SWARM

MERCHANT 'SOFTWARE AS A SERVICE' TERMS OF SERVICE

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1. Introduction

1.1. *Background.*

1.1.1. Swarm has developed a cloud-based service with related mobile app technology which it makes available to subscribers for the purpose of customer loyalty, mobile vouchering and mobile payment.

1.1.2. The Customer wishes to make use of the services provided by Swarm, and Swarm wishes to provide such services to the Customer.

1.1.3. Accordingly, the parties agree to the terms set out in this Agreement.

1.2. *Interpretation.* The interpretation of this Agreement and the definitions of terms in it are set out below in clause 28 (Interpretation) and clause 29 (Glossary).

1.3. *Precedence.* If any conflict or inconsistency exists between the terms of the Principal Agreement (this document) and any schedule or annexure to it, then the respective documents will take precedence in interpretation as follows in descending order:

1.3.1. Principal Agreement (The SWARM SaaS Merchant Agreement + this Merchant 'Software as a Service' Terms of Service);

1.3.2. Service Terms (As outlined in the The SWARM SaaS Merchant Agreement); then

1.3.3. any other schedule or annexure.

2. Appointment & Term

2.1. *Appointment.* The Customer hereby appoints Swarm to provide the Services to the Customer on the terms and conditions of this Agreement, and Swarm accepts the appointment.

2.2. *Commencement & Term.* This Agreement will commence on the Effective Date and will continue for a period of one (1) calendar month (the "Initial term").

2.3. *Renewal.* Upon expiry of the Initial Term, this Agreement will continue in force indefinitely until terminated by either party upon one (1) calendar month's prior written notice.

3. Service

3.1. In return for payment of the relevant Fees and subject to the terms of this Agreement, Swarm will provide Services in accordance with the Service Terms (The SWARM SaaS Merchant Agreement).

4. Fees and Payment

4.1. *Service Fees.* Unless otherwise stated in The SWARM SaaS Merchant Agreement, the Customer will pay Service Fees to Swarm or Swarm's nominated representative in advance.

4.1.1. Service Fees will be invoiced monthly in advance and must be paid within fifteen (15) days after the date of the invoice.

4.1.2. Swarm or Swarm''s nominated representative will provide the Customer with a tax invoice for all locations in a single invoice by no later than the 5th of each calendar month including a report of the number of Locations for purposes of calculating the Service Fees, as described in The SWARM SaaS Merchant Agreement.

4.1.3. The invoice will reflect the Service Fees in respect of each Location if required. Any removal or cancellation of the Swarm service for individual stores must be provided in writing with at least one (1) calendar month's prior written notice.

4.2. *Transaction Fees.* Unless otherwise stated in The SWARM SaaS Merchant Agreement, the Customer will pay Transaction Fees to Swarm in arrears.

4.2.1. Transaction Fees will be invoiced monthly in arrears and must be paid within fifteen (15) days after the date of the invoice.

4.2.2. Swarm or Swarm's nominated representative will provide the Customer with a tax invoice for all Locations collectively, as described in The SWARM SaaS Merchant Agreement. A report of the number of Transactions for purposes of calculating the Transaction Fees will be available in the Swarm Dashboard platform.

4.2.3. The invoice will reflect the Transaction Fees in respect of all Locations.

4.3. *Other Fees.* Unless otherwise stated in The SWARM SaaS Merchant Agreement or another Schedule, the Customer will pay Fees other than Transaction Fees and Service Fees (such as implementation fees or *ad hoc* fees) to Swarm Swarm's nominated representative in arrears, unless otherwise stated on the relevant CE and invoice.

4.3.1. Such Fees will be invoiced monthly in arrears, or according to the payment terms on the CE and invoice, and must be paid within seven (7) days after the date of receipt of the invoice.

4.3.2. Swarm or Swarm's nominated representative will provide the Customer with a tax invoice setting out the calculation of such Fees, as described in The SWARM SaaS Merchant Agreement.

4.4. *Invoices.*

4.4.1. The Customer must challenge Swarm's calculations within seven (7) days of receipt of invoice. The Customer consents to the receipt of electronic tax invoices.

4.5. Payment.

4.5.1. The Customer must pay all amounts due to Swarm or Swarm's nominated representative without deduction or set-off for any reason.

4.5.2. No obligation to make payment will be cancelled and no refunds will be given under this Agreement unless agreed between the Parties in writing.

4.5.3. Payment must be made by direct deposit into a bank account designated by Swarm. Swarm may designate a new bank account or another method of payment by written notice to the Customer.

4.6. Pricing. The Fees are as set out in the Service Terms (The SWARM SaaS Merchant Agreement).

4.7. *Escalation.* Swarm may increase the Fees upon one calendar month's written notice to the Customer, unless otherwise stated in a Schedule. Such increase may be in accordance with any increases which have been imposed upon it by its suppliers and/or with benchmarks in the South African IT industry which will include, but not be limited to, changes in exchange rates, and increases in labour costs (having regard to, *inter alia*, premium salaries being paid to specialist personnel, the accelerated demand by computer users for new computer systems, bonuses, "high average" salaries and "skills scarcity" premiums).

4.8. *Interest on Outstanding Amounts.* Any amount which remains unpaid beyond the date upon which it becomes owing will attract an administration fee of R650 per month (or equivalent in another curreny) as well as interest at the prime overdraft rate (percent, per annum) charged by Swarm's then current bankers from time to time, as evidenced by any manager of such bank, whose authority it will not be necessary to prove. Such interest will be calculated from the due date of payment to the date of actual payment, both days inclusive, compounded monthly in arrears and the Customer agrees and undertakes to pay such interest.

4.9. *Recovery of outstanding amounts.* Where Swarm employs the services of attorneys or other debt-recovery agencies in respect of any outstanding debt or amount then the Customer undertakes to pay on demand all legal costs incurred on the scale as between attorney and own client and including related costs such as collection commission and tracing fees.

4.10. *Taxes.* It is recorded that all amounts to be paid by the Customer to Swarm in terms of this Agreement are exclusive of any VAT, export duties and any other taxes, duties, fees, costs, and charges raised on the provision of the Services, or which may be attributable thereto, which will be paid by the Customer in addition to the amounts set out in this Agreement.

4.11. *Allocation.* Swarm may allocate amounts received from the Customer in terms hereof as follows: firstly, towards administration fees, interest and reimbursement of expenses, and secondly towards Fees payable for Services rendered.

5. Equipment

5.1. The Customer may purchase scanners and other equipment from Swarm from time to time as described in the Schedules. Such equipment will either be procured as set out in a Schedule, or by separate order.

5.2. The equipment will be shipped to the Location(s) concerned by Swarm at the Customer's risk and cost after payment for the equipment in full by the Customer.

5.3. Equipment prices will either be set out in the relevant Schedule, or will be on an accepted quotation basis.

5.4. Swarm is not responsible for the installation and maintenance of any equipment, and the Customer must ensure that its PoS or Hardware Provider installs and maintains such equipment as necessary.

6. Intellectual Property

6.1. *No License in Server Software.* The Services are provided by Swarm to the Customer using the Swarm Server Software, which is proprietary to Swarm and is at all times installed on computer servers administered by Swarm (though the servers themselves may be under the physical control of a third party). The Customer does not require a reproduction of any Swarm Server Software in order for Swarm to provide the Services. Consequently, nothing in this

Agreement should be interpreted as granting to the Customer, the Authorised Users or any other party any license (whether implied or otherwise) or other Intellectual Property right whatever in the Swarm Server Software or Know-How.

6.2. *Ownership of Customer Data.* The Customer will own all Intellectual Property in the Customer Data (subject to third party rights).

6.3. *Retention of Rights*. The Customer acknowledges and agrees that Swarm owns all Intellectual Property in the Swarm Server Software, the Swarm App and the Program Documentation. Any rights to Intellectual Property granted to the Customer are limited to the rights set out in this clause 6. Beyond such rights, nothing in this Agreement will be interpreted as granting the Customer a license to deal in any way with the Swarm Server Software or any Intellectual Property owned by Swarm, nor will anything be construed as an assignment of such rights. Swarm (or its licensors as the case may be) will remain solely entitled to all ownership rights in the Swarm Server Software, including all Intellectual Property therein and all Know-How represented by or incorporated in the Swarm Server Software. Notwithstanding the provisions of clause 6.2:

6.3.1. Any adaptation of the Swarm Server Software or Swarm App will not constitute Customer Data.

6.3.2. The Customer's ownership of Customer Data does not give rise to any right to use the Swarm System or Swarm Server Software not provided for in this Agreement. In particular Swarm does not give the Customer license to use the Swarm Server Software or any component thereof to process, display or otherwise give effect to the Customer Data.

6.4. *Customisations of Swarm Software.* The Customer may request Swarm to customise the Swarm Server Software or Swarm App to its particular needs. For the avoidance of doubt, any resulting adaptation to the Swarm Server Software or Swarm App undertaken on the Customer's instructions will be owned by Swarm, even if the adaptation contains Intellectual Property or Know-How owned by the Customer.

6.5. *Use of Know-How.* To the extent that Swarm utilises any of its Know-How in connection with its obligations in terms of this Agreement, same will remain the property of Swarm and the Customer will acquire no right in such Know-How.

6.6. *License of Customer Data.* The Customer grants Swarm a non-exclusive, royalty free and non-assignable license to deal with Intellectual Property owned by the Customer to the extent that it is necessary for the provision of the Services.

6.7. *Consumer and Transaction Data.* In regard to all Personal and Transaction Data generated through use of the Swarm Platform and Applications, Swarm will be the Data Owner and Controller and Swarm will grant the Customer a non-exclusive, royalty free and non-assignable license to personal and transaction data to the extent that it is necessary for the provision of the Services. The Customer will also be Data Controller of that Personal Data.

7. Intellectual Property Indemnity

7.1. Each Party (the "Indemnifying Party") hereby indemnifies and holds the other Party (the "Innocent Party") harmless from and undertakes to pay all damages (including legal costs on the scale as between attorney and own client and any additional legal costs), if any, finally

awarded against the Innocent Party by a court of competent jurisdiction in any action relating to or arising from an infringement by the Indemnifying Party (including Authorised Users in the case of the Customer) of a third party's Intellectual Property rights relating to or arising from the provision of the Services.

8. Customer Cooperation

In order to allow Swarm to provide the Services, the Customer agrees to provide such assistance, support and co-operation as is reasonably required by Swarm. The Customer must, without limitation:

8.1. *Co-operation.* procure that its employees, officers and agents co-operate with and give Swarm any necessary assistance in the provision of the Services, and procure that sufficiently qualified and authorised Personnel are made available for this purpose;

8.2. *Instructions and Policies.* comply with any reasonable instructions given by Swarm relating to the provision of the Services.

8.3. *Requests for information.* respond to any request for information, access or authorisation as soon as reasonably possible, having regard to the circumstances of the request.

8.4. *Consents and decisions*. timeously provide necessary consents or approvals and take such decisions as are necessary in order for Swarm to provide the Services without impediment or delay;

8.5. *Customer Material*. provide Swarm with such information and documentation reasonably required to enable Swarm to comply with its obligations in terms of this Agreement, and to be responsible for the accuracy and completeness of the information and documentation and all other data provided to Swarm pursuant to its provision of the Services;

8.6. *Customer purchase and basket data.* The Customer allows and agrees to provide SWARM with all basket data collected through the PoS integration relating to any mobile loyalty, payment and vouchering running through the PoS integration. The Customer also allows and agrees to provide SWARM with their total turnover per quarter for Swarm to use to provide reporting to compare the Customers total turnover alongside the turnover through the Swarm platform.

9. Variation Procedure

9.1. *Scope Changes.* During the currency of this Agreement, events may occur which require a change to the nature or scope of the Services. Such changes will be implemented on the following basis:

9.1.1. Should either Party wish to propose any change to the nature or scope of the Services, such change must be requested by way of a written proposal to the other Party detailing the desired changes.

9.1.2. Should such proposal be made by:

1.1.1.1. the Customer, the Customer must specify the reasons for that change and describe the change in sufficient detail to enable Swarm to formulate a response. Swarm must investigate the likely impact of any proposed changes or amendments upon the relevant Services and the provision thereof and must provide the Customer with a document setting out such

impact, including amended scope, pricing and timeframes in respect thereof (a "Change Note");

1.1.1.2. Swarm, it must detail in a Change Note the reasons for and impact of the change, the Services required to implement the change and the effect that the changes, if implemented, will have on the relevant Services, setting out sufficient detail to enable the Customer to formulate a response.

9.1.3. If the Customer wishes Swarm to produce a quotation in respect of the changes to be effected under the Change Note, Swarm may charge the Customer for production of the quotation on a Time and Materials basis.

9.1.4. The Parties must discuss the proposed changes and effect such amendments to Swarm's Change Note as may be agreed. The Change Note must then be considered by the Customer and approved or rejected in its discretion, provided that if a Change Note:-

1.1.1.1. is accepted by the Customer, it must be signed off by duly authorised representatives of the Parties and incorporated into the relevant Schedule;

1.1.1.2. is rejected by the Customer, the Services will continue to be provided by Swarm on the existing terms.

9.1.5. Neither Swarm nor the Customer will be entitled to proceed or require the implementation of any change to the Services pursuant to this clause 9 until such change and all matters relating it to have been agreed in writing between the Parties in accordance with the provisions of this clause 9. Pending signoff as aforesaid, the Parties must continue to perform the obligations without taking account of the proposed change. Neither Party will be obliged to agree to any change proposed by the other Party but the Parties may not unreasonably delay or withhold the agreement to a proposed change.

9.1.6. Notwithstanding the above, no change agreed between the Parties and reduced to writing and signed by the Parties will be invalid for the sole reason that the Parties failed to comply with the process set out in this clause 9.

10. Dependencies

10.1. The Parties note that Swarm will be able to meet its obligations in providing the Services only if dependencies are fulfilled timeously, and that in the event that any due date is not met as a result of such non-fulfilment, Swarm cannot be penalised or deemed to be in breach of this Agreement if it should not deliver by any due date, or at all. Such dependencies are any action required to be performed by the Customer (or a third party retained by the Customer or otherwise not under the control of Swarm) which Swarm reasonably requires to be performed timeously so as to deliver the Services on due date. The Customer must in particular (unless stated to the contrary in a Schedule or due to reasons out of its control):

10.1.1. be responsible for the acquisition, installation and configuration of suitable hardware, as well as the acquisition, installation and configuration of all operating systems and other software necessary for the proper operation of the Customer's computer

systems (the Customer will be liable for all costs related to such hardware and software, which must be available timeously so as not to delay the provision of Services by Swarm);

10.1.2. procure and pay for all necessary internet connectivity services and bandwidth, which must be available timeously so as not to delay the provision of Services by Swarm;

10.1.3. provide any decisions and approvals required as soon as is reasonably possible;

10.1.4. notify Swarm as soon as reasonably possible of any issues, concerns or disputes;

10.1.5. make available sufficiently qualified and authorised Personnel, with appropriate access rights and permissions; and

10.1.6. provide Swarm with all necessary input in respect of design, content or any other information reasonably required and duly requested by Swarm in order for it to provide the Services;

10.1.7. ensure that it complies with the provisions of clause 11 and procure that the PoS Provider and the Loyalty Engine Provider meet the obligations set out in that clause.

11. Third Party Service Providers

11.1. *PoS Provider.* In order for Swarm to provide the Service, the Swarm System must be integrated into the PoS installed at each of the Locations. Accordingly, it is the sole duty of the Customer to ensure that the PoS specified in the Functional Specification (The SWARM SaaS Merchant Agreement) is maintained at each Location and remains compatible with Swarm's requirements for provision of the Services. The Customer must further procure that the PoS Provider in respect of the PoS installed at each Location:

11.1.1. co-operates with the Loyalty Engine Provider in integrating the PoS with the Loyalty Engine in such a way that data can be transmitted to and from the Swarm System via the Loyalty Engine to allow for provision of the Services, and does the same in respect of any Loyalty Engine substituted by agreement between the Parties;

11.1.2. maintains the PoS and any equipment required for provision of the Services (including equipment procured from Swarm);

11.1.3. timeously implements updates provided to it by the Loyalty Engine Provider;

11.2. *Loyalty Engine Provider.* It is the sole duty of the Customer to procure access to the Loyalty Engine specified in the Functional Specification (The SWARM SaaS Merchant Agreement) and install it at the Locations (if necessary). The Customer must further procure that the Loyalty Engine Provider (in cases where the Loyalty Engine Provider is a party other than Swarm):

11.2.1. makes such adaptations to the Loyalty Engine so as to allow data can be transmitted from the PoS to and from the Swarm System via the Loyalty Engine to allow for provision of the Services; and

11.2.2. integrates the Loyalty Engine with the PoS at each Location in such a way that data can be transmitted as set out in clause 11.2.1, and does the same in respect of any PoS substituted by agreement between the Parties.

11.3. *PoS Integration.* SWARM has the right at its sole discretion to adjust, at any time, the way in which the SWARM system integrates with the PoS provider/s, whether a direct integration or whether or not SWARM chooses to utilise a 3rd party to facilitate that integration.

11.4. *Use of 3rd party solutions.* SWARM has the right at its sole discretion to make use of any 3rd party solutions or providers in order to provide its SWARM services.

12. Acceptance

12.1. Swarm must submit a written request to the Customer's representative for acceptance of Deliverables.

12.2. Swarm must conduct the Acceptance Tests in respect of the Deliverables which will determine whether the Deliverables are materially in conformance with the Functional Specification. The Customer may observe, and to the extent considered reasonable by Swarm, participate in the conduct of the Acceptance Tests, but must do all things and provide all information without undue delay.

12.3. Within 5 days from Swarm's written request to the Customer's representative for acceptance of Deliverables, the Customer must provide Swarm with written acknowledgement of the acceptance or failure of Acceptance Testing.

12.4. The acceptance tests and acceptance of the Deliverables are related only to SWARM's deliverables. Any delay in the Customer launching the solution as a result of delays in 3rd party deliverables such as PoS updates and scanner installations by the PoS or hardware provider, or any delays from the Customers' side for whatever reason will not impact the acceptance of the Swarm deliverables or the Hand-over date, at which point the balance of the implementation fee will be due and the monthly service fee for all locations included in the initial locations list will commence.

12.5. For any rejected Deliverables, the Parties will agree upon a deadline for Swarm to correct the deficiencies. Swarm will correct the deficiencies and will submit another request for acceptance before the agreed upon deadline pursuant to the procedure in this clause 12.

12.6. This process will be repeated until all material deficiencies in the Deliverables are corrected according to the standards contained in the relevant Schedule.

12.7. Upon acceptance, the Customer's Relationship Manager must provide Swarm with written acceptance of the Deliverables.

12.8. If the Customer does not either accept or reject the Deliverables within 5 (five) Business Days following receipt or re-submission of the Deliverables and the written request, the Customer will be deemed to have accepted the Deliverables.

13. Use of Services

1.1. *Customer's Responsibility.* The Customer will have access to the Service by means of a username and password. The Customer accepts that the Customer is responsible for the consequences of the Customer's use of the Service. This responsibility extends to all of the Customer's employees, officers or agents that may access the Service.

1.2. *Acceptable Use.* The Customer must make use of the Services in a lawful manner, and Swarm may further impose rules for the use of the Services in an Acceptable Use Policy ("AUP"). The

Customer must abide by the Acceptable Use Policy and ensure that Authorised Users do so. Further, due to the fluid nature of security threats and evolving technology, Swarm will amend the Acceptable Use Policy from time to time. The Acceptable Use Policy as amended will be available for viewing on the Swarm Website.

1.3. *Status of AUP.* For the avoidance of doubt, the Acceptable Use Policy will contain reasonable rules for conduct, which are not themselves material terms of this Agreement; the Customer's duty under this Agreement is to abide by such reasonable rules as Swarm may include in the Acceptable Use Policy from time to time. An amendment to the Acceptable Use Policy is hence not an amendment to this Agreement so long as it does not affect a material term.

14. Personal Information

1.1. *Definitions.* The terms "Data Subject", "De-identify", "Personal Information" and "Processing" have the meanings assigned to them in the Protection of Personal Information Act 4 of 2013.

1.2. *Processing of Personal Information.*

1.1.1. Swarm and the Customer are each responsible for complying with their respective obligations under applicable laws governing the Processing of Personal Information.

1.1.2. Swarm will restrict Processing of Personal Information to the extent necessary to provide the Services.

1.1.3. The Party that collects Personal Information is responsible for obtaining each Data Subject's consent for Processing Personal Information for purposes consistent with providing the Services, or otherwise ensuring the lawfulness of such Processing in accordance with applicable law.

1.1.4. Swarm may withhold access by the Customer to any consumer's Personal Information if it believes that access to such Personal Information by the Customer would constitute a breach of applicable law.

1.3. *Notification of Unauthorised Access.* Each Party must notify the other immediately where it has reasonable grounds to believe that the Personal Information of a Data Subject has been accessed or acquired by any unauthorised person.

1.4. *Information Security Standards.* Both Parties must have due regard to generally accepted information security practices and procedures which may apply to it generally or be required in terms of specific industry or professional rules and regulations.

15. Suspension of Service

1.1. *General Grounds for Suspension.* Swarm is entitled to suspend provision of the Services to the Customer where:

1.1.1. a court of competent jurisdiction so orders;

1.1.2. Swarm needs to carry out Emergency Maintenance;

1.1.3. the Customer has not made payment of monies owing to Swarm by due date, and has not rectified such breach within 7 (seven) days of written demand delivered in terms of clause 26;

1.1.4. Swarm becomes aware of a potential threat to the proper operation or security of the Swarm System; or

1.1.5. Swarm has reasonable grounds to believe that the Services are being used fraudulently, or unlawfully, or in violation of the terms of this Agreement.

1.2. *Notice of Suspension.* Swarm is entitled to suspend the Services as set out in clause 15.1 immediately and without notice. Nonetheless in the case of the grounds set out in clauses 15.1.4 or 15.1.5 Swarm must provide the Customer with such advance notice as is reasonable in the circumstances while taking into account the need to avoid loss to Swarm, the Customer or any third party.

1.3. *Period of Suspension.* The suspension will be for a period that is reasonable under the particular circumstances that gave rise to the suspension.

1.4. *Suspension for Upgrades or Maintenance.* Swarm may suspend provision of the Services should this be necessary for required upgrades or maintenance to the Swarm System. Swarm must provide the Customer with no less than two (2) weeks 'notice of such suspension and must ensure that takes place at a time and for a duration that minimises the impact of such suspension on provision of the Services.

16. Relationship

16.1. *Independent Contractor.* The Parties agree that the relationship between them is one of commissioner and independent contractor, and nothing in this Agreement will be construed as giving rise to a relationship of employer and employee, whether between the Customer and Swarm or between the Customer and any officer, employee or agent of Swarm.

16.2. *No Agency, Partnership or Joint Venture.* This Agreement does not give rise to a relationship of principal and agent, a partnership or a joint venture between the Parties. Neither Party will be entitled to conclude any agreement on behalf of the other, nor to sign any document on behalf of the other, unless so specifically authorised in writing by the other.

16.3. *Good Faith.* Both Parties to this Agreement (including the employees, officers and agents of the Parties) undertake to use their best endeavours and exercise good faith in implementing the provisions of this Agreement according to its intent and purpose and they further undertake to pass such resolutions and do all such acts and deeds as may be necessary, to this end.

17. Confidential Information

1.1. *Acknowledgment of Confidentiality.* Each Party ("Receiving Party") must treat and hold as confidential all information which it may receive directly or indirectly from the other Party ("Disclosing Party") in connection with this Agreement which the Disclosing Party designates as confidential or which, under the circumstances surrounding disclosure, ought to be treated as confidential (the "Confidential Information"). For the purposes of this clause 17, "employee" means employees or officers of either of the Parties but specifically excludes, without limitation, agents, independent contractors and service providers.

1.2. *Scope.* The Confidential Information of the Disclosing Party will, without limitation, include all information relating to:

1.2.1. Know-How, all program code (including of the Swarm Server Software and Swarm App) and associated material and the Service Description and the information contained therein;

1.2.2. the Disclosing Party's past, present and future research and development;

1.2.3. the Disclosing Party's business activities, products, services, customers and suppliers;

1.2.4. the Disclosing Party's technical knowledge and trade secrets;

1.2.5. the terms and conditions of this Agreement;

1.2.6. any information identified as confidential; and

1.2.7. any other material which contains or otherwise reflects, or is generated or derived from any such Confidential Information.

1.3. *Duty of Confidentiality.* The Receiving Party agrees that in order to protect the proprietary interests of the Disclosing Party in the Confidential Information:

1.3.1. The Receiving Party must only make the Confidential Information available to those of the Receiving Party's employee and professional advisors who are actively involved in the execution of the Receiving Party's obligations under this Agreement and then only on a "need to know" basis;

1.3.2. If the Receiving Party makes use of independent contractors in its execution of its obligations under this Agreement it must:

1.1.1.1. only make the Confidential Information available to such independent contractors with the Disclosing Party's consent, and

1.1.1.2. procure that such independent contractors are bound in writing to terms at least as stringent as those which bind the Receiving Party in this clause 17.

1.3.3. The Receiving Party must take all reasonable steps to impress upon those employees who need to be given access to Confidential Information, the secret and confidential nature thereof, and to ensure their compliance with this clause 17.

1.3.4. Subject to the right to make the Confidential Information available to its employee and professional advisors under clause 17.3.1 above, the Receiving Party will not at any time, whether during this Agreement or thereafter, either use any Confidential Information or directly or indirectly disclose any Confidential Information to third parties.

1.3.5. All instructions, drawings, notes, memoranda, records and other information in whatever format and of whatever nature relating to the Confidential Information which have or will come into the possession of the Receiving Party and its employee, will be and will at all times remain the sole and absolute property of the Disclosing Party and must promptly be handed over to such Party or be destroyed when no longer required for the purposes of this Agreement.

1.4. *Exclusions.* The aforegoing obligations will not apply to any information which -

1.4.1. is lawfully in the public domain at the time of disclosure;

1.4.2. subsequently and lawfully becomes part of the public domain by publication or otherwise;

1.4.3. subsequently becomes available to the Receiving Party from a source other than the Disclosing Party, which source is lawfully entitled without any restriction on disclosure to disclose such Confidential Information; or

1.4.4. is disclosed pursuant to a requirement or request by operation of law, regulation or court order.

1.5. *Survival.* This clause is severable from the remainder of the Agreement and will remain valid and binding upon the Parties, notwithstanding any termination thereof, for a period of 5 (five) years after the effective date of termination.

18. Dispute Resolution

1.1. *Negotiation.* Should any dispute of whatsoever nature arise between the Parties concerning this Agreement, the Parties must try to resolve the dispute by negotiation. This entails that the one Party invites the other in writing to meet and attempt to resolve the dispute within 7 (seven) days from date of written invitation.

1.2. *Mediation.* If the dispute has not been resolved by such negotiation, either of the Parties may submit, by written notice to the other party, the dispute to the Arbitration Foundation of Southern Africa ("AFSA") for administered mediation, upon the terms set by the AFSA Secretariat. The receipt by either party of a notice as aforesaid, will constitute the submission of the dispute to arbitration for the purposes of delaying the completion of prescription in terms of section 13 of the Prescription Act No. 68 of 1969 or the corresponding provisions in any amendment thereto or replacement legislation.

1.3. *Arbitration.* Failing such a resolution, the dispute, if arbitrable in law, will be finally resolved in accordance with the Rules of the AFSA by an arbitrator or arbitrators appointed by AFSA. The arbitration will be held in Cape Town, in English.

1.4. *Consent.* This clause constitutes an irrevocable consent by the Parties to any proceedings in terms hereof and neither of the Parties will be entitled to withdraw from the provisions of this clause or claim at any such proceedings that it is not bound by this clause.

1.5. *Urgent Relief.* The aforegoing will not restrict the right of either Party to apply to a competent court for relief of an urgent nature or should its intellectual property rights be violated or threatened.

1.6. *Persisting Duty to Perform.* Pending final settlement or determination of a dispute, the Parties must continue to perform their subsisting obligations hereunder.

1.7. *Severability.* This clause is severable from the rest of this Agreement and will remain in effect even if this Agreement is terminated for any reason.

19. No Warranties

19.1. Save as expressly set out in this Agreement or its Schedules, and to the maximum extent permitted by law, Swarm does not make any representations nor does it give any warranties

or guarantees of any nature whatsoever in respect of the Services, which are provided on an "as is" and "reasonable effort" basis, and all warranties which are implied or residual at common law are hereby expressly excluded.

20. Limitation of Liability

20.1. *Damages excluded.* Swarm is not liable for any loss or damage of whatsoever nature and howsoever arising (including consequential, indirect, punitive, special or incidental loss or damage which will include but will not be limited to loss of property, data, profit, business, goodwill, revenue or anticipated savings) or any costs (including legal costs on the scale as between attorney and own client and any additional legal costs), claims or demands of whatsoever nature and howsoever arising, whether out of breach of express or implied warranty, breach of contract, misrepresentation, negligence, strict or vicarious liability, in delict or otherwise, and whether in the contemplation of the Parties or not, and whether arising from or relating to this agreement, or otherwise.

20.2. *Indemnity.* Each Party (the "Indemnifying Party") will indemnify, defend, and hold the other Party (the "Innocent Party") harmless from and undertakes to pay all damages (including legal costs on the scale as between attorney and own client and any additional legal costs), if any, finally awarded against the Innocent Party by a court of competent jurisdiction in any action insofar as they relate to or arise from:

20.2.1. breach by the Indemnifying Party of privacy rights, including the infringement of any law (whether South African or foreign) governing protection of Personal Information or transborder data flows; or

20.2.2. any unlawful act or breach of this Agreement by the Indemnifying Party.

20.3. *Benefit of Limitations.* These limitations on liability and indemnities apply to the benefit of each Party and its Affiliates, Personnel, directors, officers, and employees.

20.4. *Precedence.* In the case of ambiguity, this clause 18 will take precedence over any expression of the Parties 'intention, whether express or implied, that may be contained elsewhere in this Agreement.

21. Breach and Termination

21.1. *Termination for Cause.* If either Party:

21.1.1. fails to comply with any of its obligations or commits a breach of this Agreement and fails to remedy the default or breach within 5 (five) Business Days after having received a written notice to do so;

21.1.2. resolves to begin business rescue proceedings as contemplated in chapter 6 of the Companies 'Act 71 of 2008;

21.1.3. is placed in provisional or final liquidation or sequestration, or administration or judicial management;

21.1.4. enters into any compromise arrangements with its creditors;

21.1.5. fails to satisfy any judgment to the value of more than R100 000.00 (one hundred thousand rand) taken against it within ninety (90) days;

21.1.6. falls under the controlling interest or ownership of a competitor of the other Party (for the purpose of this clause, the Party who makes this allegation will carry the burden to prove it);

the other Party will be entitled either:

21.1.7. to hold the Party in breach to the Agreement; or

21.1.8. to cancel the Agreement.

21.2. *No Prejudice to Right to Compensation.* The provisions of this clause 21 will not affect the rights of the Parties to seek legal redress including a claim of damages in respect of a breach of any of the provisions of this Agreement.

22. Effect of Termination

22.1. *Amounts due to Swarm*. On termination of this Agreement for any reason, all amounts applicable to Services rendered prior to termination will become due and payable immediately, as will the full balance of the capital, interest, and costs of amounts payable in instalments. Swarm must submit an invoice in respect of Services that have been supplied but for which no invoice has yet been issued, which invoice will be payable by the Customer.

22.2. *Termination Assistance.* The Customer may request but not oblige Swarm to assist with handover and integration of Customer Data to a third party upon termination of this Agreement. Should Swarm provide this Service, it will be charged on a Time and Materials basis.

22.3. *Accrued Rights.* The expiry or termination of this Agreement will be without prejudice to any rights of the Parties accrued as at the date of such expiry or termination.

22.4. *Survival*. Termination of this Agreement will not affect the enforceability of the provisions which have been specified or are by their nature required to operate after such expiry or termination.

23. Force Majeure

23.1. *Parties not liable for force majeure*. Subject to due compliance with clause 23.2, neither Party will be liable to the other for any delay or non-performance of its obligations under this Agreement arising from any cause beyond its reasonable control including without limitation any of the following: act of God, strikes, lock outs or other industrial action, sabotage, terrorism, civil commotion, riot, invasion, war, threat of or preparation for war, fire, explosion, storm, flood, subsidence, epidemic or other natural physical disaster, impossibility of the use of railways, shipping, aircraft, motor transport or other means of public or private transport, interruption of electricity supply, any act or policy of any state or government or other authority having jurisdiction over either Party, sanctions, boycott or embargo, termination or suspension of upstream network connectivity.

23.2. *Duties in case of force majeure.* In the event of either Party being so delayed or prevented from performing its obligations, such Party must:

23.2.1. give notice in writing of such delay or prevention to the other Party as soon as reasonably possible, stating the commencement date and extent of such delay or prevention, the cause thereof and its estimated duration;

23.2.2. use all reasonable endeavours to mitigate the effects of such delay or prevention on the performance of its obligations under this Agreement; and

23.2.3. resume performance of its obligations as soon as reasonably possible after the removal of the cause of the delay or prevention.

23.3. *Right to terminate*. In the event that such delay or prevention continues for more than 30 (thirty) days, the Party whose performance is not delayed or prevented may terminate this Agreement on 30 (thirty) days 'written notice to the other Party.

24. Assignment and Reselling

24.1. *No Assignment*. Neither Party will be entitled to cede, assign, delegate, sub-license or otherwise transfer any of its rights or obligations under this Agreement without the prior written consent of the other Party, such consent not to be unreasonably withheld.

24.2. *Reselling.* The Customer may not resell the Services, or otherwise provide the Services to a third party for consideration without Swarm's prior written consent.

25. No Solicitation

25.1. *Undertaking.* Both Parties undertake that they will not during the term of this Agreement and for a period of 12 (twelve) months after the termination thereof for any reason, directly or indirectly employ or persuade, induce, encourage or procure any Personnel of the other, or any person who was an employee of the other during the previous 12 (twelve) months, to become employed by or through them or to terminate his or her employment with the other or any of its subsidiaries.

25.2. *Unsolicited Applications.* The provisions of clause 25.1 do not prohibit either of the Parties from giving consideration to any application for employment submitted on an unsolicited basis or response to a general advertisement of employment opportunities.

26. Notices and Domicilia

26.1. *Addresses.* The Parties choose their addresses where they will accept service of any notices arising from or pursuant to this Agreement (*domicilium citandi et executandi*), as set out on the first page (cover sheet) of the Agreement.

26.2. *Change of Address.* Any Party will be entitled from time to time by written notice to the other(s), to vary its given address to any other address within the Republic of South Africa which is not a post office box or to vary its other domicilium contact details.

26.3. *Deemed Delivery.* Any notice given in terms of this Agreement must be in writing and any notice given by any Party to another ("the addressee") which:

26.3.1. is delivered by hand or transmitted by telefax will be deemed to have been received by the addressee on the first business day after the date of delivery or transmission, as the case may be; or

26.3.2. is transmitted by e-mail will be deemed to have been received upon confirmation of receipt (not automated receipt) thereof by the addressee; or

26.3.3. is posted by pre-paid registered post from an address within the Republic of South Africa to the addressee at its domicilium address for the time being will be deemed to have been received by the addressee on the 7th (seventh) day after the date of such posting.

26.4. *Notice actually received*. Notwithstanding anything to the contrary contained or implied in this agreement, a written notice or communication actually received by one of the parties from another, including by way of telefax or e-mail transmission, will be adequate written notice or communication to such Party.

27. General

1.1. *Whole Agreement.* This Agreement constitutes the whole of the agreement between the parties hereto relating to the subject matter hereof and the parties will not be bound by any terms, conditions or representations whether written, oral or by conduct and whether express or tacit not recorded herein.

1.2. *No Representations.* The Parties warrant that they have not been induced to enter into this Agreement by any prior representations, warranties or guarantees, whether oral or in writing, except as expressly contained in this Agreement.

1.3. *Variation.* No variation, addition to or cancellation of this agreement and no waiver of any right under this agreement will be of any force or effect unless reduced to writing and signed by or on behalf of the parties to this Agreement.

1.4. *Warranty of Authority.* The signatories hereto acting in representative capacities warrant that they are authorised to act in such capacities, and accept personal liability under this Agreement should they prove not to be so authorised.

1.5. *Waiver.* The failure by any Party to enforce any provision of this Agreement will not affect in any way that Party's right to require performance of the provision at any time in the future, nor will the waiver of any subsequent breach nullify the effectiveness of the provision. No waiver will be effective unless it is expressly stated in writing and signed by the Party giving it.

1.6. *Governing Law and Jurisdiction*. This Agreement will be governed and construed according to the laws of the Republic of South Africa and, subject to clause 18 (Dispute Resolution), the Parties agree to submit to the exclusive jurisdiction of the High Court of South Africa, Western Cape Division, Cape Town regarding any and all disputes arising in connection with this Agreement.

1.7. *Costs*. Each Party will be responsible for its own legal and other costs relating to the negotiation of this Agreement.

1.8. *Publicity*. Neither Party will make or issue any formal or informal announcement or statement to the press in connection with this Agreement without the prior written consent of the other Party, provided that either Party may name the other of them as the Customer or supplier, as applicable, and disclose the general nature of the overall arrangement between the Parties.

1.9. *Reading Down.* If a provision of this Agreement is reasonably capable of an interpretation which would make that provision valid and enforceable and an alternative interpretation that would make it void, illegal, invalid or otherwise unenforceable, then that provision must be interpreted, so far as is possible, to be limited and read down to the extent necessary to make it valid and enforceable.

1.10. *Severability.* If the whole or any part of a provision of the Agreement is void or voidable by either Party or unenforceable or illegal, the whole or that part (as the case may be) of that provision, must be severed, and the remainder of the Agreement will have full force and effect, provided such severance does not alter the nature of the Agreement between the Parties.

1.11. *Consents.* Unless specifically otherwise provided, any consent, approval or agreement to be provided by a Party in terms of this Agreement may not be unreasonably withheld or delayed.

28. Interpretation

1.1. *Number, Gender and Status.* In this Agreement, unless the context requires otherwise: - words importing any one gender will include the other gender; the singular will include the plural and vice versa.

1.2. *Reference to Persons.* A reference to natural persons will include created entities (corporate or unincorporate) and vice versa. Reference to any Party will be interpreted to include reference to their successors or permitted assigns, unless the context indicates otherwise.

1.3. *Local Definitions.* Words and expressions defined in any clause will, for the purposes of that clause, bear the meanings assigned to such words and expressions in such clause. If it is clear from the context that the term so defined has application beyond the clause in which it was defined, it will bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that the term has not been defined in a definitions clause.

1.4. *Substantive Provisions.* If any provision is a substantive provision conferring rights or imposing obligations on any party, notwithstanding that it is only in a definitions clause, effect will be given to it as if it were a substantive provision in the body of the Agreement.

1.5. *Clause Headings.* Clause and sub-clause headings have been inserted for convenience only and will not be used for nor assist or affect its interpretation.

1.6. *Clause References.* Unless otherwise stated herein, references to clauses, sub-clauses, schedules or paragraphs are references to clauses, sub-clauses, schedules or paragraphs of this Agreement, as the case may be.

1.7. *Clause Numbers.* Where a clause number is cited, such citation will be deemed to include reference to all subclauses of that numbered clause.

1.8. *Contra Proferentum Excluded.* The rule of construction that an agreement will be interpreted against the party responsible for its drafting or preparation (*contra preferentum*) will not apply.

1.9. *References to this Agreement.* Unless otherwise stated in this Agreement, references in this Agreement to this Agreement or to any other agreement are references to this Agreement or such other agreement as varied, supplemented, substituted or replaced from time to time.

1.10. *Enactments*. References to any law will be deemed to include references to such law as re-enacted, amended or extended from time to time.

1.11. *Date of Signature.* Any reference in this Agreement to “date of signature” will be read as meaning a reference to the date of signature of the last party required to sign an agreement in order for it to come into existence.

1.12. *Calculation of Days.* When any number of days is prescribed in this Agreement, it will be reckoned excluding the first and including the last, unless the last day falls on a Saturday, Sunday or public holiday in the Republic of South Africa, in which event the last day will be the next succeeding Business Day.

1.13. *Counterparts.* This Agreement may be executed in any number of counterparts (including faxed counterparts) and all of such counterparts taken together will be deemed to constitute one and the same instrument.

29. Glossary

For purposes of the Agreement, the following terms will have the following meanings:

29.1. "Acceptance Date" means the date upon which a Deliverable is accepted or deemed to be accepted as described in clause 5.

29.2. "Acceptance Tests" means the criteria and process for testing of Deliverables as agreed in writing between the Parties.

29.3. "Affiliate" means, in relation to a Party, the Party's holding company, its subsidiaries, the subsidiaries of its holding company and any other company which, directly or indirectly, is controlled by the Party, controls the Party or is under common control with the Party.

29.4. "Agreement" means this document, as well as any schedules or annexures to this document, which are all deemed to form part of the Agreement and any other documents expressly incorporated into this Agreement, as amended from time to time in accordance with the terms hereof.

29.5. "Authorised User" means Personnel of the Customer that is granted authorisation by the Customer enabling such person to make use of the Services.

29.6. "Business Day" means any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa.

29.7. "Customer Data" means:

all data, documentation, or other materials uploaded to the Swarm System, or otherwise provided or made available by or on behalf of the Customer to Swarm, irrespective of the media on which they occur; but excludes Personal and Transaction data relating to any consumer.

29.8. "Consumer and Transaction Data" means:

all data generated by the Swarm System and provided or made accessible to the Customer as a result of the Customer's lawful use of the Services.

29.9. "Customer System" means all information technology resources owned or controlled by the Customer or an Authorised User.

29.10. "Deliverable" means Software, documentation and any other deliverable prepared by Swarm in accordance with the terms of this Agreement and which is explicitly described in a Schedule.

29.11. "Effective Date" means the date stipulated as such in Schedule 1 (Service Terms).

29.12. “Error” means a failure by the Services to conform in a material respect to the Service Description relevant thereto, but excludes all Excluded Defects.

29.13. "Emergency Maintenance" means maintenance to the Swarm System intended to remedy existing circumstances or prevent imminent circumstances that are likely to cause danger to persons or property, an interruption to the Services, or substantial loss to Swarm, the Customer or any third party.

29.14. “Excluded Defect” means a defect in the Services caused by any factor outside of the reasonable control of Swarm including the following:

29.14.1. any equipment or Software not provided by Swarm;

29.14.2. accident, misuse, operator error, negligence or abuse of the Customer or Authorised User’s failure to comply with the Service Description;

29.14.3. failure of third party services on which provision of the Service depends where Swarm has not warranted performance by such third party;

29.14.4. any breach by the Customer of any of its obligations under this Agreement; or

29.14.5. Force Majeure events.

29.15. “Fees” means the fees and charges to be paid by the Customer to Swarm in respect of the Services procured pursuant to this Agreement, and includes reference to both Service Fees and Transaction Fees.

29.16. “Functional Specification” means the functional specification set out in Schedule 2.

29.17. “Good Industry Practice” means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a skilled and experienced service provider engaged in the provision of similar services seeking in good faith to comply with its contractual obligations, complying with all applicable laws, codes of professional conduct, relevant codes of practice, relevant standards, and all conditions of planning and other consents.

29.18. “Implementation Plan” means the document attached hereto as Schedule 3.

29.19. “Intellectual Property” means and includes:

29.19.1. rights in relation to any patent, design, trade mark, trade or business name (including all goodwill associated with any trade mark, or any trade or business name), copyright, database, domain name, circuit topography design, and/or utility model, and including the benefit of all registrations or applications to register and the right to apply for registration of any of the foregoing items and all rights in the nature of any of the foregoing items, each for their full term (including any extensions or renewals thereof);

29.19.2. all other intellectual property rights and forms of protection of a similar nature or having equivalent or similar effect and which may subsist anywhere in the world.

29.20. “Know-How” means and includes:

29.20.1. any and all concepts, ideas, methods, methodologies, procedures, processes, know-how, formulae, techniques, models (including, without limitation, function, process, system and data models);

29.20.2. the generalised features of the structure, sequence and organisation of Software, user interfaces and screen designs;

29.20.3. templates;

29.20.4. general purpose consulting and Software tools, utilities and routines; and

29.20.5. logic, coherence and methods of operation of computer systems that a Party has created, acquired or otherwise has rights in and may, in connection with the performance of its obligations in terms of this Agreement, employ, provide, modify, create or otherwise acquire rights in.

29.21. “Location” means a store, outlet or other location at which the Customer has instated a PoS which allows it to access the Swarm System.

29.22. “Initial Locations” means all the stores, outlets or other locations that are included in the implementation as outlined in Schedule 2. Once the Deliverables have been accepted, the monthly billing will commence for all Initial Locations.

29.23. “Loyalty Engine” means software that allows consumers to pay for goods or by means of mobile devices such as cellular telephones and the like, and also allows for Transactions to be recorded for use in loyalty programs and the like.

29.24. “Loyalty Engine Provider” means the party that licenses or provides the Loyalty Engine to the Customer.

29.25. “Party” means either of the signatories to this Agreement and “Parties” means both of them collectively.

29.26. "Personnel" means any director, employee, agent, consultant, contractor or other representative of a Party.

29.27. “PoS” means “point of sale” software.

29.28. “PoS Provider” means the party that licenses, installs and maintains the PoS.

29.29. “Principal Agreement” means this document and The SWARM SaaS Merchant Agreement alone, without reference to any schedules or annexures to this document.

29.30. “Program Documentation” means the operating manuals, user instructions, technical literature and all other related materials in eye readable form supplied to the Customer for assisting in the use and application of the Swarm App.

29.31. “Schedule” means a schedule to this Agreement, whether part of the Agreement at Date of Signature or appended to it by subsequent agreement between the Parties.

29.32. “Services” means the services to be provided by Swarm to the Customer pursuant to this Agreement as set out in the Schedules.

29.33. “Service Description” means the description of a Service set out in Schedule 1 with the exclusion of any service or function that is identified as out of scope.

29.34. “Software” means any computer programme (whether source- or object code), as well as any database structure or content, artistic work, screen layout, cinematograph film, sound recording, preparatory material, user or technical documentation or any other work created in connection therewith and any modifications, enhancements or upgrades thereto.

29.35. “Service Fees” means fees charged by Swarm to the Customer in respect of making the Service available to the Customer for a particular period.

29.36. “Swarm App” means a Software application made available for download to consumers by Swarm for use on mobile devices to allow consumers to make use of the Services.

29.37. “Swarm Server Software” means the Software owned or licensed by Swarm which is utilised by Swarm on the Swarm System to provide the Services.

29.38. “Swarm System” means all information technology resources operated by Swarm to provide the Services, including without limitation Software (including the Swarm Server Software and databases), hardware (including servers and networking equipment), communications links, and all data stored thereon, but excluding the Customer System and the Swarm App.

29.39. “Swarm Website” means the website published at URL www.swarmloyalty.co.za (including sub-domains) or such other URL as Swarm may from time to time advise.

29.40. “Time and Materials” means the rate applicable to Swarm’s Personnel providing a Service as set out in Schedule 1 (Service Terms) or otherwise according to Swarm’s time and materials fees and charges as amended from time to time, with reference to such Personnel’s seniority and expertise. The Customer will in addition be charged for materials and other expenses reasonably and actually incurred.

29.41. “Transaction” means a transaction between a consumer and the Customer.

29.42. “Transaction Fees” means fees charged by Swarm to the Customer which are calculated according to the number of Transactions recorded by the Swarm System during a particular period.

29.43. “VAT” means value added tax payable in terms of the Value-Added Tax Act, No 89 of 1991, as amended.

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