retained for three (3) weeks. Monthly backups are retained for six (6) months. Nightly and weekly backups are performed for disaster recovery purposes only.
- d) Is not responsible for data loss resulting from the failure or loss of the data storage or backup media.

Scheduled Maintenance. To guarantee optimal performance of the Service, it is necessary for Upendo and/or its Partner(s) to perform routine maintenance on the servers. Such maintenance often requires taking servers off-line and is typically performed during off-peak hours.

Upendo reserves the right to plan a scheduled outage with forty-eight (48) hours advance notice. Upendo will use commercial best efforts to schedule these outages at non-peak hours and limit their occurrence to strictly necessary upgrades and required maintenance.

Scheduled outages will be sent to the primary account contact of the Client. It is the responsibility of the Client to ensure that the primary contact information is updated on a periodic basis.

It is the responsibility of the Client to notify all persons within Client's organization of any scheduled outages.

Scheduled maintenance will not be applied towards outage credits.

2. Service Management

2.1. Service Availability

For services outlined in this Appendix, Customer Support will respond to service related incidents and/or requests submitted by the Client within the following time frames:

Hours of operation:

- 10:00 A.M. to 5:00 P.M. EST, Monday - Friday, excluding holidays recognized by banks in New York, New York.

Response within:

- 2 business hours (during regular business hours, excluding holidays) for issues classified as **High** priority.
- 4 business hours (during regular business hours, excluding holidays) for issues classified as **Medium** priority.
- 8 business hours (excluding holidays) for issues classified as **Low** priority.

2.2. Service Requests

Requesting Support. If Client encounters an error, Client must first refer to the Upendo Materials and any on-line help for possible solutions and suggestions. For the avoidance of doubt, Upendo Materials include the on-line documentation for the Services set forth at Hotcakes.org, UpendoVentures.com, and/or via HotcakesCommerce.Zendesk.com.



If Client is unable to resolve the error or problem, then Client may contact Customer Support through any of the following methods.

- *{Preferred}* Support via Upendo's **support module on Customer Website**.
 - Example: (<https://upendoventures.com/Support>)
- **Telephone support**
 - Main Support # (650) 381-9160
- **E-mail support**
 - Support E-mail: support@upendoventures.com



APPENDIX 2

Upendo Services & Fees

Upendo Cloud - \$80.00 monthly

Hotcakes Commerce software is installed and maintained on Upendo's standard cloud-based and hosted hardware. Upendo provides software support to Client.

Upendo "Reserved" Cloud - \$130.00 monthly

Hotcakes Commerce software is installed and maintained on Upendo's cloud-based and hosted hardware, with additional hardware resources and hosting-related services. Upendo provides software support to Client.

On Premise SLA - \$1,999.00 yearly

Hotcakes Commerce software is installed and maintained in a hosting environment of the Client's choosing, by the Client. Upendo provides software support to Client.

Site Migration - \$1,999.00 (one-time fee)

Upendo's staff moves a backup of the Client's site into the Cloud or Reserved Cloud.

Scaling Options

\$10/monthly each 1,000 MB file system disk space

\$15/monthly each 100 MB database disk space

The Client's Cloud environment resources are increased at specific and agreed intervals.

DNN & Hotcakes Commerce Standard Support - \$1,119.00 yearly

(\$129/month with a three (3) month minimum commitment)

All members of the Client's team may place an unlimited number of support request about anything DNN-related for a single DNN instance. Covered by this same SLA.

DNN & Hotcakes Commerce Developer Support Services - \$1,999.00 yearly

(\$199/month with a three (3) month minimum commitment)

Includes all benefits of the Standard Support, please the ability to get more technical with requests and responses. This includes requests such as general code reviews, high-level solution architecture, providing code samples, and anything else that isn't considered to be a hands-on project. Only covers a single DNN instance.

Sponsored Enhancements & General Consulting (cost varies)

Sponsored enhancements refer to any software updates or prioritization made by Upendo staff to the Hotcakes Commerce software by the request of the Client.

