

# MIVA MERCHANT

## SOFTWARE SERVICES, LICENSE AND HOSTING AGREEMENT

This Agreement (“**Agreement**”) sets forth terms and conditions you, the customer (“**Customer**” or “**you**”) and MSB Acquisition, Inc., a California corporation doing business as Miva Merchant (“**Miva Merchant**”). This Agreement shall become effective on the date (the “**Effective Date**”) that payment is received and accepted by Miva Merchant.

Before you are eligible to use the services provided by Miva Merchant under this Agreement, you must meet each of the following conditions:

1. You must fully and correctly complete the Order Form.
2. You must read and agree to the terms and conditions of the Agreement and indicate your acceptance of the terms and conditions of the Agreement by clicking “I Agree” at the Order Page.
3. You must submit proper payment as required in Section 2 hereof.

**NOW, THEREFORE**, in consideration of the premises and the mutual covenants and agreements contained herein, Customer and Miva Merchant hereby agree as follows:

### **1. SOFTWARE AND HOSTING SERVICES**

A. **Hosting Services.** Miva Merchant shall provide access to its e-Commerce shopping cart software (“Miva Merchant Software”) and make it available for Customer’s end-users to access.

B. **Service Levels.** Miva Merchant shall provide the hosting services (“Hosting”) in substantial compliance with the hosting service levels set forth in the Service Level Agreement.

C. **Service Level Warranty.** Miva Merchant guarantees that its Hosting network will be available 99.9% of the time in any given calendar month. The foregoing warranty shall not apply to any performance outages:

- i. That are scheduled by Miva Merchant for purposes of maintaining or updating the Web Site or the Miva Merchant Software;
- ii. That resulted from any actions or omissions of Customer or any third parties;
- iii. That resulted from Customer’s equipment and/or third party equipment;
- iv. That resulted from software related issues other than a bug in the Miva Merchant Software; or
- v. To the extent caused by factors outside of Miva Merchant’s commercially reasonable control.

Network downtime is measured from the time service notification is received by Miva Merchant from Customer to the time the server is once again able to transmit and receive data. If Customer fails to comply with this notice requirement, Customer forfeits its right to a receive service credit.

Upon experiencing network downtime above and beyond the 99.9% availability in any calendar month, Miva Merchant will credit Customer 5% of the monthly fee for each 30 minutes of downtime (up to and not to exceed 100% of Customer’s monthly fee). Network downtime exists when a Customer is unable to transmit and receive data and Miva Merchant records such failure in the Miva Merchant service repair system.

### **2. FEES**

A. **Miva Merchant’s Fees.** As payment for the Hosting services, Customer will pay to Miva Merchant all fees due according to the prices and terms listed on the invoice received by Customer. All sales are final, and Miva Merchant offers no refunds of any kind on any purchase. Miva Merchant offers no refunds on the Setup Fee, the purchase or set-up of an SSL Certificate or on any other product or service offered through Miva Merchant.

B. **Change in Fees.** Miva Merchant may change its fees upon sixty (60) days notice by U.S. mail, electronic mail, by posting the fee changes on Miva Merchant’s website or by posting a notice in the Customer’s admin site. Upon notice, Customer shall have thirty (30) calendar days prior to the effective date of the fee schedule to notify Miva Merchant by certified U.S. mail or overnight courier service if Customer wishes to terminate this Agreement.

C. **Payment.** Customer shall be invoiced once a month, shortly after the first day of the month, and all payments are due within five (5) days after the invoice is dated. If a payment is returned or rejected by Miva Merchant’s bank, or if Miva Merchant incurs additional costs related to a Customer’s payment for any reason, then (i) Customer shall pay a service fee of \$40 and reimburse Miva Merchant for all such fees and costs incurred by Miva Merchant, and (ii) Customer shall be in default of this Agreement. Accounts not paid in full by the tenth day after an invoice is submitted to Customer entitle Miva Merchant to interrupt or terminate a Customer’s service. Any such interruption does not relieve Customer from the obligation to pay all fees due to Miva Merchant, including, without limitation, the monthly account charge. Accounts and all amounts in default are subject to a late payment charge of 1.5% per month, or the maximum amount permitted by law, whichever is less, until fully paid. If Customer defaults, Customer agrees to pay Miva Merchant its reasonable expenses, including attorney and collection agency fees, incurred in enforcing its rights under this Agreement.

D. **Taxes.** All fees charged by Miva Merchant for the Hosting Services are exclusive of all taxes and similar fees now in force or enacted in the future imposed on the delivery of Hosting Services, for which Customer will be solely and hereby agrees to pay in full (excluding any taxes based on Miva Merchant’s net income). If applicable law requires Miva Merchant to pay such taxes directly, Customer will, upon receipt of Miva Merchant’s invoice, promptly reimburse Miva Merchant for any such taxes paid by Miva Merchant.

### **3. NO SUBLICENSE**

Customer may not sublicense or resell any of Miva Merchant’s Software or Hosting Services to any third parties without the prior written permission of Miva Merchant. As an example, Customer may not provide Web Hosting services to any third party without Miva Merchant’s prior written permission. Any attempts to do so will constitute a material breach and entitle Miva Merchant to terminate this Agreement.

### **4. USE OF CUSTOMER’S NAME AND TRADEMARKS BY MIVA MERCHANT**

Customer hereby grants Miva Merchant a non-exclusive right and license to use Customer’s name and such of Customer’s trade names, trademarks, and service marks (collectively, “**Customer’s Marks**”) as are listed on Customer’s Content or otherwise provided to Miva Merchant in connection with this Agreement. The license shall permit Miva Merchant to use Customer’s Marks (i) on Miva Merchant’s web site, (ii) in printed and online advertising, publicity, directories, newsletters, and updates describing Miva Merchant’s services, and, (iii) in applications reasonably necessary and ancillary to the foregoing. Customer may use Miva Merchant’s trade name, trademarks, and service marks (collectively, “**Miva Merchant’s Marks**”) in advertising and publicity in conjunction with the offering of Customer’s Content via Miva Merchant; provided, however, that Customer shall submit a copy of its proposed use to Miva Merchant for its prior written approval; and provided further that under no circumstances shall such use imply that Miva Merchant endorses, sponsors, certifies, approves or is responsible for Customer’s Content. Notwithstanding the foregoing, Customer need not obtain Miva Merchant’s prior written approval where use of Miva Merchant’s Marks is limited to inclusion in a list of systems via which Customer’s Content is available. Neither license granted in this Section 4 shall constitute a transfer of any ownership interest in either Customer’s or Miva Merchant’s marks.

### **5. TERM OF AGREEMENT**

A. **Term.** The term of this Agreement shall begin on the Effective Date, and shall continue on a month-to-month basis until either party gives the non-terminating party not less than thirty (30) days written notice of its election to terminate this Agreement. Notice of termination may be sent by U.S. Mail, overnight courier or electronic mail with confirmation of receipt from the receiving party.

B. **Termination For Breach.** Either Miva Merchant or Customer shall have the right to terminate this Agreement upon prior written notice if the other Party is in material breach of any term of this Agreement, including without limitation the payment of monies, and the breaching party fails to remedy such breach within the following time frames: five (5) days for a monetary default, and fifteen (15) days for a non-monetary default.

C. **Cancelling Your Account.** To cancel your account and terminate this Agreement, a Customer's request must be received in writing by U.S. certified mail and submitted to Miva Merchant via email. Written request should be addressed to Miva Merchant, Inc. 5060 Shoreham Place Suite 330, San Diego, CA 92122 and submitted via email to [saas@mivamerchant.com](mailto:saas@mivamerchant.com). To ensure that you are not billed for another month of service, you must cancel your account before your billing cycle due date. All accounts requesting cancellation are terminated upon receipt of submission. Cancellation requests submitted before the completion of a billing cycle will not receive a prorated refund.

## 6. MIVA MERCHANT'S ACCEPTABLE USE POLICY

A. **Acceptable Use Policy.** Miva Merchant maintains on its Web site Miva Merchant's then-current Acceptable Use Policy ("AUP") attached to this agreement Exhibit A. Customer agrees to abide by the AUP. Miva Merchant may modify its AUP at any time, and shall post the then-current AUP on Miva Merchant's Web site, which will be effective upon posting.

B. **End Users to Comply with AUP.** Customer acknowledges that Miva Merchant may terminate an end user's access to Customer's Web Site for non-compliance with Miva Merchant's AUP. Miva Merchant may terminate such end user's access to Customer's Content even if the end user has not violated Customer's own terms and conditions of use of its Web Site. Miva Merchant acknowledges that Customer may terminate a User's access to Customer's Content for non-compliance with Customer's terms and conditions. Decisions as to whether a violation of the AUP has occurred shall be made by Miva Merchant in its sole and absolute discretion.

## 7. MIVA MERCHANT'S CONTENT

Upon payment of any fees charged for the development of Miva Merchant's Content, Miva Merchant hereby provides Customer with a non-exclusive, royalty-free, irrevocable, non-supported license to use Miva Merchant's Content as part of Customer's Web Site. Customer agrees to maintain a text hyperlink to "http://www.mivamerchant.com" at the footer/bottom of Customer's Web Site. The link must be standard html, contain no javascript, and be approved by Miva Merchant.

## 8. CUSTOMER'S CONTENT

A. **Protection of Content.** Customer acknowledges and agrees that Customer is solely responsible for ensuring the integrity of its Content. Although Miva Merchant provides data backup services, Customer is advised that Miva Merchant is not responsible for any damages resulting from the loss of Customer's Content, regardless of the reason for such loss. Customer is solely responsible for backing-up/archiving Customer's Content.

B. **Ownership of Content.** Customer acknowledges and agrees that (i) unless expressly stated elsewhere, Miva Merchant has no proprietary, financial, or other interest in Customer's Content; (ii) Miva Merchant does not, by virtue of offering or hosting Customer's Content, edit, distribute, market, sublicense, publish, or otherwise provide Customer's Content to end users; and (iii) Customer is solely responsible for the information, data, graphics, text, quality, performance, and all other aspects of its Content. Customer warrants that it owns or has the right to use and offer the Content in connection with Customer's Marks in the manner in which such Content is offered and will be offered by Customer during the term of this Agreement.

## 9. SECURITY

Customer acknowledges that the Internet is not a secure or completely reliable system, and that the purpose of the Hosting Services is to allow end users easy access to Customer's Content consistent with current technology. Miva Merchant will take such precautions Miva Merchant deems reasonable in its sole discretion to secure Customer's Web Site from attack, but Miva Merchant makes no warranty, whether

express or implied, that there will be no outages or interruptions of service, or that Customer's Content will be secure against attack of any form by end users or other third parties. Customers are urged to take reasonable steps to protect the security of its Web Site from attack.

## 10. PCI GUIDELINES

Miva Merchant's platform is capable of being PCI-DSS compliant under optimal security settings. However, if Customer chooses to view credit card information, involves a less secure set of security settings, and, as a result Customer is assuming higher risk which Miva Merchant does not recommend. Any Customer who chooses to view credit card information assumes all liability for their actions and the inherent risk associated with viewing credit card information.

If Customer chooses to view credit card information, Customer is certifying that Customer understands and is following all PCI guidelines for viewing credit card information. The guidelines can be found at Visa's website: [PCI Overview](#). If Customer does not follow all of the PCI guidelines when viewing credit card information, Customer will be in breach of its contract with Miva Merchant and may also be in breach of agreements with credit card companies.

Customer hereby agrees to comply with the PCI DSS and assumes all liability applicable to PCI DSS and further agrees to use a strong security protocol (e.g. SSL) to safeguard sensitive cardholder data over networks.

At its sole discretion, Miva Merchant reserves the right to change the security settings of any Customer at any time with or without warning.

## 11. PROHIBITED PRACTICES

Miva Merchant shall have no duty or obligation to monitor Customer's Content or any other Content provided or distributed by others, and Miva Merchant agrees not to edit or otherwise exercise any control over Customer's Content. Nevertheless, Miva Merchant may, in its sole discretion at any time, without notice or liability to Customer, remove from public view, disconnect, or terminate the hosting of any of Customer's Content or other Content that Miva Merchant deems in its sole discretion to be offensive or illegal, for any reason, including, without limitation, the following:

- i. The content is in violation of the laws of the state where the server resides; illegal or sexually explicit Content or activities, or any Content that allegedly violates the law, rules or regulations of any country or subdivision thereof.
- ii. The content constitutes harassment of Users, including, but not limited to, by means of Customer's billing practices.
- iii. Claims are made by third parties against Miva Merchant that Customer or any of its end users has engaged in one or more of the above practices.
- iv. Customer's noncompliance with or material breach of any of the terms and conditions of the AUP or this Agreement.

## 12. WARRANTIES OF BOTH PARTIES

Each party warrants and represents to the other party that it has the complete right to enter into and perform its responsibilities under this Agreement.

## 13. DISCLAIMER OF ALL OTHER WARRANTIES BY MIVA MERCHANT

EXCEPT AS OTHERWISE SET FORTH IN SECTION 12 ABOVE, MIVA MERCHANT MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. THE SOFTWARE AND HOSTING SERVICES ARE PROVIDED BY MIVA MERCHANT ON AN "AS IS" AND "AS AVAILABLE" BASIS, AND MIVA MERCHANT NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR MIVA MERCHANT ANY OTHER LIABILITY IN CONNECTION WITH THE SOFTWARE OR HOSTING SERVICES PROVIDED UNDER THIS AGREEMENT.

## 14. LIMITATION OF MIVA MERCHANT'S LIABILITY

MIVA MERCHANT ASSUMES NO RESPONSIBILITY REGARDING CUSTOMER'S OR END USER'S USE OF THE SOFTWARE OR HOSTING SERVICES AND SHALL NOT BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, AND SPECIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF USE, BUSINESS INTERRUPTION, AND LOSS OF PROFITS, OR

INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, EVEN IF MIVA MERCHANT IS AWARE OF (OR HAS BEEN INFORMED BY CUSTOMER OF) THE POSSIBILITY THEREOF. MIVA MERCHANT SHALL IN NO EVENT BE LIABLE FOR MORE THAN THE TOTAL FEES ACTUALLY RECEIVED BY IT FROM CUSTOMER FOR THE SERVICES DURING ANY 12-MONTH PERIOD.

#### **15. NO ASSIGNMENT BY CUSTOMER**

Customer shall not assign this Agreement without the prior written consent of Miva Merchant, which Miva Merchant may refuse in its sole and absolute discretion. Any attempt by Customer to assign this Agreement without the prior written consent of Miva Merchant shall be null and void. Miva Merchant may assign this Agreement, without prior consent from Customer, which assignment shall be effective upon written notice provided to Customer.

#### **16. POINT OF CONTACT**

Customer shall designate in the accompanying Order Form a person to be the single point of contact. Customer's point of contact shall have full authority to enter into agreements and make binding decisions on behalf of Customer. Customer agrees that Miva Merchant may rely on representations made by Customer's designated point of contact. Customer may change its point of contact at any time by giving written notice to Miva Merchant in accordance with the notice provisions of this Agreement. Miva Merchant is under no obligation to accept instructions from anyone other than the point of contact.

#### **17. NOTICES**

(i) Any notice or other communication ("**Notice**") required or permitted pursuant to this Agreement shall be in writing and either delivered personally or sent by facsimile, overnight delivery, express mail, or certified or registered mail, postage prepaid, return receipt requested, to the address listed above in this Agreement, for Miva Merchant or the address provided in the application form submitted with the payment for Customer; (ii) a Notice delivered personally shall be deemed given only if acknowledged in writing by the person to whom it is given. A Notice sent by facsimile will be deemed given when transmitted, provided that confirmation of that transmission was received. A Notice sent by overnight delivery or express mail will be deemed given twenty-four (24) hours after having been sent. A Notice that is sent by certified mail or registered mail will be deemed given forty eight (48) hours after it is mailed. If any time period in this Agreement commences upon the delivery of Notice to any one or more parties, the time period shall commence only when all of the required Notices have been deemed given; (iii) either Miva Merchant or Customer may designate, by Notice to the other, substitute addresses, addressees or facsimile numbers for Notices, and thereafter, Notices are to be directed to those substitute addresses, addressees or facsimile numbers.

#### **18. NOTICES OF TRADEMARK AND COPYRIGHT INFRINGEMENT**

To cover the increased cost of processing DMCA, trademark, and copyright infringement claims, Miva Merchant reserves the right to charge a processing fee of \$150 for each instance of notification received from a legitimate copyright holder. Miva Merchant reserves the right to close any store that, after notification, fails to comply with a legitimate infringement claim within the specified time.

#### **19. CUSTOMER'S INDEMNIFICATION**

Customer shall indemnify and hold harmless Miva Merchant from and against any and all claims, demands, actions, causes of action, suits, proceedings, losses, damages, costs, and expenses, including reasonable attorneys fees, arising from or relating to Customer's provision, or an end user's use, of Customer's Content, or any act, error, or omission of Customer in connection therewith, including but not limited to matters relating to incorrect, incomplete, or misleading information; libel; invasion of privacy; infringement of a copyright, trade name, trademark, service mark, or other intellectual property or other right; or violation of any applicable law.

#### **20. MISCELLANEOUS**

A. **Entire Agreement.** This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, and there are no representations, promises, warranties, covenants or understandings with respect thereto other than those contained in this Agreement. Without limiting the generality of the foregoing, it is expressly agreed that the terms of any purchase order issued by Customer with respect to the Hosting Services provided under this Agreement shall not be applicable and that any acceptance of such purchase order by Miva Merchant shall be for acknowledgment purposes only.

B. **Amendments.** This Agreement may be amended, waived, changed, modified or discharged only by an agreement in writing signed by all of the parties.

C. **Severability.** In the event that any one or more of the provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remainder of the Agreement shall not in any way be affected or impaired.

D. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the State of California, without regard to its conflicts of laws principles.

E. **Venue; Attorney's Fees.** Any action to enforce or interpret this Agreement shall be brought in the appropriate state or federal court located in San Diego County, California, and in any such action, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs.

F. **Remedies.** The remedies set forth in this Agreement are cumulative and are in addition to any other remedies allowed by law. Resort to one form of remedy shall not constitute a waiver of alternate remedies.

G. **Waiver.** Failure to insist upon strict compliance with any of the terms, covenants or conditions of this Agreement shall not be deemed a waiver of that term, covenant or condition or of any other term, covenant or condition of this Agreement. Any waiver or relinquishment of any right or power hereunder at any one or more times shall not be deemed a waiver or relinquishment of that right or power at any other time.

H. **Headings.** The section and subsection headings have been included for convenience only, are not part of this Agreement and shall not be taken as an interpretation of any provision of this Agreement.

I. **General.** Wherever used in this Agreement, the singular shall include the plural, and the plural shall include the singular. The use of any gender, tense or conjugation shall include all genders, tenses and conjugations. The Parties are independent contractors and nothing contained herein shall constitute this arrangement to be employment, a joint venture, or a partnership. This Agreement is only between Miva Merchant and Customer, and does not make any third-party a beneficiary of this Agreement, whether known or contemplated by either party. Further, this Agreement does not make Customer a third-party beneficiary of any agreement that Miva Merchant may have with third parties, nor does this Agreement make Miva Merchant a third-party beneficiary of any agreement that Customer may have with third parties.

J. **Interpretation.** Any capitalized terms used this Agreement but not otherwise defined therein shall have the meaning as defined below. For all purposes hereof:

"**Customer's Content**" means any and all material developed, purchased, or otherwise acquired by Customer that is published, made available or otherwise used in conjunction with Customer's Web Site. Customer's Content includes, but is not limited to, end user data collected by Customer, and information regarding merchandise or services sold by Customer through its Web Site.

"**Software**" means the Miva Merchant eCommerce software, current release version, including any updates provided by Miva Merchant, and Miva Merchant's proprietary technology and source code.

"**Hosting Services**" means the services described in Section 1.A of this Agreement.

"**Miva Merchant's Content**" means any and all material developed by Miva Merchant and made available for use by Customer, including any designing of Customer's Web Site, and templates prepared by Miva Merchant for use by Customer.

"**Web Site**" means Customer's Internet presence, identified by the domain name provided by Customer.

# MIVA MERCHANT

## ACCEPTABLE USE POLICY AND TERMS

### Miva Merchant's Acceptable Use Policy & Terms ("AUP Policy")

#### I. MIVA MERCHANT'S PRIVACY POLICY AND STATEMENT

Miva Merchant, Inc. ("Miva Merchant") collects certain information from you to ensure we are giving you the support you need. Because we respect your privacy, we assure you that we will maintain and use this information responsibly.

**A. General Web Browsing.** Miva Merchant collects navigational information about where you go on our Web Site. This navigational information allows us to see which areas are most visited and which are not. Additional non-personally identifiable information (*i.e.* domain type, browser version, service provider and IP address) may also be collected to provide information regarding your use of our Web Site (such as the time of your last visit to a page on our Web Site). Collecting this information helps us improve the quality of visitors' online shopping experiences by delivering more of the features, services and products our visitors prefer.

**B. Miva Merchant's Disclosure Of Personal Information.** Any information you provide to us at this Web Site when you establish or update an account, purchase credits online or request information (*i.e.* name, address, e-mail address, telephone number and credit card information), is maintained on our secure Web server and our internal systems. This information is used to enable Miva Merchant to deliver services to you. To ensure compliance with federal law, Miva Merchant does not maintain information provided by children under the age of 16.

You should be aware that we may disclose specific information about you if necessary to do so by law or based on our good faith belief that it is necessary to conform or comply with the law or is necessary to protect the users of our Web Site, the site or the public.

Miva Merchant does not sell, rent or trade your e-mail address to third parties. We may, however, use third parties to help us provide services to you, such as fulfilling orders, processing payments, monitoring site activity, conducting surveys, and administering e-mails. If personally identifiable information (*i.e.* name, address, e-mail address, telephone number) is provided to any of these third parties, we will require that such information be maintained by them in strictest confidence.

**C. Updating Your Personal Information.** We prefer our Customers to keep their personal information accurate and up-to-date. To do this, we provide Customers with the opportunity to update or modify their personal information, including billing and shipping information, by logging into their accounts.

**D. Miva Merchant's Use Of Cookies.** Miva Merchant uses a browser feature known as a cookie, which assigns a unique identification to your computer. Cookies also allow Miva Merchant to make our sites more responsive to your needs, by delivering a better and more personalized experience to you. The cookies are typically stored on your computer's hard drive and are used by Miva Merchant to help track your clicks as you go through the pages within a Miva Merchant Web Site. In addition, Miva Merchant uses cookies to help keep track of support requests and to tell us whether you have previously visited a Miva Merchant web site. This allows registered users to avoid re-entering information upon each new visit to our site.

**E. Links.** Our Web Site may contain links to other sites. However, Miva Merchant is not responsible for the privacy practices or the content of such web sites.

**F. Use Of Forums And Discussion Boards.** None of the information contained on our Web Site is medical, legal, business, or other advice or opinion of Miva Merchant. Any opinion that is expressed on or through these services is that of its author. Users are reminded that postings are instantaneous, automatic, and are not pre-screened. Additional facts and information on legal or other developments may affect the subjects discussed. Confidential information should never be discussed. Miva Merchant assumes no responsibility for the content or consequences, whether direct or indirect, of communications by users.

**G. Questions/Changes In Policy.** If you have any questions with respect to Miva Merchant's Privacy Policy, please feel free to contact us at [saas@mivamerchant.com](mailto:saas@mivamerchant.com). Should elements of Miva Merchant's Privacy Policy change, we will post the changes on this Web Site. If you are concerned about how your personal information is used, please visit our Web Site often for this and other important announcements about Miva Merchant.

Miva Merchant is committed to providing a safe and secure shopping experience for

all of our clients. We provide stringent and effective security measures on our Web Site. It is Miva Merchant's policy to never send private information, such as your credit card number, via e-mail. In fact, this is a practice we recommend our Customers adopt in all of their Internet activities.

#### II. TERMS AND CONDITIONS

To maintain our system integrity and resources, we expect our customers to act responsibly. When you use any Miva Merchant services, in any form, you automatically agree to the following Conditions:

- No Spam, No unsolicited e-mailing (*See* Miva Merchant's Email Policies in Section IV below).
- No IRC: We do not allow IRC or IRC bots to be operated on our servers.
- No Server abuse -Any attempt to undermine or cause harm to a server, or customer of us is strictly prohibited.
- No Warez, cracks, or copyright infringement.
- No adult content (*See* Miva Merchant's Email Policies in Section V below).
- No Background Running Programs Without Prior Approval: Prior approval is required for any programs to run continually in the background.
- No IRC Chat Rooms: We do not allow clients to install their own chat rooms of any kind, without approving it with the Support Team.
- No unauthorized use of other people's accounts or computers .
- No online gambling .
- Payment Policies: All accounts are set up on a pre-pay basis. Setup fees are charged for all new accounts and major account changes. All pricing is guaranteed for the term of pre-payment. We reserve the right to change prices at any time, unless other terms have been agreed upon. Customers are responsible for all money owed on their accounts from the time their accounts were established until the time that Miva Merchant receives an official cancellation request form from the Customer.
- Domain Registration fees are not refundable at all.
- Miva Merchant's Cancellation Policy: We reserve the right to cancel service at any time. Any violation of policies which results in extra costs will be billed directly to the Customer (*i.e.* transfer, space etc.).
- Lawful Purposes: Miva Merchant reserves the right to refuse service to anyone. Customers may use our servers only for lawful purposes. Any transmission of material in violation of Federal, State or Local regulations is prohibited.
- Indemnification: Customer agrees that it shall defend, indemnify, save and hold us harmless from any and all demands, liabilities, losses, costs and claims, including reasonable attorney's fees asserted against us, our agents, our customers, officers and employees, that may arise or result from any service provided or performed or agreed to be performed or any product sold by customer, it's agents, employees or assigns. Customer agrees to defend, indemnify and hold us harmless against liabilities arising out of:
  - Any injury to person or property caused by any products sold or otherwise distributed in connection with our servers;
  - Any material supplied by customer infringing or allegedly infringing on the proprietary rights of a third party;
  - Copyright infringement; and
  - Any defective products sold to customer from our servers.

We reserve the right to suspend or cancel a customer's access to any or all services we provided when we decide that the account has been inappropriately used.

**Disclaimer:** Miva Merchant will not be responsible for any damages your business may suffer. Miva Merchant make no warranties of any kind, expressed or implied for services we provide. Miva Merchant disclaims all warranties, including but not limited to merchantability or fitness for a particular purpose. This includes loss of data resulting from delays, non-deliveries, wrong delivery, and any and all service interruptions caused by our Web hosting service and our employees. We reserve the right to revise the policies at any time.

- All end-users, resellers and dedicated servers of ours must adhere to the above policies.
- Use of any mass email programs in conjunction with Miva Merchant SMTP servers is strictly prohibited.
- Failure to follow any term or condition is grounds for immediate account deactivation.

In addition, any web site using Miva Merchant software must maintain a hyperlink to "http://www.mivamerchant.com" at the bottom/footer of the web site, which is visible throughout the majority of the web site. If the hyperlink is not found, Miva Merchant reserves the right to place the hyperlink on your web site without notice.

### **III. MIVA MERCHANT'S BILLING POLICIES AND CYCLES**

- Miva Merchant offers billing via credit card or debit card charge only.
- Initial fees must be paid prior to service setup. These fees include:
  - Service setup fees
  - 1st month service charge
- Your billing cycle begins on the day we setup your account, and payment is due on that day each month thereafter.
- All accounts not paid within 15 days after your due date will be suspended. Suspended accounts will not be allowed any access to their servers.
- Miva Merchant automatically attempts to charge credit cards on file for any past due invoice for current, suspended and cancelled accounts.
- Accounts suspended and subsequently reactivated must pay all past due and current amounts and are subject to the following reactivation fees:
  - Shared Servers: \$29 reactivation fee
  - Dedicated Servers: \$89 reactivation fee
- Accounts more than 30 days past due cannot be reactivated. Customers must sign up for new service and pay the full setup fees associated with the server option they choose.
- To cancel your account, your request must be received in writing by certified mail in addition to our online form. Please send your written request to Miva Merchant, Inc., 5060 Shoreham Place Suite 330, San Diego, CA 92122 and submit the online form at [saas@mivamerchant.com](mailto:saas@mivamerchant.com). In order to ensure that you are not billed for an additional month of service, you must cancel your account before your billing cycle due date. All accounts requesting cancellation are terminated upon receipt of submission. Please note that cancellation requests submitted prior to the end of a billing cycle will not receive a prorated refund.

Note: All billing correspondence [*e.g.*, invoices, notifications, etc] is done via email. It is crucial that you maintain a current email address with us.

Our online account login enables every customer to:

- View your past and current order history.
- Update your email address, billing address, shipping address, etc.
- Update credit card information.
- Print out your invoices.

We currently accept payment, in US Dollars only, through the following sources:

- Discover
- MasterCard
- VISA
- American Express

You can contact our billing department as described on our contact us page.

### **IV. MIVA MERCHANT'S EMAIL POLICIES**

Miva Merchant has a zero tolerance spam (*i.e.*, unsolicited commercial email) policy. Miva Merchant does not permit spam being sent using Miva Merchant mail servers.

All email sent via Miva Merchant servers must meet the following criteria:

- The recipient of your email must have made a purchase, requested information, responded to a questionnaire or a survey, or had offline contact with you.
- The email "from address" is required to contain the domain name of your Miva Merchant store.
- No email subject lines can contain misleading information.
- Marketing and/or newsletter emails must contain a working link for users to unsubscribe.
- All requested to unsubscribe must be processed within 10 days.

Miva Merchant actively monitors our mail servers for abuse. Any Customer found to be using Miva Merchant mail servers to send spam will be immediately cut-off from use of Miva Merchant services. Further, any use of mass email programs in conjunction with Miva Merchant SMTP servers is strictly prohibited

### **V. MIVA MERCHANT'S ADULT MATERIAL POLICY**

Material that is appropriate in some countries may not be appropriate in others. For this reason and many others, we maintain a strict "No Adult Material Policy."

Miva Merchant defines "adult material" as any of the following:

- Any photos or videos showing any sexually explicit nudity;
- Any audio clips or text containing sexually explicit material; or
- Any photos or videos showing frontal nudity on either men or women.

We also prohibit the following:

- Any web sites with direct links to other web sites containing such material.

Further, we reserve the right to determine what might be considered "sexually explicit" or "sexually related." If you are unsure if your web site contains such material, please let us know prior to placing the order.