



Mercero, Inc.  
Terms of Service  
Last revised: June 11, 2021

## 1. Definitions and Construction

**1.1. Definitions.** For the purposes of this Agreement, the following initially capitalized words are ascribed the following meanings:

**“Acceptable Use Policy”** means the Mercero policy described in Section 12.

**“Administrative User”** means any individual who is an employee or independent contractor of Customer, its Affiliates, or its or their Customer Service Providers, and who is authorized by Customer to use the administrative features and functions of the Mercero Platform to administer access to and use of Customer Applications.

**“Affiliate”** means any person, partnership, joint venture, corporation or other form of venture or enterprise, domestic or foreign, including subsidiaries, which directly or indirectly Control, are Controlled by, or are under common Control with a party. **“Control”** means the possession, directly or indirectly, of the power to direct or cause the direction of the management and operating policies of the entity in respect of which the determination is being made, through the ownership of more than fifty percent (50%) of its voting or equity securities, contract, voting trust or otherwise.

**“Mercero Platform”** means the computer software applications, tools, application programming interfaces (APIs), and connectors, provided by Mercero as its online transaction management platform as a service offering, together with the programs, networks and equipment that Mercero uses to make such platform available to its customers.

**“Confidential Information”** has the meaning ascribed to it in Section 6.1.

**“Customer”** means the entity identified as such in the applicable Sales Order.

**“Customer Application”** means an application or web-based service developed or used by Customer (including its APIs), and which utilizes the Mercero’s Platform to manage transactions and process payments. Customer Applications are provided by Customer, and not by Mercero; “Customer Application” does not include the Mercero Platform.

**“Customer Data”** means any data that Customer or its Users input into the Mercero Platform for Processing as part of the Subscription Services, including any Personal Data forming part of such data.

**“Customer Service Provider”** means a third party, to the extent the third party is providing services to Customer.

**“Documentation”** means the software user and administrator manuals published by Mercero, regarding use of the Mercero Platform, including additional, updated or revised documentation, if any.

**“End User”** means any individual who has been authorized by Customer to use the end user features and functionality of the Mercero Platform as part of its obtaining access to and use of Customer Applications.

**“Entitlements”** means the license metrics and other scope limitations applicable to Customer’s license rights to access and use the Subscription Services, as specified in the applicable Sales Order and the Subscription Page.

**“Intellectual Property Rights”** means all trade secrets, patents and patent applications, trademarks (whether registered or unregistered and including any goodwill acquired in such trade marks), service marks, trade names, copyrights, moral rights, database rights, design rights, rights in know-how, rights in Confidential Information, rights in inventions (whether patentable or not) and all other intellectual property and proprietary rights (whether



registered or unregistered, any application for the foregoing, and all rights to enforce the foregoing), and all other equivalent or similar rights which may subsist anywhere in the world.

**“Personal Data”** means any information deemed “personal data” or “personal information” (or analogous variations of such terms) under applicable privacy laws or data protection laws and regulations, including any information relating to an identified or identifiable natural person.

**“Process”** or **“Processing”** means any operation or set of operations which is performed on Customer Data or on sets of Customer Data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction. **“Renewal Term”** has the meaning ascribed to it in Section 8.

**“Sales Order”** means, as applicable to the specific plan that Customer has subscribed to: (i) the online checkout form submitted by Customer and accepted by Mercero, (ii) the sign-up page on which Customer assents to this Agreement, or (iii) if none of the foregoing apply, a written sales order executed by Customer and Mercero and applicable to a Mercero Pilot Program, Mercero Basic and Mercero Enterprise plan. Each Sales Order becomes effective when Mercero and the Customer have signed the agreement via HelloSign. Each Sales Order is made part of this Agreement as described in Section 1.2.

**“Subscription Services”** means the Mercero Platform service offerings to which Customer subscribes, together with, if applicable to the pricing program to which Customer has subscribed, the “Enterprise” Support Program, each as specified in the Subscription Page, the applicable Sales Order, and the Documentation.

**“Subscription Start Date”** means the date on which Mercero enters the Sales Order into its system.

**“Subscription Term”** has the meaning ascribed to it in Section 8.

**“Supplemental Materials”** means sample code, and sample programs made available or supported by Mercero or by third parties for use with the Mercero Platform. Supplemental Materials are not required for use of the Subscription Services, and may be accessed and used by Customer on a permission basis.

**“Support Program”** means the “Standard” Mercero support and maintenance services program, applicable to: (a) all plans which require payment of subscription fees; and (b) the pilot program. Terms governing the Support Program are specified in the ‘Additional Terms of Service – Support Program’ referenced in Section 12. Customers with a subscription to a plan that does not require payment of subscription fees (except for the pilot plan) may participate in community support, but are not eligible for the Support Program.

**“Tenant”** means a logical isolation unit, or dedicated share of a particular Mercero Platform instance; the dedicated share may be configured to reflect the needs of the specific Customer business unit using the share.

**“User”** means any Administrative User or End User. The following words will be interpreted as designated: (i) “or” connotes any combination of all or any of the items listed; (ii) where “including” is used to refer to an example or begins a list of items, such example or items will not be exclusive; (iii) “specified” requires that an express statement is contained in the relevant document; (iv) “will” is, unless the context requires otherwise, an expression of command, not merely an expression of future intent or expectation; and (v) “may” is, unless the context requires otherwise, an expression of permission, but not an obligation.

**1.2. Construction.** This Agreement applies to the provision of all Subscription Services. The parties will enter into one or more Sales Orders that contain additional terms and conditions applicable to the provision of certain Subscription Services. Upon execution by the parties, each Sales Order will be incorporated into this Agreement.

## **2. Provision and Use of Subscription Services; Operational Issues**

**2.1. Provision of Subscription Services.** During the Subscription Term, Customer may access and use the Mercero Platform in accordance with this Agreement. Mercero will make the Mercero Platform available to Customer, and, if and as applicable to Customer’s subscription, provide the Support Program.



**2.2. Customer's Account.** Customer will designate one or more of its employees to be the point of contact with Mercero for the management and support of the Subscription Services, and who will be responsible for establishing and managing Customer's use of the Subscription Services ("**Account**"), including the creation of authentication credentials to access Customer's Account. Customer is solely responsible for the collection of payments, Mercero offers collection tools but it remains the Customers responsibility. Customer will safeguard all Administrative User authentication credentials in its possession or under its control. Customer is responsible for all activities that occur under the Account.

**2.3. Customer's General Responsibilities.** Customer and its Users are solely responsible for obtaining and maintaining their Internet access to the Subscription Services. Customer is solely responsible for the accuracy, quality and integrity of the Customer Data that Customer or its Users input into the Mercero Platform. Customer must comply, and will ensure that its Administrative Users comply, with the Acceptable Use Policy referenced in Section 12 below. Customer is responsible for acts and omissions of its Administrative Users relating to this Agreement as though they were Customer's own.

**2.4. Transaction Management Services.** The Mercero Platform includes functionality that enables Customer, at Customer's option, to connect with certain ecommerce services or sites, via public facing APIs provided and controlled by the ecommerce service. Any transaction data transmitted to or accessed by the Mercero Platform is considered Customer's Confidential Information under this Agreement and, to the extent within Mercero's possession or under Mercero's control, is subject to the data protection provisions of Section 7. If an ecommerce site modifies its APIs or equivalents so that they no longer interoperate with the Mercero's Platform, or imposes requirements on interoperability that are unreasonable for Mercero, and if after applying reasonable efforts Mercero is unable to overcome such modifications or requirements then, upon reasonable notice to Customer, Mercero may cease or suspend its provision of interoperability between the Mercero Platform and the affected ecommerce services or sites, without liability to Customer. Except for Mercero's obligations to protect transaction details obtained by the Mercero Platform from an integration, Mercero has no responsibility for the acquisition, development, implementation, operation, support, maintenance or security of any ecommerce integration.

**2.5. Customer Load Testing or Penetration Testing.** Customer may conduct load testing or penetration testing on Customer infrastructure that interoperates with the Mercero Platform as Customer determines necessary or advisable. Customer may not conduct any penetration testing or load testing on the Mercero's Platform without Mercero's prior written consent in each instance, and then only subject to such conditions as Mercero reasonably requires. Mercero may terminate any testing of the Mercero Platform at any time, as Mercero determines necessary or advisable to protect the Mercero Platform's operation or integrity.

**2.6. Backup and Restore.** Mercero will perform backups of Customer Data stored on the Mercero Platform every six hours.

**2.9. Technology Improvement.** Mercero may modify the Subscription Services and Mercero Supplemental Materials as it determines necessary to reflect to changes in technology and information security practices. Mercero will notify Customer in advance of any material changes. Mercero may require Customer to utilize Mercero or third party software updates in order to continue using some or all of the Subscription Services (but at no additional charge with respect to updates provided by Mercero). If Mercero proposes to introduce any "Breaking Change" into the Mercero Platform, then Mercero will provide Customer at least one weeks' notice prior to Mercero's implementation of the Breaking Change, except in cases of emergency, such as critical vulnerability remediation, in which case Mercero will provide as much prior notice as is reasonable in the circumstances. A "Breaking Change" means a change to the Mercero Platform that, to Mercero's knowledge, will cause failures in the interoperation of the Mercero Platform. If a modification made by Mercero materially reduces the features or functionality of the Subscription Services then, unless Mercero has provided a substantially equivalent replacement, or made the modification (i) to address a security vulnerability, (ii) to remain compliant with applicable law, or (iii) to comply with changes in its third party certification standards (such as ISO 27001 and ISO 27018), and if Customer has prepaid for a 12 month subscription, Customer may, at any time within the 30 day period following Mercero's

implementation of the modification, terminate any affected Sales Order by delivery of written notice to Mercero to that effect and, within 30 days of such termination, Mercero will refund to Customer a pro-rata amount of any affected Subscription Services fees prepaid to Mercero and applicable to the unutilized portion of the Subscription Term for terminated Subscription Services. If Customer has prepaid for a monthly subscription, then Customer may elect not to renew its subscription.

### **3. License Grants and Proprietary Rights**

**3.1. License by Mercero.** Subject to the terms and conditions of this Agreement, Mercero hereby grants to Customer a non-exclusive, non-transferable, royalty-free, worldwide license, without right to sub-license, for the Subscription Term, to (a) access and use, and to permit its Users to access and use, the Mercero Platform, in accordance with the Documentation, subject to the Entitlements, and (b) reproduce, modify, and distribute and display the Documentation, in each case solely for Customer's operations in its ordinary course of business. Mercero reserves all other rights not expressly granted in this Agreement.

**3.2. License by Customer.** Customer hereby grants to Mercero a non-exclusive, royalty-free license, without right to sub-license (except to its sub-processors, as required for the provision of the Subscription Services), to use the Customer Data, solely as necessary to perform the Subscription Services and as otherwise may be agreed in writing by Customer. Customer reserves all other rights not expressly granted in this Agreement.

#### **3.3. Ownership of Intellectual Property Rights.**

**3.3.1. Ownership and Use of Customer Data.** Customer retains all of its rights, title and interest and Intellectual Property Rights in and to the Customer Data and Customer Confidential Information. No ownership interest in the Customer Data or Customer Confidential Information is transferred or conveyed to Mercero by virtue of this Agreement. Mercero will use Customer Data and Customer Confidential Information only for purposes of providing the Subscription Services, unless otherwise authorized in writing by Customer.

**3.3.2. Mercero's Intellectual Property and Ownership Rights.** As between Customer and Mercero, Mercero and Mercero's licensors retain and own all right, title and interest and all Intellectual Property Rights in and to the Subscription Services, Mercero's Confidential Information, and Mercero's Supplemental Materials, and all enhancements or improvements to, or derivative works of any of the foregoing created or developed by or on behalf of Mercero (collectively, "Mercero Intellectual Property"). Nothing in this Agreement transfers or conveys to Customer any ownership interest in or to the Mercero Intellectual Property.

**3.4. Suggestions.** If Customer provides Mercero with any suggested improvements or enhancements to the Subscription Services ("Suggestions"), then Customer also grants Mercero a non-exclusive, perpetual, irrevocable, paid-up, royalty-free, worldwide, transferable license, with right to sublicense, to make, have made, sell, offer for sale, use, import, reproduce, distribute, display, perform, and make derivative works of the Suggestions.

**3.5. Restrictions.** Customer will not: (i) except to the extent, if any, permitted by applicable law or required by Mercero's licensors, reverse assemble, reverse engineer, decompile or otherwise attempt to derive source code from any of the Mercero Platform; (ii) reproduce, modify, or prepare derivative works of the Mercero Platform; or (iii) share, rent or lease the Subscription Services, or use the Subscription Services to operate any timesharing, service bureau or similar business or to license the Mercero Platform as a standalone offering.

### **4. Compensation**

**4.1. Subscription Services Fees and Plans.** The rates for the Subscription Services are as published on the Subscription Page. Customer's subscription plan for the Subscription Services is specified in the applicable Sales Order and on the Subscription Page. Customer may not reduce Customer's commitment under the subscription



plan specified in the Subscription Page during the Subscription Term. Customer is not entitled to any refund of fees paid or relief from fees due if the volume of Subscription Services Customer actually uses is less than the volume Customer ordered, and Customer may not carry over any of the unused volume to Customer's next Subscription Term.

#### 4.2. Over-Quota Use

4.2.1. *Use in Excess of Entitlements.* If Customer's use of the Mercero Platform exceeds Customer's then current Entitlements ("**Excess Use**") then, without limiting any other remedies available to Mercero, Mercero may charge Customer for the excess use, by applying the fees applicable to the excess use (as solely determined by Mercero) ("**Over-Quota Fees**") against Customer's credit card on file with Mercero.

4.2.2. *Over-Quota Fees Collection.* Mercero will notify Customer of Customer's Excess Use before charging Over-Quota Fees. Mercero will base the excess Fees upon the next pricing tier that Mercero determines applicable to Customer's Excess Use.

4.2.3. *Changes to Subscription Plan.* Whenever Mercero charges Over-Quota Fees, Customer's subscription plan, Sales Order and Entitlements will be deemed automatically increased to reflect the pricing tier that Mercero applies.

4.3. **Payment of Subscription Services Fees.** Customer will pay Mercero the fees for the Subscription Services monthly or annually in advance, as specified in the applicable Sales Order, via USD payment. Mercero will not invoice for Subscription Services. All Fees are stated and payable in US dollars. Customer hereby authorizes Mercero or its agents and Customer's financial institution to charge any credit card submitted by Customer for all fees due and payable under this Agreement, including any and all Over-Quota Fees.

4.4. **Sales Taxes, Etc.** Customer will be responsible for any applicable sales, value-added, use and similar taxes, together with all customs and import duties, and similar levies and impositions ("**Taxes**") payable with respect to its acquisition of Subscription Services, or otherwise arising out of or in connection with this Agreement, other than taxes based upon Mercero's personal property ownership or net income. All Fees exclude Taxes. If Customer has tax-exempt status, Customer will provide written evidence of such status with its purchase orders or upon request by Mercero.

4.5. **Value Added Taxes.** All amounts payable under this Agreement are exclusive of any value added taxes or similar taxes ("**VAT**") levied or assessed by any taxing authority. If Mercero is required to account to the relevant tax authority for VAT, Customer must pay to Mercero (in addition to and at the same time as paying any other consideration for the Services) an amount equal to the amount of VAT, subject to Mercero providing a valid VAT invoice to Customer. Where VAT is required to be withheld by Customer on payments made to Mercero, the amount payable to Mercero shall be grossed up so that Mercero receives the same amount as if such VAT withholding had not applied. Where Customer is required to reimburse any expenses of Mercero, such reimbursement shall be treated for VAT purposes as part of the consideration payable for the Services by Mercero and shall not include any amount of VAT invoiced to Mercero unless the Mercero notifies Customer that it is not entitled to credit or repayment of that invoiced VAT from the relevant tax authority. In relation to any Services provided by Mercero to Customer under this Agreement, if reasonably requested by Mercero, Customer must promptly provide Mercero with details of the Customer's VAT registration and such other information as is reasonably requested in connection with such Mercero's VAT reporting requirements in relation to such Services. It is Mercero's understanding that, in line with the nature of the Services, Customer will be using the Services only for enterprise (business) purposes. Should any tax authority provide notification to that VAT was applied by Mercero in error, then: (a) Mercero shall without unreasonable delay provide Customer with a valid credit note; and (b) if the VAT applied in error was paid by Customer, Mercero shall, without unreasonable delay, repay to Customer any such VAT after obtaining a VAT credit or otherwise receiving a refund of such VAT from the tax authority for the VAT that was charged in error, subject to the reasonable cooperation of Customer in ensuring that, where reasonably

possible, Mercero will be able to apply for the refund. If VAT, GST, and other applicable indirect taxes were not charged but subsequently it is found that they should have been charged or such taxes are assessed and agreed with the relevant tax authority as being due on the consideration, the relevant taxes due will be paid upon presentation of a valid invoice and under the conditions that Customer has been notified of the assessment within a reasonable time. Any penalties or late payment interest related to the incorrect application of the VAT, GST, or other applicable indirect tax legislation shall be due by the party who is liable for the tax under the applicable law.

## **5. Warranties**

### **5.1. Warranties.** Mercero warrants to Customer that:

5.1.1. *Performance Warranty.* During the Subscription Term, the Mercero Platform, in the form provided by Mercero, will conform in all material respects to its applicable specifications set forth in the Documentation.

5.1.2. *Viruses.* Mercero will use commercially reasonable efforts, using applicable current industry practices, to ensure that the Mercero Platform, in the form provided by Mercero to Customer under this Agreement, contains no computer virus, Trojan horse, worm or other similar malicious code.

5.1.3. *Support Program.* Mercero will provide the Support Program in a good, professional and workmanlike manner, consistent with applicable industry standards.

5.1.4. *Infringement.* Mercero's provision to Customer of the Subscription Services does not infringe any third party patent existing under the laws of the United States, Canada, any member state of the European Economic Area, the United Kingdom, Switzerland, Australia, New Zealand, Japan, Singapore, South Korea, India, Argentina or Brazil, or infringe any third party copyright, trademark or service mark, or result from misappropriation by Mercero of any third party's trade secrets (collectively, an "**Mercero Infringement**").

5.1.5. *Compliance with Law.* The Subscription Services, in the form provided or made available by Mercero, will comply with all laws applicable to Mercero.

**5.2. Performance Remedy.** If the Mercero Platform fails to conform to the warranty set forth in Section 5.1.1 and Customer provides written notice of the non-conformance to Mercero within the applicable Subscription Term then, as Customer's exclusive remedy and Mercero's sole obligation: Mercero will either repair or, at its option, replace the non-conforming Mercero Platform or, if Mercero is unable to correct the non-conformance within 30 days of receipt of such written notice from Customer, Customer may terminate the applicable Subscription Services, and Mercero will refund to Customer a pro-rata amount of any Subscription Services fees prepaid to Mercero and applicable to the unutilized portion of the Subscription Term for the terminated Subscription Services.

**5.3. Infringement Remedy.** Customer's sole and exclusive remedy for any non-conformance with the warranty in Section 5.1.4 above will be Customer's defense and indemnification rights under Section 9.1 below, and Customer's termination rights under Section 8.2 below.

**5.4. Bugs and Abatement; Scope.** Without limiting the express warranties in this Section 5 or any express warranties specified in the Additional Terms of Service, Mercero does not warrant that the Mercero Platform or Subscription Services are completely free from all bugs, errors, or omissions, or will ensure complete security. THE WARRANTIES IN SECTIONS 5.1.1 AND 5.1.3 DO NOT APPLY TO ANY FREE SUBSCRIPTION, OR TO ANY Mercero SUPPLEMENTAL MATERIALS. Supplemental Materials developed, created or provided by third parties are made available AS IS, without warranty of any kind. The warranties in this Agreement are for the sole benefit of Customer, and may not be extended to any other person or entity.

**5.5. Disclaimer Of Implied Warranties.** Neither party makes any representation or warranty in connection with the



Subscription Services, except as expressly warranted in this Agreement or the Additional Terms of Service. TO

THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT AS SPECIFICALLY WARRANTED IN THIS SECTION 5 OR THE ADDITIONAL TERMS OF SERVICE, EACH PARTY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ANY IMPLIED WARRANTY OF NON-INFRINGEMENT OR IMPLIED OBLIGATION TO INDEMNIFY FOR INFRINGEMENT, ANY IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR USAGE OF TRADE, AND ANY STATUTORY REMEDY.

## **6. Confidential Information**

**6.1. Restrictions on use and Disclosure.** Neither Mercero nor Customer will disclose to any third party any information provided by the other party pursuant to or in connection with this Agreement that the disclosing party identifies as being proprietary or confidential or that, by the nature of the circumstances surrounding the disclosure, ought in good faith to be treated as proprietary or confidential (such information, “**Confidential Information**”), and will make no use of such Confidential Information, except under and in accordance with this Agreement. Each party may disclose Confidential Information to its Affiliates and service providers, and its Affiliates and service providers may use such information, in each case solely for purposes of this Agreement. Each party will be liable for any breach of its obligations under this Section 6 that is caused by an act, error or omission of any such Affiliate or service provider. Confidential Information includes information disclosed by the disclosing party with permission from a third party, and combinations of or with publicly known information where the nature of the combination is not publicly known. Mercero’s Confidential Information includes information regarding Mercero Platform, Mercero’s processes, methods, techniques and know-how relating to transaction management, user authentication or user authorization, Documentation, road-maps, pricing, marketing and business plans, financial information, information security information, Mercero’s ISMS Standards (defined in Section 7.4 below) statements and similar independent third party certifications, and Personal Data of Mercero personnel. Customer’s Confidential Information includes its proprietary workflows and processes, systems architecture, marketing and business plans, financial information, information security information, information pertaining to Customer’s other suppliers, and Personal Data of Customer personnel. This Section 6 does not apply to Mercero’s obligations regarding use and protection of Customer Data; those obligations are specified in Section 7 (Data Protection).

**6.2. Exclusions.** Except with respect to Personal Data, Confidential Information does not include information that the receiving party can establish: (i) has entered the public domain without the receiving party’s breach of any obligation owed to the disclosing party; (ii) has been rightfully received by the receiving party from a third party without confidentiality restrictions; (iii) is known to the receiving party without any restriction as to use or disclosure prior to first receipt by the receiving party from the disclosing party; or (iv) has been independently developed by the receiving party without use of or reference to the disclosing party’s Confidential Information.

**6.3. Disclosure Required By Law.** If any applicable law, regulation or judicial or administrative order requires the receiving party to disclose any of the disclosing party’s Confidential Information (a “Disclosure Order”) then, unless otherwise required by the Disclosure Order, the receiving party will promptly notify the disclosing party in writing prior to making any such disclosure, in order to facilitate the disclosing party’s efforts to protect its Confidential Information. Following such notification, the receiving party will cooperate with the disclosing party, at the disclosing party’s reasonable expense, in seeking and obtaining protection for the disclosing party’s Confidential Information. The receiving party will disclose only that portion of the Confidential Information that is required.

**6.4. Independent Development.** The terms of confidentiality under this Agreement will not limit either party’s right to independently develop or acquire products, software or services without use of or reference to the other party’s Confidential Information.

## **7. Data Protection**

### **7.1. Regulatory Issues.**

7.1.1. *Personal Data – Compliance with Applicable Law.* Customer may select the Personal Data it elects to input into and Process using the Mercero Platform in its sole discretion; Mercero has no control over the nature, scope, or origin of, or the means by which Customer acquires, Personal Data Processed by the Subscription Services. Subject to the Customer Consent Assurance (defined in Section 7.1.3 below), Mercero will comply, and will ensure that its personnel comply, with the requirements of state, provincial, regional, federal and national privacy laws and regulations governing Customer Personal Data in Mercero’s possession or under its control and applicable to Mercero’s provision of Subscription Services. Customer is solely responsible for ensuring that it complies with any legal, regulatory or similar restrictions applicable to the types of data Customer elects to Process with the Mercero Platform.

7.1.2. *ePHI.* If Customer is subject to US healthcare data protection laws (e.g., HIPAA), Customer may not use the Mercero Platform to Process “electronic Protected Health Information”.

7.1.3. *Data Consents.* Customer is solely responsible for obtaining, and represents and covenants that it has obtained or will obtain prior to Processing by Mercero, all necessary consents, licenses and approvals for the Processing of any Customer Data (and any other Personal Data provided by Customer) as part of the Subscription Services (the “**Customer Consent Assurance**”).

7.1.4. *Regulator Inquiries and Court Orders.* If any regulator, or any subpoena, warrant or other court or administrative order, requires Mercero to disclose or provide Customer Data to a regulator or to any third party, or to respond to inquiries concerning the Processing of Customer Data, Mercero will promptly notify Customer, unless prohibited by applicable law.

**7.2. Instructions.** Mercero will Process Customer Data only as necessary to provide the Subscription Services, and in accordance with Customer’s written instructions. This Agreement, and Customer’s use of the Mercero Platform’s features and functionality, are Customer’s complete set of instructions to Mercero in relation to the Processing of Customer Data. Mercero will not disclose Customer Data to third parties except (a) to its sub-processors, as required to perform the Services and in accordance with Section 7.6 below, and (b) as otherwise expressly agreed in writing between Customer and Mercero.

7.2.1. *CCPA Restrictions.* The restrictions in this Section 7.2.1 apply for purposes of Customer Data that is (a) Personal Data, and (b) subject to the California Consumer Privacy Act of 2018, as amended from time to time.

7.2.1.1. As between Customer and Mercero, for purposes of the CCPA, Customer is a “business” and Mercero is a “service provider” (each as defined in the CCPA).

7.2.1.2. Mercero will not retain, use, or disclose Personal Data for any purpose other than as required for the specific purpose of performing the Services and for the business purposes described in Section 14.8 (Service Performance Analytics);

7.2.1.3. Mercero will not sell Personal Data to any third party. For these purposes, “Sell” means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means any Personal Data to any third party for monetary or other valuable consideration.

7.2.1.4. For clarity, the restrictions in this Section 7.2.1 include retention, use or disclosure of Personal Data by Mercero outside of the direct business relationship between Mercero and Customer.

7.2.1.5. Mercero certifies that it understands the restrictions in this Section 7.2.1 and will comply with them.





**7.3. Information Security.** Mercero will implement and maintain commercially reasonable technical and organizational security measures designed to meet the following objectives: (i) ensure the security and confidentiality of Customer Data in the custody and under the control of Mercero; (ii) protect against any anticipated threats or hazards to the security or integrity of such Customer Data; (iii) protect against unauthorized access to or use of such Customer Data; and (iv) ensure that Mercero's return or disposal of such Customer Data is performed in a manner consistent with Mercero's obligations under items (i)-(iv) above. Customer is solely responsible for consequences of Customer's decision not to adopt updates or best practices that Mercero makes available to Customer.

**7.4. Audits and Security Assessments.** Mercero is and will remain in compliance with its SOC-2 statement and, with effect from July 2018, the ISO 27001 and ISO 27018 standards (collectively, "**ISMS Standards**"), throughout the Subscription Term. Mercero will cause its independent ISMS Standards certification auditors to verify the adequacy of the controls that Mercero applies to the Subscription Services at least annually. Mercero will provide Customer with copies of its ISMS Standards certifications applicable to Mercero's provision of Subscription Services, upon request by Customer. Mercero will in addition provide such information regarding its information security systems, policies and procedures as Customer may reasonably request relating to Customer's due diligence and oversight obligations under applicable laws and regulations.

**7.5. Data Export, Retention and Destruction.** Customer may export Customer Data from the Mercero Platform at any time during the Subscription Term, using the Mercero Platform's then existing features and functionality. Customer is solely responsible for its data retention obligations with respect to Customer Data. Customer may delete Customer Data on its Tenants at any time. Mercero will delete Customer's Tenants (and any data remaining on such Tenants) within 30 days of termination or expiration of the Subscription Term, and other Customer Data retained by Mercero (if any). Mercero is not obligated to delete copies of Customer Data retained in automated backup copies generated by Mercero, which Mercero will retain for up to 14 months from their creation. Such backup copies will remain subject to this Agreement until the copy, or the Customer Data in the copy, is deleted.

**7.6. Sub-Processors.** Customer consents to Mercero's use of sub-processors to provide aspects of the Subscription Services, and to Mercero's disclosure and provision of Customer Data to those sub-processors. Mercero publishes a list of its then-current sub-processors at <https://Mercero.com/legal> ("**Sub-Processor List**"). Mercero will require its sub-processors to comply with terms that are substantially no less protective of Customer Data than those imposed on Mercero in this Agreement (to the extent applicable to the services provided by the sub-processor). Mercero will be liable for any breach of its obligations under this Agreement that is caused by an act, error or omission of a sub-processor. Mercero may authorize new sub-processors by provision of not less than 30 days' prior written notice to Customer, and by updating the Sub-Processor List. If Customer objects to the authorization of any future sub-processor on reasonable data protection grounds within 30 days of notification of the proposed authorization, and if Mercero is unable to provide an alternative or workaround to avoid Processing of Customer Data by the objected to sub-processor within a reasonable period of time, not to exceed 30 days from receipt of the objection, then, at any time within expiration of such 30 days period, Customer may elect to terminate the affected Sales Order(s) without penalty, by notice to Mercero to that effect.

**7.7. Access by Mercero Personnel.** Mercero will ensure that its personnel access Customer Data only when authorized by Mercero, and in accordance with Mercero's applicable controls. Access is typically required only in connection with Mercero's provision of the Support Program, and then only when necessary to resolve an issue. Mercero will ensure that its personnel are subject to obligations of confidentiality with respect to Customer Data. Mercero will not permit its personnel to access Customer Data unless they have passed a criminal and employment background check.

**7.8. End User Requests.** If any End User requests Mercero to provide them with information relating to Processing of their Personal Data, or to make changes to their Personal Data, then Mercero will promptly notify Customer of the request, unless otherwise required by applicable law. Customer may make changes to User data using the features and functionality of the Mercero Platform. Mercero will not make changes to User data except as agreed

in writing with Customer.

**7.9. Breach Notification.** Mercero will notify Customer of any breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to Customer Data in Mercero's possession or under its control (a "Security Breach") within 72 hours of Mercero's confirmation of the nature and extent of the same or when required by applicable law, whichever is earlier. Each party will reasonably cooperate with the other with respect to the investigation and resolution of any Security Breach including, in the case of Mercero, prompt provision of the following, to the extent then known to Mercero: (i) the possible cause and consequences of the Security Breach; (ii) the categories of Personal Data involved; (iii) a summary of the possible consequences for the relevant Users; (iv) a summary of the unauthorized recipients of the Customer Data; and (v) the measures taken by Mercero to mitigate any damage. Upon confirmation of any vulnerability or breach of Mercero's security affecting Customer Data in Mercero's custody and control, Mercero will modify its processes and security program as necessary to mitigate the effects of the vulnerability or breach upon such Customer Data. Insofar as the Security Breach relates to Customer, and except to the extent required otherwise by applicable law, Customer will have approval rights on notifying its Users and any third party regulatory authority of the Security Breach. All security breach or security compromise notifications will be via the Mercero Platform dashboard or account center, and via email to the persons designated by Customer to receive notices in the Mercero Platform dashboard or account center.

**7.10. Territorial Restrictions.** Mercero will Process Customer Data within the AWS regions selected by Customer upon creation of the applicable Tenant. In addition, some processing of Customer Data will occur on infrastructure located in the European Union (currently Germany, with failover to the Republic of Ireland). Dashboard data may be viewed (but not stored) in the United States. Mercero personnel may access Customer Data from any location for purposes of providing Support Subscription Services (subject to the restrictions described in Section 7.7 above).

**7.11. Data Processing Addendum for GDPR.** If and to the extent Customer uses the Mercero Platform to Process Personal Data that is subject to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (known as the General Data Protection Regulation) ("GDPR") then (i) if Customer has executed a DPA with Mercero, pre-signed by Mercero, in the form published at <https://Mercero.com/legal> (the "DPA"), then the DPA applies, or (ii) if Customer has not executed a DPA, then the additional data protection provisions specified in Exhibit A to this Agreement apply.

## **8. Term; Termination of Sales Orders**

**8.1. General.** This Agreement will commence on the Effective Date and will continue in effect until terminated in accordance with Section 8.2 or 8.3 below.

**8.2. Termination On Breach.** In the event of a material breach of the Agreement by either party, the non-breaching party may terminate the Agreement or any Sales Order affected by the breach by giving the breaching party written notice of the breach and the non-breaching party's intention to terminate. If the breach has not been cured within the period ending 30 days after such notice, and if the non-breaching party provides written notice of termination to the breaching party ("Termination Notice"), then this Agreement or any such Sales Order will terminate within the time period specified in the Termination Notice. Notwithstanding the foregoing, (a) Customer's failure to pay any overdue fees and expenses within 10 days of Mercero notifying Customer of the overdue payment, (b) Customer's failure to provide a valid credit card within 10 days of Mercero's request, or (c) Customer's use of two or more Tenants in a manner that Mercero in its sole discretion determines is to avoid or reduce fees payable to Mercero, and which is not cured within 10 days of notification by Mercero, will each constitute a material breach of this Agreement; the default 30 day cure period described above is inapplicable to any breach under items (a), (b) or (c) above. If Customer has not cured a material breach within the applicable cure period (if any) then, without limiting Mercero's rights to terminate as described above, Mercero may, on not less than 5 business days' prior written notice to Customer, in its sole discretion, and without prejudice to its other rights following material breach



and failure to cure, until such breach has been cured in full, do all or any of the following: (i) downgrade Customer to a “Free” Self-Service Plan); or (ii) suspend performance of some or all of Mercero’s obligations to provide Subscription Services under this Agreement. If Customer terminates this Agreement or any Sales Order for breach in accordance with this Section 8.2, then Mercero will refund to Customer a pro-rata amount of any affected Subscription Services fees prepaid to Mercero and applicable to the unutilized portion of the Subscription Term for terminated Subscription Services.

**8.3. Termination for Convenience.** The parties acknowledge and agree that each Subscription Term is priced as a minimum term, and may not be terminated for convenience.

**8.4. Subscription Term and Renewal.** Each subscription term for Subscription Services will commence on the Subscription Start Date, and will continue for the period for which Customer has prepaid Mercero using the online checkout (for example, for one month or for one year) (an “**Initial Term**”). Upon expiration of the Initial Term the Initial Term will automatically renew for successive periods of the same length as the Initial Term (each, a “**Renewal Term**”), at the then-current rates specified on the Subscription Page. However, Mercero may require any Renewal Term to be at the rates and for the programs specified in a written notice to Customer, effective upon the later to occur of (a) not less than sixty (60) days of its written notice of such requirement, or (b) expiration of Customer’s Subscription Term in effect on the date on which Mercero transmits its notice that new rates will apply (applies to Customers with an annual subscription). Customer’s credit card will be automatically debited for the fees payable for each Renewal Term at the beginning of each Renewal Term. The Initial Term and each Renewal Term are individually referred to in these Terms as the “**Subscription Term**”. Customer may terminate the Subscription Term at any time by deleting its Account via the Mercero Platform dashboard; the termination will become effective at the end of the then-current period for which Customer has prepaid, and the Subscription Term will not renew. ***Customer acknowledges that its subscription will automatically renew, and Customer’s credit card will continue to be charged, until Customer terminates its subscription as specified in this Section 8.4.1.*** Mercero may terminate the Subscription Term upon expiration of the Initial Term or the then-current Renewal Term, by provision of not less than 10 days’ prior notice to Customer.

**8.5. Fulfillment of Obligations on Termination.** Except as otherwise specified in this Agreement or any Additional Terms of Service, termination of the Agreement or of any Subscription Services will not entitle Customer to any refund of or relief from payment of any Subscription Services fees paid or payable under this Agreement.

**8.6. Post Termination Obligations.** Following any termination of the Agreement or any Sales Order, each party will, within 30 days of such termination, (i) immediately cease use of any Confidential Information of the other communicated for the purposes of this Agreement or such Sales Order, and (ii) return or destroy (and certify destruction of) all copies of any Confidential Information of the other party disclosed under the Agreement or such Sales Order within 30 days of such termination, subject to each party’s customary backup and archival processes.

**8.7. Suspension.**

**8.7.1. Critical Threats.** If Mercero determines that Customer’s or any of its Users’ use of the Subscription Services or of any ecommerce service or site poses an imminent threat to (i) the security or integrity of any Customer Data or the data of any other Mercero customer, or (ii) the availability of the Mercero Platform to Customer or any other Mercero customer (collectively, a “**Critical Threat**”), then Mercero will immediately attempt to contact Customer to resolve the Critical Threat. If Mercero is unable to immediately contact Customer, or if Mercero contacts Customer but Customer is unable to immediately remediate the Critical Threat, then Mercero, acting reasonably in the circumstances then known to Mercero, may suspend Customer’s and its Users’ use of the Mercero Platform until the Critical Threat is resolved and Mercero is able to restore the Subscription Services for Customer.

**8.7.2. Other Non-Compliance.** If Mercero determines that Customer’s or any of its Users’ use of the Subscription



Services or of any ecommerce service or site do not comply with applicable law or with the Acceptable Use Policy, or if they subject Mercero or any of its sub-processors to liability to any third party, or if they infringe or are alleged to infringe any third party Intellectual Property Rights (collectively, a “Non-Compliance”), and if Customer has not remediated the Non-Compliance within 5 days of notification by Mercero, then Mercero may suspend Customer’s and its Users’ use of the Mercero Platform until the Non-Compliance is resolved and Mercero is able to restore the Subscription Services for Customer. If Mercero determines that the Non-Compliance is incapable of cure, then Mercero may immediately terminate its provision of Subscription Services to Customer.

**8.8. Survival.** The provisions of Sections 1, 3.3-3.5, 6, 7, 8.5-8.8, 9-11 and 14 of this Agreement will survive any termination or expiration of this Agreement.

## **9. Indemnification**

### **9.1. Mercero’s Infringement Indemnification.**

9.1.1. *Defense and Indemnity.* If any third party makes any claim against Customer that, if true, would constitute an Mercero Infringement (defined in Section 5.1.4) then, upon notification of such claim, Mercero will, at its sole cost and expense, defend Customer against such claim and any related proceeding brought by such third party against Customer, and indemnify Customer from and against all damages, fines and penalties finally awarded against Customer or agreed to be paid by Customer in a written settlement approved in writing by Mercero, and resulting from the Mercero Infringement. Mercero’s obligations under this Section 9.1.1 are subject to Customer’s compliance with the “Indemnification Conditions” (defined below).

“**Indemnification Conditions**” means the following conditions with which a party must comply in order to be entitled to defense or indemnification under the Agreement by the other party: (i) the indemnified party notifies the indemnifying party in writing of any claim that might be the subject of indemnification promptly after any executive officer of the indemnified party or member of the indemnified party’s legal department first knows of the claim, provided, however, that no failure to so notify an indemnifying party will relieve the indemnifying party of its obligations under this Agreement except to the extent that such failure materially prejudices defense of the claim, and except to the extent of damages incurred by the indemnifying party as a result of the delay; (ii) the indemnifying party is given primary control over the defense and settlement of the claim (subject to the foregoing, the indemnified party may nonetheless participate in the defense at its sole cost and expense); (iii) the indemnified party makes no admission of liability (except as required by applicable law) nor enters into any settlement without the indemnifying party’s prior written agreement (not to be unreasonably withheld); (iv) the indemnified party provides such assistance in defense of the proceeding as the indemnifying party may reasonably request, at the indemnifying party’s reasonable expense; and (v) the indemnified party uses all commercially reasonable efforts to mitigate its losses.

9.1.2. *Mercero’s Mitigation Rights.* If any Subscription Services become (or in Mercero’s opinion are likely to become) the subject of any infringement or misappropriation claim, Mercero may, and if Customer’s use of the Subscription Services is enjoined, Mercero must, at its sole expense, either: (i) procure for Customer the right to continue using the relevant Subscription Services; (ii) replace or modify the relevant Subscription Services in a functionally equivalent manner so that they no longer infringe; or (iii) terminate the applicable Sales Order or Customer’s rights to use affected Subscription Services, and refund to Customer a pro-rata amount of any subscription fees prepaid to Mercero and applicable to the unutilized portion of the Subscription Term for the terminated Subscription Services.

9.1.3. *Exclusions.* Notwithstanding the foregoing, Mercero will have no obligation with respect to any infringement or misappropriation claim to the extent based upon (i) any use of the Subscription Services not in accordance with their applicable license rights, (ii) the combination of the Subscription Services with other products, equipment, software, services or data not supplied by Mercero where the infringement would not have occurred but for such combination, or (iii) any Customer Data.

## **9.2. Customer's Consent Indemnification.**

9.2.1. *Defense and Indemnity.* If any third party makes any claim against Mercero that, if true, would constitute a non-conformance with the Customer Consent Assurance (defined in Section 7.1.3) then, upon notification of such claim, Customer will, at its sole cost and expense, defend Mercero against such claim and any related proceeding or investigation brought by such third party against Customer, and Customer will indemnify Mercero from and against all damages, fines and penalties finally awarded against Mercero or agreed to be paid by Mercero in a written settlement approved in writing by Customer, and resulting from the non-conformance. Customer's obligations under this Section 9.2.1 are subject to Mercero's compliance with the Indemnification Conditions.

9.2.2. *Mitigation Rights.* If Customer Data is, or in Customer's reasonable opinion is likely to become, the subject of a claim of non-conformance with the Customer Consent Assurance, then Customer will have the right to: (i) procure the rights necessary for Customer and Mercero to continue to Process the affected Customer Data; (ii) modify the Customer Data so that there is no longer a non-conformance; or (iii) delete or otherwise remove the non-conforming Customer Data from the Mercero Platform.

9.2.3. *Exclusions.* Notwithstanding the foregoing, Customer will have no obligation under this Section 9.2 or otherwise with respect to any claim of non-conformance with the Customer Consent Assurance to the extent based upon Mercero's Processing of the affected Customer Data other than in accordance with this Agreement.

**9.3. Improper Use of Mercero Platform.** Customer will indemnify and hold Mercero harmless from any claims, damages, losses, judgments, liabilities, costs, and expenses (including reasonable attorneys' fees) arising out of or in connection with any non-compliance by Customer or its Administrative Users with the Acceptable Use Policy.

## **10. Limitations and Exclusions of Liability**

**10.1. Exclusion of Certain Claims.** SUBJECT TO SECTION 10.3, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR TO ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE (INCLUDING ANY DAMAGES FOR LOSS OF DATA, GOODWILL, REVENUE OR PROFITS), EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, ARISING OUT OF (i) THE PERFORMANCE OR NON-PERFORMANCE OF THIS AGREEMENT OR ANY RELATED AGREEMENT, OR ANY SOFTWARE, PRODUCTS OR SERVICES PROVIDED HEREUNDER, OR (ii) ANY CLAIM, CAUSE OF ACTION, BREACH OF CONTRACT OR ANY EXPRESS OR IMPLIED WARRANTY, UNDER THIS AGREEMENT, ANY RELATED AGREEMENT OR OTHERWISE, MISREPRESENTATION, NEGLIGENCE, STRICT LIABILITY, OR OTHER TORT.

**10.2. Limitation of Liability.** Subject to Section 10.3, neither party's maximum aggregate liability arising out of this Agreement or any related agreement will in any event exceed the greater of US \$25, or the fees paid to Mercero under the Sales Order giving rise to the claim during (i) if Customer is pre-paying for Subscription Services on a monthly basis, the one month period, or (ii) if Customer is pre-paying for Subscription Services on an annual basis the twelve month period, immediately preceding the aggrieved party's first assertion of any claim against the other, regardless of whether any action or claim is based in contract, misrepresentation, warranty, indemnity, negligence, strict liability or other tort or otherwise.

**10.3. Exceptions.** Sections 10.1 and 10.2 do not apply to liability or loss which may not be limited by applicable law. Any amounts payable by an indemnified party to a third party pursuant to a judgment or to a settlement agreement approved in writing by an indemnifying party, liability for which falls within the indemnifying party's indemnification obligations under this Agreement, and all fees payable by Customer under this Agreement, will be deemed direct damages for purposes of this Section 10. Section 10.2 does not apply to (i) each party's defense and indemnification obligations, (ii) any infringement or misappropriation by Customer of any of Mercero's Intellectual Property Rights, (iii) Customer's obligations to pay fees and expenses when due and payable under this Agreement, or (iv) either party's obligations under Section 6 (Confidential Information).

**10.4. General.** Each party agrees that these exclusions and limitations apply even if the remedies are insufficient to cover all of the losses or damages of such party, or fail of their essential purpose and that without these limitations the fees for the Subscription Services would be significantly higher. Neither party may commence any action or proceeding under this Agreement more than two years after the occurrence of the applicable cause of action.

**11. Dispute Resolution**

**11.1. Governing Law and Venue.** This Agreement will be governed by and interpreted in accordance with the internal laws of the states or countries specified in the table below, without regard to conflicts of laws principles. In the event of any controversy or claim arising out of or relating to this Agreement, or its breach or interpretation, the parties will submit to arbitration as specified in the table below. Each party waives all defenses of lack of personal jurisdiction and inconvenient forum.

If the Customer’s address in the Sales Order is in:	The governing law is that of:	The arbitration bodies having exclusive jurisdiction are:
The USA, Mexico, Canada or any country in Central or South America or the Caribbean	Colorado, USA, and controlling United States federal law	Arbitration in Denver, Colorado, USA under the Commercial Arbitration Rules and the Optional Rules for Emergency Measures of Protection of the American Arbitration Association; those rules are incorporated by reference in this clause. <sup>1</sup>

Note 1: The Tribunal will consist of one independent, disinterested arbitrator. The language of the arbitration will be English. The determination of the arbitrator will be final, conclusive and binding. Judgment upon the award rendered may be entered in any court of any state or country having jurisdiction.