



**MASTER SUBSCRIPTION AND SERVICE AGREEMENT**

Last Updated June 21st, 2018

PLEASE READ CAREFULLY: BY CREATING AN ACCOUNT, BY UTILIZING THE MOBIT APPLICATION, OR THROUGH PURCHASING CONSULTING SERVICES, YOU AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS.

From the date of order and email delivery of your MOBIT login details and password, the “customer” has 24 hours to notify Engage Media and Technology, Inc (the Company) by email or our [cancellation page](#) that they do not wish to continue with the subscription or consulting services. If we do not receive your “notice to cancel” within this 24-hour period, then the following agreement is deemed to have been accepted and is binding against the terms and conditions outlined below.

The MOBIT Master Subscription and Service Agreement (the agreement) governs the use of the MOBIT Mobile Messaging and Marketing Automation Platform (the Application) and any related consulting services or Services provided by Engage Media and Technology, Inc (the Company), a registered company having its principal place of business registered at 12828 W. Lasalle St Suite 101, Boise ID 83713, USA.

Our agreement is a contract between you (the “customer” or “client” or “you”) and the “Company” (Engage Media and Technology, Inc). It describes the services we will provide to you, how we will work together, and other aspects of our business relationship. It is a legal document, so some of the language is necessarily in “legalese”, but we have tried to make it as readable as possible. These terms are so important that we cannot provide our products and services to you unless you agree to them. By using our Application or by receiving consulting services, you are agreeing to these terms.

We periodically update these terms. If you have an active MOBIT subscription, we will let you know when an update is available via an email or in-app notification and SMS. You can find archived versions of our agreements [here](#).

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## 1. DEFINITIONS

“**Acceptance**” refers to your acceptance of this agreement by using the Application (for example, by logging in to your account), by making a verbal or written confirmation of an order, by clicking “I agree,” or by taking any other affirmative action indicating your acceptance of this agreement. If you show any of these acts of acceptance, then you have agreed to these terms. If you are an agent or employee of the intended subscriber or user, you individually represent and warrant the Company that you are authorized to bind that party to this agreement. If you do not agree to this agreement, then you are not authorized to use the Application.

“**Access**” is when we will provide you access to use the Application as described in this agreement and the applicable order. We may provide some of the elements of the subscription service through third-party service providers.

“**Client message**” is defined as an SMS (short message service) or MMS (multimedia message service) message sent from the customer Application account, or, an SMS (manual send or automated reply) sent to the Application short code (e.g. 72000) and “keyword” of the country where the customer registered their Application account. Definitions of message types are outlined in section 2.13. SMS/MMS (Message) Credits.

**“Client work time”** is offline or online Company consulting services (“time”) provided by an assigned mobile strategist from the Company. This includes: (a) the development of mobile campaigns, (b) the design of mobile landing pages (within your application), or (c) integration to your other applications (limited to applications supported by Zaiper.com or directly to the client Infusionsoft account). In all cases, and without exception, payment for Company consulting services is required prior to any work commencing.

**“Customer,” “you,” or “the client”** refers to your company throughout the agreement.

**“Delivery period”** is 90 days in which your consulting services schedule must be completed.

**“Expiration period”** is the period after which you no longer have access to your subscription, products, or consulting services. Unless specifically agreed and stated on your order, the expiration period of 90 days applies, after which time, the Company is no longer obligated in any way to provide the subscription, product, or consulting service.

**“Grace period”** is the 14-day period after the customer subscription has auto-renewed and billed to the customer’s credit card on file. Within the grace period, the customer may request a “partial credit” of the amount paid on the credit card. The Company will deduct 20 percent (20%) of the total amount billed to the credit or debit card as towards costs of administration and assistance with this credit payment. The balance will be reimbursed to the customer credit card on file within 14 days. There is no refund of any payment made after the 14-day grace period.

**“Message bundle”** is a number of SMS or MMS messages (e.g. 500, 1,000, or 10,000) that are grouped in a “bundle” for the purpose of billing and allocating “client message credits” to the client Application account. Message bundles can be purchased manually or automatically using the Application auto-top-up facility.

**“Engage Media and Technology, Inc” “the Company,” “we,” “us,” or “our”** means the applicable contracting entity as specified in the Contracting Entity and Applicable Law section.

**“Notice to cancel” or “Termination/cancellation by the user”** is when the customer requests the termination or cancellation of their subscription. In all cases, the request must be lodged via our cancellation page at <https://www.mobit.com/policies/cancellations>.

**“Opt in”** is when a customer requires that a consumer reply “YES” via text message to confirm they want to “opt in” to a recurring text-messaging program. This text message can be performed either in response to a consumer text messaging or an SMS keyword to a short code or by entering their mobile phone number into a website form.

**“Order” or “order form”** means the approved form or online subscription process by which you agree to subscribe to our Application and purchase consulting services. Most orders are completed through our online payment process or via in-app purchase. The order may be referred to as a Statement of Work if you are purchasing only consulting services.

**“Prior express consent”** is defined as specific unambiguous acceptance provided by consumers before any text messages may be sent. This consent process varies from country to country.

“**Short code**” are “**short number(s)**” (e.g. 72000) used by the Company for the delivery and receipt of customer messages. These messages can be through a multimedia message service (MMS) or a short message service (SMS). The Company provides each customer application account with a “shared short code” specific to the country where the customer application is registered.

“**SMS keyword**” or “**keyword**” are short words that are sent (“text in”) to an SMS short code (e.g. Text SAVE to 72000). These keywords tell our short code what Application account and mobile messaging campaign a consumer is trying to interact with. A keyword is what a consumer uses to initially interact (“opt in”) with an SMS short code on their mobile phone. Keywords are unique and specific to each Application account and short code.

“**Subscription term**” means the initial term of your subscription to the applicable Application service as specified on your order form(s) and each subsequent renewal term (if any).

“**The Application**” means the MOBIT web-based application available to you as part of your subscription and is developed, operated, and maintained by us, accessible via <http://app.mobit.com>.

“**Third-party applications**” means non-embedded applications that are provided by third parties that inter-operate with or are used in connection with the Application. These applications may include non-MOBIT applications, for example, applications from the Infusionsoft Marketplace or integrations from Zapier.com.

## **2. COMMERCIAL TERMS AND DISCLOSURES**

### **2.1. Scope/Changes to Agreement**

Occasionally the Company may, at its discretion, make changes to the agreement. When the Company makes material changes to the agreement, it will provide you with prominent notice as appropriate under the circumstances, e.g. by displaying a prominent notice on the Application login screen or by sending you an email, in-app message, or SMS message (text). In some cases, we will notify you in advance. In all cases, your continued use of the Application after the changes have been made will constitute your acceptance of these changes. Please, therefore, make sure you read any such notice carefully. If you do not wish to continue using the Application under the new version of the agreement, you may terminate your subscription and agreement by notifying us at <https://www.mobit.com/policies/cancellations>.

### **2.2. Age of Consent**

Access to the Application is available only to individuals who can enter into legally binding contracts under the applicable law. The Application is not intended for use by individuals under 18 years of age (or the applicable age of majority if greater than 18 years of age). If you are under 18 years of age (or the applicable age of majority, if greater than 18 years of age) and/or you are unable to enter into legally binding contracts under the applicable law, you do not have permission to use and/or access the Application.

### **2.3. The Application**

The Application may or may not be available in all countries. You agree to use the Application in accordance with all applicable guidelines, as well as all local, state, national, federal, and international laws.

The Application includes one or more of the following: (a) a web-based interface located in the designated area of the Application (app.mobit.com “the Application”); (b) access to our text messaging application center; (c) access to our mobile page builder and template library, which enable you to access and/or design mobile landing pages; (d) SMS gateway access; (e) contact management center to store and manage customer lists and details; (f) data (images and video) storage for the purpose of client messages; and (g), if applicable, synchronization software, as well as software maintenance, upgrades, and customer support, that enable you to send Client Messages to recipients designated by you. You are responsible for obtaining and maintaining all computer hardware, software, and communications equipment needed to access the Application and for paying all access charges incurred while using the Application.

We endeavor to ensure that client messages are processed correctly and delivered by the Application to the applicable network. The Company or the Application is not responsible for the final delivery of any client message or other communications, as final delivery is out of our control and is the responsibility of the applicable telecommunications carrier.

The Application transmits and receives client messages via major telecommunications companies and mobile network operators, and thus the Application’s influence over the timing of the transmission of your client message and broadcasts are within the technical constraints imposed on the Application. While the Application uses commercially reasonable efforts to transmit your client message and broadcasts to the applicable network for final delivery to your designated recipients as fast as possible, the Company cannot commit to, and does not guarantee, a specific maximum delivery time. Such times depend on various network and system-related factors among the various entities involved in the transportation of your client message and broadcasts across the public switched telephone network and/or the Internet. You should know that communications carriers assign client messages with a default lifetime, and any client message that cannot be delivered successfully within the lifetime assigned to it will be discarded by the applicable communications carrier without any notice. The Company is not liable for any loss incurred if a client message cannot be delivered, and you acknowledge that damages for financial or other loss resulting from delivery failure cannot be claimed from the Company for any such non-deliveries. Furthermore, you agree that all client message contents is deemed to have zero financial value.

#### **2.4. Subscriptions, Terms, and Fees**

The Company offers three “subscription plan” options. Each subscription plan may be ordered as an Annual Subscription (prepaid for 12 months in advance) or a Monthly Subscription (prepaid for one month in advance). Each payment plan automatically renews on the anniversary date of the initial order date. The Company may, at their own discretion, make changes to the subscription plan names and those items included in each subscription plan. When the Company makes material changes to a subscription name, subscription price, or what’s included in the plan, we will provide you with prominent notice as appropriate under the circumstances, e.g. by displaying a prominent notice on the Application login screen or by sending you an email, in-app message, or SMS message. Descriptions and inclusions of each MOBIL subscription plan can be found on our pricing page at <https://www.mobit.com/pricing>.

- (a) Subscription Fees: The annual or monthly subscription fee will remain fixed during the subscription term unless you (a) exceed your maximum contacts, campaigns, or keywords, (b) upgrade products or base packages, or (c) subscribe to additional features or products, including additional contacts, campaigns, and keywords.
- (b) Term and Renewal: Your initial subscription period will be specified in your order/invoice, and your subscription will automatically renew for the shorter of the subscription period or for one year. To prevent renewal of the subscription, the required notice must be provided within the timeframe as specified in section 2.4(d) Notice of Renewal/Cancellations below. If you add products during the subscription term, the fees for these additional products will be pro-rated and they will renew along with your subscription, unless otherwise indicated in your order. The renewal pricing set forth in your order will apply.
- (c) Fee Adjustments in Next Billing Period: Your Application subscription plan includes limits for contacts, campaigns, and keywords. You may, at any time between billing periods, upgrade your Application account to allow for additional contacts, campaigns, or keywords. You may purchase additional keywords for your Application account by using the manual purchase option in your Application account settings.
- (d) Notice of Renewal/Cancellation: Your subscription will automatically renew according to the Term and Renewal section above. Unless otherwise specified in your order, to prevent renewal of your subscription, you must provide written notice of your non-renewal at <https://www.mobit.com/policies/cancellations> within 24 hours in advance of the end of your subscription term.
- (e) Fee Adjustments at Renewal: For your Application, upon renewal, your subscription will be adjusted to match the number of contacts, campaigns, and keywords actually assigned at the end of your then-current subscription term, provided that, if you purchased a subscription plan that included additional contacts, campaigns, or keywords, then you'll continue to have those included even if they are not assigned.
- (f) Payment by Credit Card: If you are paying by credit card, you authorize us to charge your credit card or bank account for all fees payable during the subscription term. You further authorize us to use a third party to process payments and consent to the disclosure of your payment information to such third party.
- (g) Payment against Invoice: Invoice payment option may be available for annual subscription accounts on special request. An additional fee of 20 percent (20%) may be applied to all products, subscriptions, and consulting services. If you are paying by invoice, we will invoice you no more than 14 days before the beginning of the subscription term and each subsequent billing period, and other times during the subscription term when fees are payable. All amounts invoiced are due and payable within seven days from the date of the invoice, unless otherwise specified in the order form. You will not have access to your Application or our consulting services until the invoice has been received by the Company.

- (h) **Payment Information:** You will keep your contact information, billing information, and credit card information (where applicable) up to date. Changes may be made on your account settings page <https://app.mobit.com/settings> within your Application account. All payment obligations are non-cancellable, and all amounts paid are non-refundable, except as specifically provided for in this agreement. All fees are due and payable in advance throughout the subscription term.
- (i) **Sales Tax:** All fees are exclusive of taxes, which we will charge as applicable. You agree to pay any taxes applicable to your use of the subscription service and our consulting services. If you are located in the European Union, all fees are exclusive of Value-Added Tax (VAT) and you must represent that you are registered for VAT purposes in your member state. At our request, you will provide us with the VAT registration number that you are registered under in your member state. If you are required to deduct or withhold any tax, you must pay the amount deducted or withheld as required by law and pay us an additional amount so that we receive payment in full as if there were no deduction or withholding.

## **2.5. Consulting Services**

You may purchase consulting services by placing an order with us. Unless we otherwise agree, the consulting services we provide are described at <https://www.mobit.com/services> and will be delivered online and in English. Fees for these consulting services are in addition to your subscription fee. If you purchase consulting services that recur (monthly or annually), these services will renew according to the terms of your consulting service schedule.

If there are a specific number of hours included in the consulting services purchased, those hours will expire as indicated in the applicable description, which expiration period will commence upon purchase (the “expiration period”). If there are deliverables included in the consulting services purchased, it is estimated that those deliverables will be completed within the time period indicated as the delivery period in the applicable description that will commence upon purchase (the “delivery period”). If there is no expiration period or delivery period indicated, then it will be 90 days from the date of order. If the consulting services provided are not complete at the end of the delivery period due to your failure to make the necessary resources available to us or to perform your obligations, such consulting services will be deemed to be complete at the end of the delivery period. If the consulting services provided are not complete at the end of the delivery period due to our failure to make the necessary resources available to you or to perform our obligations, the delivery period will be extended to allow us to complete such consulting services.

Consulting services are non-cancellable and all fees for consulting services are non-refundable. For the avoidance of any doubt, our consulting services (“packages”) descriptions are outlined below. In all cases, these services are delivered online and in English.

**2.5.1. Quick Start Training:** This is our most basic training option that the Company provides. The Quick Start Training package includes two one-hour online training sessions with a dedicated mobile strategist. The client may utilize the two one-hour sessions for any purpose including, training, campaign strategy, or general assistance with the Application.

**2.5.2. Quick Start Build:** This package includes three components:

- (a) **Initial Strategy Session:** In this session, your assigned mobile strategist (assigned by the Company) will learn about your business and put together a plan for your first mobile campaign (up to a maximum of two mobile campaigns). The Initial Strategy Session is conducted online and in English for 35–45 minutes.
- (b) **Campaign Design and Build:** From the information obtained during your Initial Strategy Session, your assigned mobile strategist will design your mobile campaign(s) (including workflow rules, the design of mobile landing pages, lead capture forms, and integration to your online application, which includes, and is limited to, applications that are integrated with Zapier or Infusionsoft). Typical campaigns may include initial lead capture and short-term nurture mobile campaigns. The Campaign Design and Build phase is conducted offline by your assigned mobile strategist and includes up to three hours of dedicated “client work time”. Your assigned mobile strategist may request additional client work time based on the Initial Strategy Session. This additional client work time will be quoted at the beginning of the Campaign Design and Build phase. Work on your campaign will not commence until you and the Company have agreed the additional client work time and fees. In all cases, payment for Company consulting services is required prior to any work commencing.
- (c) **Campaign Review:** Following the two previous phases, your assigned mobile strategist will present (in detail) the mobile campaign(s) built in your Application account. You may request changes or enhancements to the campaigns. These changes and enhancements will be made as long as the total work time does not exceed the allocated 45 minutes for the Campaign Review phase. Should additional work time be required (over and above the 45 minutes), your assigned mobile strategist will provide a quote (written or verbal) for this additional work. Work will not commence until a Company order form has been processed and paid in full. Included in the total work time of this phase is an outline of future campaigns you may wish to initiate yourself or have your assigned mobile strategist undertake for you.

**2.5.3. Complete Mobile Strategy:** This program combines both the Quick Start Training and Quick Start Build programs. In addition to the two consulting service programs (discount applied), the Complete Mobile Strategy program includes a bonus of 30–45 minutes of client work time (online or offline), which can be utilized immediately or held in credit to provide ongoing assistance, training, or additional services to the client.

## **2.6. Related Services and Limited Warranty**

The Company warrants, for a period of 30 days following their delivery of services, that all training, coaching, and campaign design services (onboarding, consulting, or services) will be performed in a professional manner. For any breach of this warranty, which is reported in a timely manner, your exclusive remedy shall be the re-performance of the deficient services, and if the Company is unable to re-perform the services as warranted, you shall be entitled to recover the portion of the fees paid to the Company for such deficient services, and such refund shall be the Company’s entire liability. You shall warrant at all times and shall comply with, and shall remain solely responsible for compliance with, all applicable laws and regulations applicable to this agreement, to anti-spam regulations, and to privacy policy, in connection with your use of the Application, and



you agree to indemnify and hold the Company harmless from and against any third party or government claims, including all related damages, costs, and expenses (including reasonable attorneys' fees) that arise due to your violation of law or breach of this warranty in your use of the Company's Application.

## **2.7. Usage Policy**

You represent and warrant that the owners of the phone numbers (consumer contacts) that you provide to the Company and the Application, to which outbound client messages are transmitted by and through the Application, have provided all requisite consent under applicable laws to receive such messages and broadcasts from you. You agree that you will include clear opt out/unsubscribe information on EVERY client message that you send through the Application. You agree to familiarize yourself with and abide by all applicable local, state, national, and international laws and regulations and are solely responsible for all acts or omissions that occur in connection with your account, including without limitation the content of the client messages transmitted by and through the Application.

Without limiting the foregoing, you agree to familiarize yourself with the legalities of any messages, calls, broadcasts, and campaigns transmitted through the Application by visiting the following websites:

- Federal Trade Commission, <http://www.ftc.gov>
- Federal Communications Commission, <http://www.fcc.gov>
- Canadian Radio-Television and Telecommunications Commission, <http://crtc.gc.ca>
- DoNotCall Registry Info, <http://www.donotcall.gov>
- Mobile Marketing Association, <http://www.mmaglobal.com>
- The Australian Communications and Media Authority (ACMA), <http://www.acma.gov.au>
- Telecommunications Users Association of New Zealand (TUANZ), <http://tuanz.org.nz>

Without limiting the foregoing, any and all consumer contacts provided by you to the Application shall consist of individuals that have provided "prior express written consent" to receive text messages from you, within the meaning of the Telephone Consumer Protection Act (47 USC § 227) (the TCPA), the Canadian Anti-Spam Legislation (CASL), and their implementing regulations as amended from time to time to the telephone number(s) provided by such individuals. You agree to fully indemnify and hold the Company harmless from and against any and all liability, claims, judgments, settlement amounts, or other costs incurred by the Company (including attorneys' fees and court costs) in connection with your failure, or suspected failure, to comply with the provisions set out in this section.

This information is provided merely as a courtesy and is not intended to replace your responsibility to familiarize yourself with and abide by the legal requirements pertaining to your client messages, broadcasts, and campaigns prior to using the Application. You are ultimately responsible to make your own informed decisions regarding your client messages, broadcasts, and campaigns.

You shall schedule campaigns and the associated customer messages responsibly, in a manner that is courteous to the recipients and in full compliance with local, state, national, and international calling time rules and regulations.

Other than the content made available to you by the Application, you are solely responsible for obtaining any and all rights or licenses to any data, including any images or video files, for inclusion in any outbound client messages and campaigns. If you are unfamiliar or unclear as to the legalities associated with any client message, broadcast, or campaign, you should consult with a legal advisor or attorney before using the Application.

You acknowledge and agree that the Application is provided for business use only, and you agree that your use of the Application, your client messages, your client content (as defined below), and your client feedback (as defined below) shall not include, comprise, or consist of:

- Sending unsolicited marketing messages or broadcasts (that is, spam);
- Sending any calls or client messages to life-line services, such as hospitals, fire, police, 911, or utility-related telephone numbers;
- Using strings of numbers (as it is unlawful to engage two or more lines of a multi-line business);
- Harvesting or otherwise collecting information about others without their consent;
- Misleading others as to the identity of the sender of your client message or broadcasts by creating a false identity, by impersonating the identity of someone or something else, or by providing contact details that do not belong to you;
- Transmitting, associating, or publishing any unlawful, racist, harassing, libellous, abusive, threatening, demeaning, immoral, harmful, vulgar, obscene, pornographic, or otherwise objectionable material of any kind;
- Transmitting any material that may infringe upon the intellectual property rights of third parties, including trademarks, copyrights, or other rights of publicity;
- Transmitting any material that contains viruses, Trojan Horses, worms, time bombs, cancel-bots, or any other harmful or deleterious programs;
- Interfering with, or disrupting, networks connected to the Application or violating the regulations, policies, or procedures of such networks;
- Attempting to gain unauthorized access to the Application, other accounts, computer systems, or networks connected to the Application through password mining or any other means;
- Engaging in any other activity that the Company believes could subject it to criminal liability or civil penalty or judgment.

You agree to provide your valid and legally sufficient contact information in connection with any outbound campaign within the initial client message.

You further agree that the Company is, under no circumstances, responsible for the contents or accuracy of your client messages and the Company via the Application will only transmit them on a good-faith belief that you use the Application in accordance with the agreement.

You will provide your own content for all outbound campaigns. The Company will not be liable for any misuse of the Application by you. The Company is not responsible for the views or opinions contained in any of your client messages.

## **2.8. Content Submission/Discussion Areas**

The Company may, at its option, provide you with access to interactive services, which may include one or more areas within the Application that allow for online discussions (e.g. chat). Should you choose to participate in such a forum, you agree NOT to utilize the forum for illegal or inappropriate purposes, and represent that any comments, messages, or other feedback submitted by you (“client feedback”) will comply with the agreement, including those restrictions set forth in the Usage Policy section above. The Company reserves the right, but will not be obligated, to edit or delete postings to its forums, including client feedback, at any time and for any reason. The Company shall also have no responsibility or liability for any client feedback or other material created or posted by you, or by third parties, within any interactive services forum.

## **2.9. Registration/Username/Password**

In order to obtain access to the Application, you must first receive your username and password from the Company. The Company reserves the right, at its sole discretion, to deny access to the Application to anyone at any time and for any reason in accordance with the terms and conditions of this agreement.

The registration data that you must supply to obtain access to the Application may include, without limitation, some or all of the following, depending on the method used by you to register: your full name; an email address; a billing address; a username and password; credit card information; and any other information requested on the applicable form (collectively known as “registration data”).

You agree to provide true, accurate, current, and complete registration data and to update your registration data as necessary. The Company will verify and approve all registrants in accordance with its standard verification procedures.

As part of the registration process, you will be provided with, or must select, a username and password. If the username that you request is not available, you will be asked to supply another username. If the Company provides you with a username and password, you can change that username or password, or the one that you selected during registration, at any time through your account settings. You agree to notify the Company of any known or suspected unauthorized use(s) of your account or any known or suspected breach of security, including loss, theft, or unauthorized disclosure of your username or password. You shall be responsible for maintaining the confidentiality of your username and password and account. You agree to accept responsibility for all activities that occur through use of your username and password and account, including any charges incurred.

Any fraudulent, abusive, or otherwise illegal activity engaged in by you, or any entity or person with access to your username and password and account, may be grounds for termination of your account, in the Company’s sole discretion, and you may be reported to appropriate law-enforcement agencies.

## **2.10. Intellectual Property**

You are permitted to access the Application and any content provided or made available by the Company (which may include text, images, hosted software, sound files, video, or other content and which may be provided via the Application). The Company hereby grants a limited, non-exclusive, non-transferable license for you to use the Application solely for the purposes outlined as follows.

We may have copyrights, trademarks, patents, trade secrets, or other intellectual property rights covering subject matter in the Application, including the mobile landing pages. Except as expressly provided in these terms, the availability of the Application does not give you any license to those patents, trademarks, copyrights, or other intellectual property. All copyrights, trademarks, patents, trade secrets, and other intellectual property rights contained in, or associated with, the Application are the sole and exclusive property of the Company or its licensors, as applicable, each of whom reserves all rights with regard to such materials. You acknowledge and agree that you may not copy, reproduce, retransmit, modify, alter, create any derivative works, reverse engineer, decompile, or disassemble any portion of the Application, including any proprietary communications protocol used by the service, without the express written permission of the Company in each instance. You may not use the Application in conjunction with any other third-party content. You may not exploit any aspect of the Application for any commercial purposes not expressly permitted by the Company.

## **2.11. Data Protection and Privacy**

In order to ensure your compliance with the agreement and to ensure compliance with national and international laws, we may, from time to time, randomly check the client message and constituent client content that you send by and through the Application; provided, however, that we undertake no responsibility to monitor or otherwise review your client message or client content. Nonetheless, we are committed to maintaining the privacy of your information, pursuant to our [Privacy Policy](#). Except as otherwise required for your use of the Application as outlined in the agreement, you must not send any confidential or proprietary information to the Company.

## **2.12. Billing Provisions**

Your use of the Application is contingent on your paying for such use (whether paid in advance or through the purchase of credits [as defined below] through the Application or provided to a member of the Company) in the amounts and using the methods indicated on the Company website or through the Application.

Your payment for access to the Application, including access, credits, keywords, usage-sensitive fees, and plans (a portion of which also includes software maintenance and upgrades, as well as customer support) shall be deemed completed when the Company receives the full amount of payment owed for such portion of the Application and service. You are responsible to pay for any client message you attempt to send to any consumer contacts, regardless of whether the message is actually received by the intended consumer contact recipient.

The Company will charge your indicated method of payment (“payment method”) for the applicable portion of the Application and services immediately upon you confirming the payment method and amount to be charged.

The charges will appear on your payment method statement, as applicable, through the identifier “DPS”. All charges are payable in United States currency. Subject to the conditions set out here, you agree to be bound by the billing provisions of the Company in effect at any given time.

With reasonable prior written notice to you (with email or SMS being acceptable), the Company reserves the right to change its billing provisions whenever necessary and at its sole discretion. Continued use of the Application after receipt of such notice shall constitute consent to any and all such changes; provided, however, that any amendment or modification to the billing provisions shall not apply to any charges incurred prior to the applicable amendment or modification. Amounts to be charged may include sales and other taxes, where applicable, and any other amounts indicated on our website.

Your account will be credited within 24 hours of the Company verifying receipt of your payment. If you have elected to make a payment by credit card and we do not receive payment from the credit card issuer, you agree to pay all amounts due immediately upon demand by the Company.

The Company cannot readily or accurately ascertain your location when you request to use the Application. You therefore agree that your use of the Application outside the continental United States is not subject to any applicable United States federal or state taxes.

To the extent that you are responsible for any additional taxes or fees beyond those collected by the Company, you agree that you will pay them when due to any applicable taxing authority, including any interest or penalties assessed.

The Application shall not be responsible for any errors or transmission failures with regard to the charging and collection of funds through your indicated payment method, nor for any actions taken by the provider of the payment method you choose (which could include refusal to authorize the charge).

In addition to the agreement, any payments made by you may be subject to the agreement between you and the provider of the applicable payment method.

You are responsible for all charges related to purchases made using your Application account and payment method, whether or not you authorized such purchases. Standard charges apply to any test customer message sent originating from your account or initiated using any third-party application.

In the event of accidental under-billing in favor of you, or non-payment by you for the Application or services, the Company shall be entitled to immediately proceed with collection remedies and shall be entitled to recover any and all costs, fees, and expenses of such collection efforts, including, but not limited to, collection agencies, court costs, filing and service of process fees, attorneys’ fees incurred through the Company’s choosing, and any other costs, fees, and expenses incurred in the pursuit of collection on all customer accounts and receivables due and payable under the agreement.

The Company’s authorization to provide and bill for the Application and other services is obtained by way of your acceptance of our terms and conditions when you apply for an Application subscription and make payment via an order form from the Company, via physical signature or voice confirmation.

The Company also obtains your permission for billing by the use of “manual orders” received via telephone, where you provide credit card details and verbal confirmation. Once an order is received and paid, this constitutes your acceptance.

### **2.13. General Billing**

Usage of the Application constitutes your acceptance of the Company’s billing policy, and you must comply with this billing policy.

- a) Unless otherwise agreed in writing, all accounts are set up on a prepaid basis. The Company must receive payment before any subscription or service is provided or activated. Customers are required to keep a valid credit or debit card on file to charge for recurring monthly or annual subscription fees, SMS, or MMS charges or any other service fees.
- b) Accepted forms of payment.  
Payment is confirmed and authorized by you when you provide:
  - i) Your credit card details to a Engage Media and Technology, Inc sales staff member or consultant. Confirmation of your credit card number, name on card, expiry date, and security number authorizes the Company to charge your card for the amount you have agreed.
  - ii) Payment via online order form. This includes payment by credit card. If a payment fails, the Company will manually retry your credit card three times. If payment is not received, you will not have access to your Application subscription or services.
- c) Subscription billing is based on availability of the Application, not based on usage. However, certain fees may be usage based, such as SMS and MMS. Unused Application accounts will incur monthly subscription fees regardless of availability of product in the case of a breach of online terms, including, but not limited to, delinquent accounts.
- d) You are responsible for keeping all credit and debit card details and contact information current. This can be done online via settings in the customer Application account. To access settings, you should log in to the Application, click on “Settings” and then click “My Account” (<https://app.mobit.com/settings>).
- e) All recurring monthly or annual subscriptions are automatically invoiced and charged to the credit or debit card on file at the anniversary period of the subscription.
- f) Payment receipts are available on request or through the “transaction history” area on the My Account page of the Application.

### **2.14. SMS/MMS (Message) Credits**

For the purposes of the agreement and for the avoidance of any doubt, “credits” are defined as those charges that relate to an SMS (short message service) or MMS (multimedia message service) as outlined in the definitions below.

SMS messages (short message service) relate to those messages that contain no greater than 160 “plain text” (content that does not include video, images, or animated GIFs in the message) characters per “message block.” SMS messages may contain a MOBIT URL automation link, but in all cases, the total character count including the mandatory “compliance language” will be debited one message “credit” from the customer’s Application account for those SMS messages that contain up to and including 160 plain text characters per message block. One additional credit will be debited from the customer’s Application account for every message block that contains up to and including 160 plain text characters. For the avoidance of doubt, and as an example of the Company’s billing methodology, an SMS message containing 400 plain text characters in a message block (including MOBIT URL automation links and compliance language) equates to three message blocks. For this example, the customer’s Application account will be debited three message credits. Message rates (per message block) vary from country to country. Current messaging rates for each country can be viewed on the Company’s website at <https://www.mobit.com/pricing/message-rates>. The Company reserves the exclusive right to vary these charges from time to time.

MMS messages (multimedia message service) are those messages that may contain (up to and including) ten images, one animated GIF, one video (no greater than 10 seconds in length), collectively referred to as “rich media,” and 1,600 plain text characters. MMS messages may contain a MOBIT URL automation link (e.g. [www.mbit.ly/ah732](http://www.mbit.ly/ah732)), but in all cases, the total character count including the mandatory “compliance language” and rich media content equates to one message credit. The customer agrees that one message credit will be debited from the customer Application account for every MMS messages as defined above. Message rates vary from country to country. Current messaging rates for each country can be viewed on the Company website at <https://www.mobit.com/pricing/message-rates>. The Company reserves its exclusive right to vary these charges from time to time.

- (a) Outbound messages: Message rates for outbound SMS and MMS messages vary per country. The current table of rates are available on our pricing page (<https://www.mobit.com/pricing/message-rates>). These rates may vary from time to time. Published message rates are also shown in the Application account settings (<https://app.mobit.com/settings>).
- (b) Inbound messages: Inbound messages include all messages sent to the Application short code relating to the customer’s Application account (e.g. text NAME to 72000). This also includes all offline marketing material with a call-to action that prompts a text-in action (e.g. text NAME to 72000). The customer’s inbound messages are non-chargeable to accounts that have “active campaigns.” All inbound messages are required to have an associated and “active response message”. In the event that the customer marketing material is still active against a non-active Application campaign, the user will be charged at the current outbound message rate (less 50 percent) for every inbound message received to any mobile keyword associated with the user’s Application account when the associated Application campaign is not active. In all cases, and without exception, the Company accepts no responsibility to manage the customer’s Application account and manage the status (active or non-active) of campaigns.

- (c) Message credits: The customer agrees to maintain a positive “account balance” in their Application account settings (<https://app.mobit.com/settings>). The customer also agrees to the charges and fees as outlined in the [General Billing](#) section above. Should the customer account balance fall below a zero credit balance, all outbound messages will STOP AND NOT BE SENT from the customer’s Application account. The customer specifically agrees to manage their account in accordance with the terms outlined in (<https://app.mobit.com/settings>).
- i) Purchasing manual message credits: The client agrees to purchase message credits for their Application account by selecting from one of the “message bundle” options shown in their Application account (<https://app.mobit.com/settings>). By selecting a message bundle, the customer agrees to accept those associated charges and for those charges to be billed to the credit or debit card held on file against their Application account.
- ii) Auto recharge: The customer may choose to enable their Application account auto-recharge facility as outlined in their Application account SMS settings (<https://app.mobit.com/settings>). The customer understands and accepts that the auto-recharge facility is NOT a mandatory requirement of the Company. The Company will automatically recharge the customer Application account against the credit or debit card held on file to the “auto top up amount” indicated in the customer’s Application account settings. The customer understands and agrees to accept all further charges to their credit or debit card held on file when their Application account “low credit balance threshold” is reached. The customer agrees to the Company’s no refund policy as outlined and described in [Refund Policy](#).
- iii) “Low credit balance threshold” is defined as the balance in which credits will be recharged and replenished in the customer’s Application account: The customer agrees to select a low credit balance threshold, which when reached, their Application account will automatically charge their credit or debit card held on file at the “recharge bundle” rate selected. The customer agrees to accept all charges as defined above and to abide by our no refund policy.

#### **2.15. Expiration of Credits**

Message credits as outlined in the [SMS and MMS \(Message\) Credits](#) section, purchased as a part of a package or monthly plan and not used within the month of purchase, automatically roll over to the next billing month. The value of message credits may change over time and you acknowledge that the number of credits needed to utilize the Application may change correspondingly. No credit refunds will be given for non-used message credits.

Any unused value associated with your credits shall be forfeited upon expiration or termination of your Application account subscription. All prices, per-message rates, and billing increments are subject to change at any time due to fluctuations in market conditions, subject to the restrictions on modification to the billing provisions set out here.



## **2.16. No Refund Policy**

The Company has a no refund policy. This applies to all subscriptions (monthly or annual) and consulting services, which have been delivered or part delivered by Company staff. We also do not refund any SMS or MMS charges for usage as outlined in [SMS/MMS \(Message\) Credits](#). Please do not use the Application at any time if you do not agree with our refund policy. Use of or access to the Application in any way confirms your acceptance of our refund policy.

## **2.17. Fees**

- a) Late fees: The Company may assess a US\$50.00 late fee for any payment that is fifteen days past due.
- b) Charge-backs: If a customer initiates a charge back, which is against the terms and conditions outlined here, the Company may apply a US\$50.00 processing fee for each individual charge-back.
- c) Returned checks: The Company may assess a US\$50.00 processing fee on each returned check.
- d) Collections fee: In the event an account is submitted to a third-party collections service, a US\$45.00 processing fee may be assessed to the existing account balance. This fee is in addition to any other fees previously assessed on the account.
- e) Interest: Any charges not paid when due are subject to interest at a rate equal to the lesser of: (i) one and one-half percent (1.5%) per month; or (ii) the maximum interest rate allowed by applicable law.

## **2.18. No Warranty and Disclaimers**

The Company reserves the right to modify, suspend, or discontinue any products and services at any time for any reason without prior notice. Further, while the Company utilizes electronic and physical security measures to reduce the risk of improper access to or manipulation of client content, client message, and other data during transmission and storage, it cannot guarantee the security or integrity of such information and shall have no liability for breaches of security or integrity or third-party interception in transit, nor for any damage which may result to your computer or other property by your use of the Application. You acknowledge that customer messages (inbound and outbound) are transmitted in unencrypted formats and that eavesdropping on communications by third parties is possible. The Company recommends that you ensure that sensitive and valuable information is communicated by a protected or encrypted method. The Company shall use commercially reasonable efforts to make access to the application available through the required access protocols but makes no warranty or guarantee that: (a) the Application will be available at any particular time or (b) you will be able to access the Application at any particular time or from any particular location.

The Company will not be liable for any act or omission of any other company or companies furnishing a portion of the Application or Company services (including, without limitation, telecommunications carriers or ISPs); any act or omission of a third party, including those vendors participating in service made available to you; equipment that it does not furnish; and damages that result from the operation of customer-provided systems, equipment, facilities, or services that are interconnected with the Application. NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE COMPANY APPLICATION AND SERVICES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS, WITHOUT ANY WARRANTIES OR CONDITIONS WHATSOEVER, EXPRESSED OR IMPLIED.

NOTWITHSTANDING THE FOREGOING OR ANY STATEMENT TO THE CONTRARY CONTAINED IN THE AGREEMENT, THE COMPANY DOES NOT WARRANT THAT THE USE OF THE APPLICATION WILL BE UNINTERRUPTED OR ERROR FREE, INCLUDING, BUT NOT LIMITED TO, ANY INTERRUPTIONS TO THE APPLICATION CAUSED BY THE INTENTIONAL OR MALICIOUS ACTS OF THIRD PARTIES (E.G. "HACKING"), NOR SHALL ENGAGE MEDIA AND TECHNOLOGY, INC BE RESPONSIBLE FOR ANY CLIENT CONTENT OR REGISTRATION DATA LOSS, OR THE LOSS OF ANY INFORMATION IN YOUR ACCOUNT, REGARDLESS OF THE CAUSE.

FURTHERMORE, THE COMPANY MAKES NO REPRESENTATIONS OR WARRANTIES AS TO THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE APPLICATION OR THAT THE APPLICATION WILL MEET ANY OF YOUR SPECIFIC REQUIREMENTS OTHER THAN AS MAY BE EXPRESSLY SET FORTH IN THESE TERMS.

THE COMPANY MAKES NO REPRESENTATIONS OR WARRANTIES AND HEREBY DISCLAIMS ALL OTHER REPRESENTATIONS AND WARRANTIES OF ANY KIND, WHETHER EXPRESS, STATUTORY, OR IMPLIED, ORAL OR WRITTEN, WITH RESPECT TO THE APPLICATION, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, RELIABILITY, COMPLETENESS, OR TIMELINESS OF THE MATERIAL, SERVICE, SOFTWARE, TEXT, GRAPHICS, OR LINKS AND ALL WARRANTIES IMPLIED FROM ANY COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE.

To the extent permissible by applicable law, you further waive any and all rights and benefits otherwise conferred by any statutory or non-statutory law of any jurisdiction that would purport to limit the scope of a release or waiver.

#### **2.19. Limitation of Liability**

THE COMPANY SHALL NOT BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, ANY DAMAGES ARISING FROM LOSS OF USE OR LOST BUSINESS, LOSS OF OPPORTUNITY, LOSS OF REVENUE, LOSS OF ACTUAL OR ANTICIPATED PROFITS OR LOSS OF, DAMAGE TO, OR CORRUPTION OF DATA OR LOSS OF GOODWILL) OR FOR ANY COST OF PROCUREMENT OF SUBSTITUTE SERVICES ARISING IN CONNECTION WITH THE AGREEMENT AND/OR THE APPLICATION, WHETHER IN AN ACTION IN CONTRACT, TORT, STRICT LIABILITY, NEGLIGENCE, OR OTHER ACTIONS, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IF THE CUSTOMER'S USE OF THE APPLICATION RESULTS IN THE NEED FOR SERVICING OR REPLACING EQUIPMENT, SOFTWARE, OR DATA, THE COMPANY IS NOT RESPONSIBLE FOR THOSE COSTS. THE COMPANY'S TOTAL LIABILITY ARISING OUT OF YOUR USE OF THE APPLICATION FOR DIRECT DAMAGES SHALL NOT, IN THE AGGREGATE, EXCEED AN AMOUNT EQUAL TO THE MONTHLY TRANSACTION FEES PAID BY YOU TO THE COMPANY HEREUNDER. THE NEGATION OF DAMAGES SET FORTH ABOVE IS A FUNDAMENTAL ELEMENT OF THE BASIS OF THE BARGAIN BETWEEN YOU AND THE COMPANY. ACCESS TO THE APPLICATION AND/OR ANY OTHER CONTENT, PRODUCTS AND/OR SERVICES OFFERED IN CONNECTION WITH THE FOREGOING WOULD NOT BE PROVIDED TO YOU WITHOUT SUCH LIMITATIONS. SOME JURISDICTIONS DO NOT ALLOW CERTAIN LIMITATIONS ON LIABILITY AND, IN SUCH JURISDICTIONS, ENGAGE MEDIA AND TECHNOLOGY, INC'S LIABILITY SHALL BE LIMITED TO THE MAXIMUM EXTENT PERMITTED BY LAW.

## **2.20. Indemnification**

You agree to indemnify and hold harmless the Company, its subsidiaries, parents and affiliates, and each of their respective officers, directors, shareholders, employees, agents, contractors, representatives, content providers, and service providers from and against any and all losses, claims, obligations, liabilities, damages, settlements, costs, and expenses (including, but not limited to, consequential damages, incidental damages, special damages, disbursements and attorneys' fees, including attorneys' fees incurred from counsel selected by the Company in its sole discretion) arising from or relating to any actual or threatened claim, suit, action, proceeding, governmental investigation, or enforcement action based on or arising out of: (a) your breach of the agreement; (b) your client content, client message, or feedback; (c) any violation of any applicable local, state, national, or international laws and regulations including, without limitation, the mobile marketing laws and MMA guidelines; or (d) any use by you of the Application or use of the Application by a third party by and through an account or computer owned by you.

You agree to cooperate as fully as reasonably required in the defense of any claim, suit, action, proceeding, governmental investigation, or enforcement action, but we reserve the right, at your expense, to assume the exclusive defense and control of any matter in which you are a named party and that is otherwise subject to indemnification by you.

## **2.21. Suspension, Termination, and Cancellation**

If at any time you breach the agreement, we may elect to suspend, terminate, or cancel your use of the Application and your account and recover any damages from you arising from the event(s) giving rise to the suspension, termination, or cancellation.

We reserve the right to suspend your Application account and access to the Application at any stage for any reason we may deem necessary to continue to provide the Application in a way that may be hindered by your status as being our client, your financial status, or the client content or client message originating from you.

- a) The Company will notify you via the email address and the SMS number on file 14 days prior to the period that the customer subscription will bill against the credit or debit card on file.
- b) Upon any such termination, cancellation, or suspension, you are still responsible for any obligations then accrued. Your obligation to pay all amounts accrued and owed shall continue even after any suspension or cancellation of your access to the Application account (in whole or in part).
- c) Upon termination, for any reason, you agree to immediately cease using the Application and the Company shall have no obligation to you after any termination or cancellation of your account or termination of your access to the Application.
- d) Should such a termination take place, any Application Credits in your Account will be forfeited. The Company does not refund unused credits in any instance.
- e) The provisions regarding ownership, payments, warranties, and indemnifications will survive any suspension, termination, or cancellation of your use of the Application.

## **2.22. Termination/Cancellation by the User**

You are free to terminate or cancel your use of the Application at any time, and for any reason. Cancellation requests must be submitted at <https://www.mobit.com/policies/cancellations>. The Company will not suspend or cancel an account via any other means.

- a) You are required to provide no less than 24 hours' notice of cancellation of your subscription prior to the next billing date. If notice of cancellation is not received during this period, the amount of your subscription (monthly or annual) will be billed against the card on file.
- b) If you fail to notify the Company of your intention to cancel, the subscription due will automatically bill to the card on file. Post the billing period, and within 14 days only ("grace period"), you may request a "partial credit" of the amount paid. The Company will deduct 20 percent (20%) of the total amount billed to the card as towards costs of administration and assistance with this payment. The balance will be returned to your credit or debit card on file within 14 days. There is no refund of any payment made after the 14-day grace period.

Notwithstanding the foregoing, in no event shall the Company be obligated to refund to you the value of any unused credits previously purchased by you. On return notification of cancellation, your Application account will be deleted from the server within 60 days and keywords registered on your Application account will no longer be active after this time. All login details, contacts, and campaigns (including templates) will be deleted at this time and will not be recoverable.

## **2.23. Retrieval of Customer Data**

For any monthly or annual subscription, as long as you have paid all fees owed to us, if you make a written request within 30 days after termination or expiration of your subscription, we will provide you with temporary access to your Application to retrieve, or we will provide you with copies of, all customer data then in our possession or control. If we provide you with temporary access to your Application, we may charge a reactivation fee. We may withhold access to customer data until you pay any fees owed to us. Thirty days after termination or expiration of your subscription, we will have no obligation to maintain or provide you the customer data and may, unless legally prohibited, delete all customer data in our systems or otherwise in our control.

## **2.24. Copyright Policy and DMCA (Digital Millennium Copyright Act) Compliance**

The Company reserves the right to terminate the Account of any client who infringes upon third-party copyrights. If you believe that a copyrighted work has been copied or posted via the site or the Application in a way that constitutes copyright infringement, you should provide the Company with the following information: (a) an electronic or physical signature of the person authorized to act on behalf of the owner of the copyrighted work; (b) an identification and location of the campaign content within the Application account of the copyrighted work that you claim has been infringed upon; (c) a written statement by you that you have a good-faith belief that the disputed use is not authorized by the owner, its agent, or the law; (d) your name and contact information, such as telephone number or email address; and (e) a statement by you that the above information in your notice is accurate and, under penalty of perjury, that you are the copyright owner or

authorized to act on the copyright owner's behalf. Contact information for the Company's copyright agent for notice of claims of copyright infringement is as follows:

**Engage Media and Technology, Inc.**

Attn: DMCA/Copyright Agent

12828 W. Lasalle St Suite 101

Boise ID 83713

United States of America

**2.25. Links to Other Websites**

The Application may contain links to third-party websites. These links are provided solely as a convenience to you and not as an endorsement by the Company of the content of such third-party websites.

The Company is not responsible for the content of linked third-party websites and does not make any representations regarding the content or accuracy of materials on such third-party websites. If you decide to access linked third-party websites, you do so at your own risk.

The Company cannot ensure that you will be satisfied with any products or services that you purchase from a third-party website that links to or from the Application, since these websites are owned and operated by independent third parties. The Company does not endorse any of the products or services, nor has the Company taken any steps to confirm the accuracy or reliability of any of the information contained on such third-party websites. The Company does not make any representations or warranties as to the security of any information (including, without limitation, credit card and other personal information) that you might be requested to provide to any third party, and you hereby irrevocably waive any claim against us with respect to such websites. The Company strongly encourages you to make whatever investigation you feel necessary or appropriate before proceeding with any online or offline transaction with any of these third parties.

The Company consents to links to the Application that conform to the following: the appearance, position, and other aspects of any link to the Application may neither create the false appearance that an entity or its activities or products are associated with or sponsored by the Company nor be such as to damage or dilute the goodwill associated with the name and trademarks of the Company or its affiliates. The Company reserves the right to revoke this consent to link at any time in its sole discretion, without notice.

**2.26. Security Rules**

You are prohibited from violating or attempting to violate the security of the Application and from using the Application to violate the security of other third-party applications, websites, individuals, or entities by any method, including, without limitation: (a) accessing data not intended for you, or logging into a third-party software application or account that you are not authorized to access; (b) attempting to probe, scan, or test the vulnerability of the Application, a system, or network or to breach security or authentication measures without proper authorization; (c) attempting to interfere with the Application, host, or network including, without limitation, via a virus to the Application, overloading, "flooding," "spamming," "text-bombing," or "crashing"; (d) sending unsolicited text messages, including promotions or advertising of products or services;

or (e) forging any packet headers from the Company or any part of the header information in any email, instant message, text message, or newsgroup posting.

Violations of the above may result in civil or criminal liability. The Company may investigate violations of the agreement and may involve and cooperate with law enforcement authorities in prosecuting users of the Application who are involved in such violations.

#### **2.27. Force Majeure**

The Company shall not be liable for any failure or delay in performing its obligations outlined here, where such failure or delay is caused by fire, flood, earthquake, elements of nature or acts of God, acts of war, insurrection, terrorism, strike, failure or downtime of any telecommunications line and/or unavailability of any telecommunications or Internet facilities, power failure, governmental restrictions, or court order or compliance with any law, regulation, or order of any governmental authority or any other cause beyond the reasonable control of the Company. In addition, the Company shall be so excused in the event it is unable to acquire from its usual sources, and on terms it deems to be reasonable, any material product or service necessary for the performance of the Application.

#### **2.28. Jurisdiction and Specific Terms**

- (a) Governing law and jurisdiction: Unless otherwise required by a mandatory law, the agreement (and any non-contractual disputes or claims arising out of or in connection with them) is subject to the laws of New Zealand, without regard to choice or conflicts of law principles. Further, you and the Company agree to the jurisdiction of the New Zealand High Court to resolve any dispute, claim, or controversy that arises in connection with the agreement (and any non-contractual disputes or claims arising out of or in connection with them). In some cases, that jurisdiction will be exclusive, meaning that no other country's courts can preside over the matter.
- (b) Class action waiver: ACCORDING TO THE GOVERNING LAWS AND JURISDICTION OUTLINED IN THIS AGREEMENT, THE CUSTOMER AND THE COMPANY AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE ACTION. UNLESS BOTH THE CUSTOMER AND THE COMPANY AGREE, NO ARBITRATOR OR JUDGE MAY CONSOLIDATE MORE THAN ONE PERSON'S CLAIMS OR OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING.
- (c) Dispute resolution and arbitration: You agree that any dispute, claim, or controversy between you and the Company arising in connection with or relating in any way to this agreement or to your relationship with the Company as a user of the Application (whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory, and whether the claims arise during or after the termination of the agreement) will be determined by mandatory binding individual arbitration.

- (d) Arbitration rules: Either you or the Company may start arbitration proceedings. Any arbitration between you and the Company will be finally settled under the Rules of Arbitration of the New Zealand Dispute Resolution Centre<sup>1</sup> (the “NZDRG”) in force at the time (the “NZDRG Rules”) by one or more arbitrators appointed in accordance with the NZFRG Rules, as modified by this agreement and will be administered by the New Zealand Dispute Resolution Centre. Any arbitration will be conducted in the English language. The law to be applied in any arbitration shall be the law of the New Zealand, without regard to choice or conflicts of law principles.
- (e) Time for filing: Any arbitration must be commenced by filing a demand for arbitration within ONE YEAR after the date the party asserting the claim first knows or reasonably should know of the act, omission, or default giving rise to the claim, and there shall be no right to any remedy for any claim not asserted within that time period. If applicable law prohibits a one-year limitation period for asserting claims, any claim must be asserted within the shortest time period permitted by applicable law.
- (f) Notice and process: A party who intends to seek arbitration must first send a written notice of the dispute to the other, by certified mail, or in the event that we do not have a physical address on file for you, by email (the “notice”). The Company’s address for notice is: Engage Media LLC, Attn: General Counsel, P.O. Box 300 548, Albany, AUCKLAND 0632, NEW ZEALAND. The notice must describe the nature and basis of the claim or dispute and set out the specific relief sought (“demand”). We agree to use “good-faith” efforts to resolve the claim directly, but if we do not reach an agreement within 30 days after the notice is received, you or the Company may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by you or the Company shall not be disclosed to the arbitrator until after the arbitrator makes a final decision and award, if any. In the event our dispute is finally resolved through arbitration in your favor, the Company shall pay you (1) the amount awarded by the arbitrator, if any, (2) the last written settlement amount offered by the Company in settlement of the dispute prior to the arbitrator’s award; or (3) US\$100.00, whichever is greater. All documents and information disclosed in the course of the arbitration shall be kept strictly confidential by the recipient and shall not be used by the recipient for any purpose other than for purposes of the arbitration or the enforcement of arbitrator’s decision and award and shall not be disclosed except in confidence to persons who have a need to know for such purposes or as required by applicable law. Except as required to enforce the arbitrator’s decision and award, neither you nor the Company shall make any public announcement or public comment or originate any publicity concerning the arbitration, including, but not limited to, the fact that the parties are in dispute, the existence of the arbitration, or any decision or award of the arbitrator.

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<sup>1</sup> <https://www.nzdrcc.co.nz/>

## 2.29. Miscellaneous

The failure of either party to exercise, in any respect, any right provided for in this agreement will not be deemed a waiver of any further rights. If any provision of the agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that the agreement will otherwise remain in full force and effect.

No agency, partnership, joint venture, or employment relationship is created as a result of the agreement and you do not have any authority of any kind to bind the Company in any respect.

The agreement shall constitute the complete agreement between the parties. No terms and conditions stated in or attached to your communications to the Company are applicable to the agreement in any way and are not to be considered to be your exceptions to the provisions of the agreement.

All notices required in the agreement shall be in writing and will be deemed to have been duly given: (a) when received if personally delivered; (b) when receipt is electronically confirmed if transmitted by facsimile or email; (c) the day after they are sent if sent for next day delivery by recognized overnight delivery service; or (d) upon receipt if sent by certified or registered mail with return receipt requested.

The Company may give notice to you by means of a general notice posted by and through the Application, to your email address on record in the Company's account information, or by written communication sent by personal delivery, fax, overnight courier, or certified or registered mail to your address on record with the Company.

Please [contact us](#) if you have any questions relating to our Master Subscription and Service Agreement. Please do not login or use our Application if you are unclear of the terms and conditions. Access to our Application constitutes full acceptance of our Master Subscription and Service Agreement.

[Link](#) to Previous Master Subscription and Service Agreement (Previously known as End-User Software Use Agreement) – Published August 2017