

## TERMS AND CONDITIONS

### 1. Application

- 1.1 These Terms and Conditions shall apply to the provision of the Opayo Extension (the Extension) the Provider to the Customer.
- 1.2 In the event of conflict between these Terms and Conditions and any other terms and conditions (of the Customer or otherwise), the former shall prevail unless expressly otherwise agreed by the Provider in writing.

### 2. Definitions and Interpretation

- 2.1 In these Terms and Conditions, unless the context otherwise requires, the following expressions have the following meanings:

<b>“Business Day”</b>	means, any day (other than Saturday and Sunday) on which ordinary banks are open for business in London;
<b>“Commencement Date”</b>	means the date the Customer purchases the Extension online;
<b>“Confidential Information”</b>	means all business, technical, financial or other information of a Party to the Agreement;
<b>“Customer”</b>	means the individual or legal entity that purchases the Extension
<b>“Provider”</b>	Ebizmarts Corporation a company registered in the United States under number 452434275 whose registered office is at 20900 NE 30 <sup>th</sup> Avenue, 200, Aventura, Florida, 33180.
<b>“Services”</b>	means the payment gateway extension software services to be provided by the Provider to the Customer
<b>“Fees”</b>	means any and all sums payable by the Customer to the Provider arising out of the performance of the Provider’s obligations under these Terms and Conditions;
<b>“Software”</b>	means the software linking the Magento e-commerce retail platform and the Opayo payment gateway.

- 2.2 Unless the context otherwise requires, each reference in these Terms and Conditions to:

- 2.2.1 “writing”, and any cognate expression, includes a reference to any communication affected by electronic or facsimile transmission or similar means;
- 2.2.2 a statute or a provision of a statute is a reference to that statute or provision as amended or re-enacted at the relevant time;
- 2.2.3 “these Terms and Conditions” is a reference to these Terms and Conditions and each of the Schedules as amended or supplemented at the relevant time;
- 2.2.4 a Schedule is a schedule to these Terms and Conditions;

- 2.2.5 a Clause or paragraph is a reference to a Clause of these Terms and Conditions (other than the Schedules) or a paragraph of the relevant Schedule; and
- 2.2.6 a "Party" or the "Parties" refer to the parties to these Terms and Conditions.
- 2.3 The headings used in these Terms and Conditions are for convenience only and shall have no effect upon the interpretation of these Terms and Conditions.
- 2.4 Words imparting the singular number shall include the plural and vice versa.
- 2.5 References to any gender shall include any other gender.

### **3. Provider's Obligations**

- 3.1 With effect from the Commencement Date until any termination under Clause 8 the Provider shall, in consideration of the Fees being paid in accordance with the terms of payment, provide the Services expressly identified in the Specification of Services Schedule, or otherwise agreed under these Terms and Conditions.
- 3.2 The Provider will use reasonable care and skill to perform the Services identified in the Specification of Services Schedule or otherwise agreed under these Terms and Conditions.
- 3.3 Upon receipt of the Customer's request for support or rectification of a defect, the Provider shall (subject to its then current commitments) normally begin investigating such support or defect not later than 72 hours thereafter and shall carry out the necessary investigative or exploratory work to establish the issue reported.
- 3.4 The Provider will not guarantee the performance of any Software which the Provider has undertaken to re-install under sub-Clause 3.3.
- 3.5 The Provider shall use all reasonable endeavours to rectify any identified defects with the Extension. The Parties agree that time will not be of the essence in the performance of these obligations.

### **4. Customer's Obligations**

- 4.1 The Customer shall:
  - 4.1.1 Allow the Provider access to the Magento Instance and all relevant Software for investigation purposes;
  - 4.1.2 Cooperate with them in the diagnosis of any defect or malfunction in the Equipment or Software.
- 4.2 The Customer will not allow any changes or modifications to the Software to be made by any party other than those changes or modifications authorised by, and notified to, the Provider. If such changes or modifications are carried out without such authorisation and appropriate notification, the Provider will no longer be able to provide technical support and reserves the right to review these Terms and Conditions and make adjustments accordingly.
- 4.3 The Customer shall create regular data backups in such a manner as to minimise any potential data loss and to ensure that these are made available to the Provider as required.

## **5. Price**

- 5.1 The Customer agrees to pay the Fees in accordance with Clause 6
- 5.2 The Customer shall pay the Provider for any additional services provided by the Provider that are not included within the provision of Services – for example investigatory work for issues not found to be the fault of the Provider) in accordance with the Provider's £100 hourly rate in effect at the time of the performance or such other rate as may be agreed. Any such charge for additional services shall be invoiced separately from any Fees due
- 5.3 All sums payable by either Party pursuant to these Terms and Conditions are exclusive of any value added or other tax or other taxes on profit, for which that Party shall be additionally liable.

## **6. Payment**

- 6.1 All payments required to be made pursuant to these Terms and Conditions by either Party shall be made online with credit or debit card via the Company's online website.
- 6.2 The Fees to be paid by Client to the Provider are as follows:
  - 6.2.1 If the Client has a Community Edition Magento Platform - £249.00
  - 6.2.2 If the Client has an Enterprise Edition Magento Platform - £399
- 6.3 The Fees set out at 6.2 above includes a 12 months subscription to the Service and any support and maintenance necessary as should occur from time to time.
- 6.4 The fees set out above include the use of the Software against 1 (one) domain URL. Any additional domain URLs that are required will be charged at £40 per domain URL.
- 6.5 At the end of the 12 month period and every 12 months thereafter, the Provider shall charge the original credit or debit card used by Client the following for an annual subscription:
  - 6.5.1 If the Client has a Community Edition Magento Platform - £119.
  - 6.5.2 If the Client has an Enterprise Edition Magento Platform - £169.
  - 6.5.3 If the Client has additional domain URLs - £40 per domain URL.

## **7. Variation and Amendments**

- 7.1 If, due to circumstances beyond the Provider's control, it has to make any change in the arrangements relating to the provision of the Services it shall notify the Customer forthwith. The Provider shall endeavour to keep such changes to a minimum and shall seek to offer the Customer arrangements as close to the original arrangements as is reasonably possible in the circumstances.

## **8. Termination**

- 8.1 The Provider may terminate the Agreement forthwith if:
  - 8.1.1 the Customer is in breach of any of its obligations hereunder;

- 8.1.2 the Customer has entered into liquidation (other than for the purposes of a bona fide amalgamation or reconstruction) whether compulsory or voluntarily or compounds with its creditors generally or has an administrator, administrative receiver or receiver appointed over all or a substantial part of its undertaking or assets;
  - 8.1.3 the Customer has become bankrupt or shall be deemed unable to pay its debts by virtue of Section 123 of the Insolvency Act 1986;
  - 8.1.4 the Customer ceases or threatens to cease to carry on business; or
  - 8.1.5 the Provider is delayed in performing or fails to perform any of the Provider's obligations due to any cause beyond the Provider's reasonable control in circumstances where, having proper regard to the nature and extent of the actual or likely future disruption to the Services due to that cause, it considers that it cannot effectively provide, or any longer provide, the Services.
- 8.2 In the event of termination under clause 8.1 the Provider shall retain any sums already paid to it by the Customer without prejudice to any other rights that either party may have whether at law or otherwise.

## 9. **Liability**

- 9.1 The Customer shall indemnify the Provider against all damages, costs, claims and expenses suffered by the Provider arising from loss or damage to any equipment (including that of third parties) caused by the Customer, or its agents or employees.
- 9.2 The Provider will indemnify the Customer for personal injury or death caused by the Provider's negligence in connection with the performance by the Service Provider of the Services.
- 9.3 In no event will the Provider be liable by reason of any breach by it of any of these Terms and Conditions or breach by it of any implied warranty, condition or other term of the Agreement, or any negligent or innocent misrepresentation, or any negligence or other duty at common law, for any:
  - 9.4.1 loss of or damage to data;
  - 9.4.2 loss of use of data;
  - 9.4.3 loss of use of any hardware or software;
  - 9.4.4 interruption to business;
  - 9.4.5 loss of income or revenue, ;
  - 9.4.6 loss of profit, contracts, business, business opportunity, or goodwill;
  - 9.4.7 loss of anticipated savings; or
  - 9.4.8 any indirect, special or consequential loss, damage, costs, expenses or other claims, whether or not the same were reasonably foreseeable or actually foreseen

arising from any act or omission of the Provider in connection with the performance of its obligations under the Agreement.

- 9.4 Except as provided above in the case of personal injury, death and damage to tangible property, and below as to fraud or fraudulent misrepresentation, the Provider's maximum liability to the Customer under the Agreement or otherwise for any cause whatsoever (whether in the form of the additional cost of remedial

services or otherwise) will be limited to a sum equivalent to the price paid up within the previous 12 months to the Provider for the Services that are the subject of the Customer's claim, plus damages limited to 25% of the same amount for any additional costs directly, reasonably and necessarily incurred by the Customer in obtaining alternative products and/or services

- 9.5 The Parties acknowledge and agree that the limitations contained in this Clause 9 are reasonable in the light of all the circumstances.
- 9.6 These limitations shall apply cumulatively, and shall apply regardless of the form of action, whether under statute, in contract or tort, including negligence, or any other form of action.
- 9.7 Nothing in these Terms and Conditions is intended to or will exclude or limit the Provider's liability for death or personal injury caused by the Provider's negligence, or for fraud or fraudulent misrepresentation by the Provider.
- 9.8 For the purposes of this clause, the 'Provider' includes its employees, sub-contractors and suppliers.
- 9.9 The employees, sub-contractors and suppliers of the Provider shall all have the benefit of the limits and exclusions of liability set out above in terms of the Contracts (Rights of Third Parties) Act 1999.

## 10. **Confidentiality**

- 10.1 During the term of the Agreement [and after termination of the Agreement for any reason for a period of 12 months starting on the date of termination, the following obligations shall apply to the Party disclosing Confidential Information ('the Disclosing Party') to the other Party ('the Receiving Party').
- 10.2 Subject to sub-Clause 10.3, the Receiving Party:
  - 10.2.1 may not use any Confidential Information of the Disclosing Party for any purpose other than the performance of its obligations under the Agreement;
  - 10.2.2 may not disclose any Confidential Information of the Disclosing Party to any person except with the prior written consent of the Disclosing Party; and
  - 10.2.3 shall make every effort to prevent the use or disclosure of the Confidential Information of the Disclosing Party.
- 10.3 The obligations of confidence referred to in the provisions of this Clause shall not apply to any Confidential Information of the Disclosing Party that:
  - 10.3.1 is in the possession of and is at the free disposal of the Receiving Party or is published or is otherwise in the public domain before its receipt by the Receiving Party;
  - 10.3.2 is or becomes publicly available on a non-confidential basis through no fault of the Receiving Party;
  - 10.3.3 is required to be disclosed by any applicable law or regulation;
  - 10.3.4 is received in good faith by the Receiving Party from a third party who, on reasonable enquiry by the Receiving Party claims to have no obligations of confidence to the Disclosing Party in respect of it and who imposes no obligations of confidence upon the Receiving Party.
- 10.4 Without prejudice to any other rights or remedies the Disclosing Party may

have, the Receiving Party acknowledges and agrees that in the event of breach of this clause the Disclosing Party shall, without proof of special damage, be entitled to an injunction or other equitable remedy for any threatened or actual breach of the provisions of this clause in addition to any damages or other remedies to which it may be entitled.

10.5 The obligations of the Parties under the provisions of this clause shall survive the expiry or the termination of the Agreement for whatever reason.

10.6 The Parties agree not to publicly disclose the nature of this Agreement and not to make negative or derogatory comments about the other in any form of media.

## **11. Sub-Contracting and Assignment**

11.1 [Subject to the provisions of Clause 12, the] OR [The] Provider may sub-contract to third parties all or any part of the Services to be carried out under the Agreement.

11.2 The Customer shall not assign to a third party any or all of its rights or obligations under the Agreement without the prior written consent of the Provider.

## **12. Force Majeure**

Neither Party to the Agreement shall be liable for any failure or delay in performing their obligations where such failure or delay results from any cause that is beyond the reasonable control of that Party. Such causes include, but are not limited to: power failure, Internet Service Provider failure, industrial action, civil unrest, fire, flood, storms, earthquakes, acts of terrorism, acts of war, governmental action or any other event that is beyond the control of the Party in question.

## **13. Waiver**

13.1 No waiver by the Provider of any breach of these Terms and Conditions by the Customer shall be considered as a waiver of any subsequent breach of the same or any other provision. A waiver of any term, provision or condition of these Terms and Conditions shall be effective only if given in writing and signed by the waiving party and then only in the instance and for the purpose for which any waiver is given.

13.2 No failure or delay on the part of any Party in exercising any right, power or privilege under these Terms and Conditions shall operate as a waiver of, nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise of or the exercise of any other right, power or privilege.

## **14. Severance**

If any provision of these Terms and Conditions is held by any competent authority to be invalid or unenforceable in whole or in part the validity of the other provisions of these Terms and Conditions and the remainder of the provision in question shall not be affected thereby.

**15. Notices**

- 15.1 All notices under these Terms and Conditions shall be in writing and be deemed duly given if signed by, or on behalf of, a duly authorised officer of the Party giving the notice.
- 15.2 Notices shall be deemed to have been duly given:
- 15.2.1 when delivered, if delivered by courier or other messenger (including recorded delivery mail) during normal business hours of the recipient; or
  - 15.2.2 when sent, if transmitted by e-mail and a successful transmission report or return receipt is generated; or
  - 15.2.3 on the fifth business day following mailing, if mailed by national ordinary mail, postage prepaid; or
  - 15.2.4 on the tenth business day following mailing, if mailed by airmail, postage prepaid.
- in each case addressed to the most recent address or e-mail address notified to the other Party.
- 15.3 Service of any document for the purposes of any legal proceedings concerning or arising out of the Agreement shall be effected by either Party by causing such document to be delivered to the other Party at its registered or principal office, or to such other address as may be notified to one Party by the other Party in writing from time to time.

**16. Dispute Resolution (ADR and Arbitration)**

- 18.1 The parties shall attempt to resolve any dispute arising out of or relating to this Agreement through negotiations between their appointed representatives who have the authority to settle such disputes.
- 18.2 If negotiations under sub-Clause 18.1 do not resolve the matter within 21 days of receipt of a written invitation to negotiate, the parties will attempt to resolve the dispute in good faith through an agreed Alternative Dispute Resolution ("ADR") procedure.
- 18.3 If the ADR procedure under sub-Clause 18.2 does not resolve the matter within 28 days of the initiation of that procedure, or if either party will not participate in the ADR procedure, the dispute may be referred to arbitration by either party.
- 18.4 The seat of the arbitration under sub-Clause 18.3 shall be England and Wales. The arbitration shall be governed by the Arbitration Act 1996 and Rules for Arbitration as agreed between the parties. In the event that the parties are unable to agree on the arbitrator(s) or the Rules for Arbitration, either party may, upon giving written notice to the other party, apply to the President or Deputy President for the time being of the Chartered Institute of Arbitrators for the appointment of an arbitrator or arbitrators and for any decision on rules that may be required.
- 18.5 Nothing in this Clause 18 shall prohibit either party or its affiliates from applying to a court for interim injunctive relief.
- 18.6 The parties hereby agree that the decision and outcome of the final method of dispute resolution under this Clause 18 shall be final and binding on both parties.

17. **Law and Jurisdiction**

17.1 The Agreement shall be governed by the laws of United States of America.

17.2 Any dispute between the Parties relating to the Agreement shall fall within the exclusive jurisdiction of the courts of the United States of America.