

Constant Retail Terms and Conditions

The enrolled Client (as defined below) agrees to be bound by the Constant Retail Terms and Conditions (these “Terms and Conditions”), which are a binding legal agreement between such Client and Cymax Services USA LLC (d/b/a Constant Retail) (“we”, “us” or “Constant Retail”). Client and Constant Retail may be referred to herein together as the “Parties” and individually as a “Party”. Any individual or entity acting on behalf of the Client in accepting these Terms and Conditions as part of the Enrollment Process (as defined below) represents and warrants that he, she or it has the right to act on behalf of the Client and to legally bind Client to these Terms and Conditions and Constant Retail may rely on such representation and warranty for all purposes.

Background

Constant Retail is in the business of generating through the Constant Retail Platform (as defined below) e-commerce websites for its retailer clients and hosting such websites for operation and management by such clients of their e-commerce retail business. Client is in the retail merchandising business and desires to have Constant Retail generate as well host and manage the Hosted Site (as defined below) in accordance with these Terms and Conditions.

Section 1: Hosted Site.

1.1 General. Client is hereby engaging Constant Retail to generate the Hosted Site through the Constant Retail Platform and based upon the input provided by the Client in the Enrollment Process as well as to host and maintain such site in accordance with the provisions of Section 1.4 below. Client agrees, understands and acknowledges that at all times: (a) generation of the Hosted Site and the design, interface, appearance and other visual and functional features of the Hosted Site are to be in accordance with Constant Retail’s established templates, looks, views and format (which Constant Retail may, in its sole discretion, update and revise from time to time), and (b) the Hosted Site shall bear the phrase “Powered by Constant Retail” or such other indication of the generation and/or hosting of the Hosted Site by Constant Retail and the Constant Retail Platform. Constant Retail, at its election, may, but is not obligated to and does not guarantee that it will, work with a Client, upon request to customize its Hosted Site through the addition or modification of any design or function features of the Hosted Site as may be agreed upon between Client and Constant Retail, and for additional charges, as may be agreed upon, for such work.

1.2 Selected Brands. Constant Retail shall make available the Selected Brands through the Hosted Site whose underlying products Client may make available and offer for sale through the Hosted Site, provided that in the event the Client has selected Additional Brands to be offered through the Hosted Site, the inclusion of such Additional Brands on the Hosted Site shall be subject to Constant Retail first obtaining authorization and approval, as well as requisite technical support, from the Vendors for such requested Additional Brands required to include such Additional Brands in the Hosted Site, with

additional fees therefor being payable by the Client to Constant Retail as provided for in the Fee Addendum.

1.3 Enrollment Process. The Client represents and warrants to Constant Retail that all of the following are true and correct and shall remain so during the Term: (a) the Client is an authorized retailer, in good standing, for the Selected Brands, and possess all approvals, licenses, consents and permits required to sell and market the products related to the Selected Brands on the Hosted Site; (b) the Client is the valid, authorized, record holder of the credit card account information provided during the Enrollment Process and that such account possess sufficient lines of available credit to cover the costs to the Client of the services provided hereunder; and (c) the Designated URLs are registered in the name of the Client or one of its Affiliates and the Client has all authorization and right to use the Designated URLs. Client further represents and warrants that all information otherwise provided to Constant Retail by the Client in connection with the Enrollment Process is true and correct and shall remain so during the Term.

1.4 Hosting and Maintenance of the Hosted Site. Constant Retail agrees to take commercially reasonable efforts to host and maintain the Hosted Site as provided for in these Terms and Conditions, including, without limitation, taking commercially reasonable efforts to: (a) operate the Hosted Site at the Designated URLs; (b) make the Hosted Site accessible to all visitors to the Hosted Site 24 hours a day, seven days a week, except for such times during which maintenance and repairs are scheduled for the Hosted Site; and (c) ensure that Customer Information is protected in accordance with the terms of Section 5.1 of these Terms and Conditions and is kept separate from, and not used for or with other e-commerce sites developed and/or hosted by Constant Retail. Client agrees, understands and acknowledges: (x) that the engagement contemplated hereunder is non-exclusive in nature and that Constant Retail may, without any obligation or liability to Client, engage with any third-party whatsoever, either in connection with the provision of similar services provided to the Client or otherwise; (y) that such third parties may be competitors of the Client or Persons with interests adverse to or in conflict with those of the Client; and (z) that nothing herein shall be construed, deemed or interpreted as a commitment on the part of Constant Retail to devote any time, resources, or efforts to the Client and the Hosted Site to a greater or lesser extent than what Constant Retail devotes to any third party receiving the same or substantially similar services as those contemplated in these Terms and Conditions or being serviced otherwise.

1.5 Operation of Client's E-Commerce Business. The parties agree, understand and acknowledge that the Hosted Site is being hosted and maintained by Constant Retail for operation by the Client of its e-commerce retail business through the Hosted Site and, for the avoidance of doubt, all responsibilities and liabilities for and regarding the operation, management and administration of such business are the Client's, and not that of either Constant Retail or any of its Affiliates, and in no event shall either Constant Retail or any of its Affiliates have any liability or responsibility whatsoever to any Customers or any Vendors, including without limitation with respect to the fulfillment of orders or for refunds or credits upon the return of any Merchandise, both of which are solely the

responsibility of the Client. Furthermore, in connection with fulfillment of Merchandise orders, Client shall be responsible for arranging shipping and freight services for delivery of such Merchandise to the applicable Customer, provided that Client may elect to have such shipping requirements within the continental United States of America (i.e. the lower 48 states of the United States of America and not Alaska and Hawaii) fulfilled through those services offered by Constant Retail under “Freight Club”, as offered, and as may be elected by the Client, during the Enrollment Process and subject to acceptance of the applicable terms and conditions for purchase of shipping and freight services through “Freight Club”. While Constant Retail hosts the Hosted Site, the Client is the seller of all Merchandise sold through the Hosted and, as such, all revenues from the sale of Merchandise through the Hosted Site shall be deemed for all purposes Client revenues. All proceeds from the sale of Merchandise through the Hosted Site on the Hosted Site will be collected and processed by the Client and the Client will be responsible for establishing the selling price for such Merchandise and for collecting and paying all federal and state sales, use, transfer, or similar taxes payable to any governmental authority on any sale of Merchandise through the Hosted Site as well as on any other charge made in connection with such sale based on the Applicable Sales Tax Rates.

Section 2: Marketing and Advertising Services.

2.1 Marketing Services. In the event the Client has elected to receive marketing services during the Enrollment Process, Constant Retail agrees to provide to Client such services as described in this Section 2.1. Constant Retail shall designate and make available for Client during ordinary business hours a marketing manager to assist and consult with the Client in the provision of such services. Constant Retail shall cause such marketing manager to work with the Client to identify those marketing channels (such as Google, Microsoft-Bing, Shopping.com, and Nextag.com) through whom Client desires Constant Retail to market the Hosted Site and, upon approval by Constant Retail of those marketing channels selected by Client, marketing accounts with such marketing channels shall be established by the Client. Through such marketing accounts, Constant Retail shall market the Hosted Site and the products being offered on the Hosted Site by purchasing search words on search engines and listings on comparison shopping engines which, in Constant Retail’s sole discretion, may generate Customers or direct users towards the Hosted Site, with such costs related to such purchases to be covered by the Client. Monthly Fees payable by Client and costs and charges to be covered by the Client for the services described in this Section 2.1 shall be in accordance with Constant Retail’s current rates in effect for such services as set forth in the Fee Addendum and payable as further described in Section 4 below.

2.2 Advertising Services. In the event the Client has elected to receive advertising services during the Enrollment Process, Constant Retail agrees to provide to Client such services as described in this Section 2.2. Client hereby authorizes and instructs Constant Retail to purchase and place, on behalf of the Client, advertising for the Hosted Site, along with the products being offered on the Hosted Site, on such other websites as Constant Retail may select in its sole discretion. Costs related to such purchases are to be covered by the Client. All advertising services agreements and other similar contracts

to be entered into in connection with the placement of such advertising shall be with Client, on the one hand (and not, for the avoidance of doubt, Constant Retail or any of its Affiliates), and the applicable advertising service provider, on the other hand. Constant Retail shall ensure that all such advertising so purchased shall be capable of directing any viewer thereof online to the Hosted Site through clicking of an embedded hyperlink. Monthly Fees payable by Client and costs and charges to be covered by the Client for the services described in this Section 2.2 shall be in accordance with Constant Retail's current rates in effect for such services as set forth in the Fee Addendum and payable as further described in Section 4 below.

2.3 General Statement Regarding Marketing and Advertising. Except for such services pursuant to either Section 2.1 or Section 2.2 above as may have been elected for by the Client, the Client shall otherwise be responsible in all respects for all advertising, promotion and marketing of the Hosted Site, the Merchandise for sale on the Hosted Site and the Selected Brands available on the Hosted Site, as well as costs thereof (which costs shall not, for the avoidance of doubt, be deemed to reduce Net Sales Revenue). The Client hereby assumes all risk of losses or costs from ineffectiveness of any advertising, promotion and marketing, whether obtained through either Section 2.1 or Section 2.2 above or otherwise, and waives and releases any and all claims it may have against Constant Retail with respect thereto including without limitation for the number of visitors to the Hosted Site and value of resulting sales. The Client acknowledges, agrees and understands that at no time, including in the event it elects services under either Section 2.1 or Section 2.2 above, shall Client have any entitlement, license, or right to use any of the Constant Retail Intellectual Property, regarding search terms or other marketing knowledge utilized to attract visitors to the Hosted Site or any other websites hosted or operated by Constant Retail or any of its Affiliates.

Section 3: Reporting; Data Feeds.

3.1 Reporting. Constant Retail will provide the Client with the ability to access reports on the performance of the e-commerce business of the Hosted Site which reports may include the following information: (a) the number of visitors to the Hosted Site, as measured by Constant Retail; and (b) sales data for the Hosted Site, as measured by Constant Retail, consisting of: (i) the aggregate amount of sales in dollars of Merchandise for such month and a breakdown of such sales into a list of all Merchandise shipped, along with the name, quantity, price, category and item numbers for such Merchandise, (ii) a list of all Customer returns, chargebacks and refunds received or accepted for sales of Merchandise through the Hosted Site, (iii) a list of all Customers that have placed orders for Merchandise through the Hosted Site, including their respective names and the bill to and ship to addresses for such Customers, and (iv) data regarding the sales, use, transfer, or similar taxes collected and remitted by the Client through the Hosted Site based on the Applicable Sales Tax Data for sales of Merchandise made. The time period over which the reports referenced in this Section 3.1 may be generated shall be established by Constant Retail.

3.2 Data Feeds. Constant Retail will periodically provide data feeds to the Client in order to update information concerning Merchandise then available for sale through the Hosted Site. Such information may include product names, product descriptions, stock keeping unit or “SKU” numbers, product prices, shipping costs, availability, other descriptive attributes, and/or links to products within the Hosted Site.

Section 4: Payment Terms.

4.1 Fees. Based on the selections made by the Client in connection with the Enrollment Process, the Client shall pay to Constant Retail the applicable charge in U.S. dollars as set forth on the then-current Fee Addendum, as calculated by Constant Retail and in the manner provided for in this Section 4 of these Terms and Conditions. The current *Fee Addendum in effect can be viewed Appendix 1*.

4.2 Payment. Valid credit card account information as well as pre-authorization of the charges for payment for services hereunder are required from the Client as part of the Enrollment Process and all payments for services provided by Constant Retail shall be by such pre-authorized charges to such Client’s credit card account provided as part of the Enrollment Process (or any updated account). Monthly Fees shall be charged on the first business day of every month during the Term, prior to service for such month (with such Monthly Fee being pro-rated for any partial initial month in the Term). Where any part of the fees payable hereunder are based on a percentage of Net Sales Revenue as provided for in the Fee Addendum, such fee shall be charged upon confirmation by Client of completion of the applicable transaction generating such Net Sales Revenues and as calculated by the Constant Retail Platform. Other than any Monthly Fee associated with any of the services provided under Section 2 of these Terms and Conditions (which Monthly Fee shall be charged as provided for in the second sentence of this Section 4.2), the costs and charges payable by the Client associated with any services elected pursuant to Section 2 above shall be charged at the time such costs and charges are incurred by Constant Retail. Regardless of whether or not Client has a valid dispute of any Monthly Fee, in the event of any non-payment when due by the Client of any fees payable to Constant Retail due to a charge on the Client’s credit card being declined and the Client, following notification, failing to update such payment information with a valid credit card, for five business days or longer, Constant Retail shall be entitled to cease to host and to provide all related services to the Hosted Site and shall have no liability whatsoever to the Client related to any interruption of the Client’s e-commerce business as result of such cessation or other matters related thereto.

4.3 Returns of Merchandise. In the event that Client’s fees are calculated based on a percentage of Net Sales Revenue, Client shall be entitled to a refund or credit based on returns of Merchandise by Customers, the sale of which factored into the calculation of Net Sales Revenue, as provided for in this Section 4.3. For the avoidance of doubt, Client, as established in Section 1.5 above, shall be responsible in all respects for processing and completing any return of any Merchandise by a Customer, including, without limitation, making any refund to the Customer for such return, which are to be processed through the Hosted Site and which Constant Retail, as host of the Hosted Site

pursuant to these Terms and Conditions, shall be entitled to track and monitor. Upon Constant Retail's confirmation through the Hosted Site and the Constant Retail Platform that such a refund to a Customer has been completed and all funds related thereto have been remitted to the Customer or the Customer's account, Constant Retail shall calculate the amount of any fees previously charged and paid to Constant Retail by the Client based on the amount so refunded and such portion of the fee so determined by Constant Retail shall represent the amount of refund or credit to which the Client is entitled. At the election of Constant Retail in its sole discretion, such amount may either be applied against the outstanding amount of any fees payable to Constant Retail by the Client or paid directly to Client. Client's entitlement to the foregoing refund or credit shall be subject to Client providing Constant Retail with any cooperation, assistance, or information reasonably requested by Constant Retail in connection with calculating the amount of any refund or credit owing to Client and based on a return of Merchandise by a Customer.

4.4 Payment Reporting. Immediately following the end of each month in the Term, upon the request of the Client, Constant Retail shall deliver a report to the Client of the applicable fees charged for such month.

4.5 Client Accounts. The foregoing provisions of this Section 4 regarding payment for the services provided hereunder are intended to apply to all Persons agreeing to these Terms and Conditions, including the Client. However, certain clients may, by specific written agreement with Constant Retail separate from these Terms and Conditions, establish an account for payment, subject to payment terms different from those set forth in this Section 4, including without limitation the carrying of an outstanding balance for Monthly Fees, incurred but not overdue after the 30th day of receipt of the invoice therefor.

Section 5: Customer Information; Proprietary Rights; Privacy Policy.

5.1 Customer Information. Constant Retail shall not, and shall ensure that its Representatives do not, disclose to any third party or use for any other purpose other than for the performance of services contemplated under these Terms and Conditions any Customer Information and, except as permitted hereunder, shall in no way use, sell, transfer or otherwise exploit any Customer Information for any purpose without the express written consent of the Client.

5.2 Privacy Policy. Client shall develop and adopt a Privacy Policy and provide a copy of such Privacy Policy to Constant Retail for inclusion of such Privacy Policy by Constant Retail in the Hosted Site. Any such Privacy Policy shall include the following statement regarding User Data:

"Our site is hosted and maintained by a third-party service provider known as "Constant Retail". Notwithstanding any other provisions of this privacy policy, in connection with the provision of such services, Constant Retail may collect and use for any purpose data and information derived from our site and your usage thereof. However, Constant Retail will not make use of your name, email address,

billing and ship-to addresses, phone number(s), and the credit card, bank account or other payment information provided by you.”

Client shall relay to Constant Retail any communications pertaining to Constant Retail received from any Customer in response to Client’s Privacy Policy. Client represents and warrants that its Privacy Policy shall be in compliance at all times during the Term with applicable law and regulations.

5.3 Proprietary Rights. At all times, Constant Retail and its Affiliates reserve all right, title and interest in and to the Constant Retail Intellectual Property and in no event shall any provision in these Terms and Conditions and the performance thereof, be deemed or construed as a transfer, assignment or license of any interest or right therein, whether to use any Constant Retail Intellectual Property or otherwise (except for the following sentence). Constant Retail hereby grants to the Client, during the Term, a worldwide, non-transferable, non-sub licensable, fully paid license to use the Hosted Site solely for the purposes of operating the Client’s e-commerce business of selling to Customers products related to the Selected Brands.

Section 6: Termination

6.1 Termination by the Client. Client shall be entitled to terminate these Terms and Conditions upon no less than 60 days’ prior written notice to Constant Retail.

6.2 Termination by Constant Retail. Constant Retail shall be entitled to terminate these Terms and Conditions upon no less than 60 days’ prior written notice to the Client. In addition, Constant Retail shall be entitled to terminate these Terms and Conditions immediately upon written notice to Client if Constant Retail is unable to fulfil payment of any fees through Client’s credit card pre-authorization, as provided for in the last sentence of Section 4.2.

6.3 Effect of Termination. Upon termination of these Terms and Conditions, each Party in receipt, possession or control of the other Party’s intellectual or proprietary property, information and materials (including any confidential information) pursuant to these Terms and Conditions must return to the other Party (or at the other Party’s written request, destroy) such property, information and materials. Sections 1.3, 4, 5, 6, 7, 8 and 9 (together with all other provisions that reasonably may be interpreted as surviving termination or expiration of these Terms and Conditions) will survive the termination or expiration of these Terms and Conditions. Notwithstanding the foregoing, termination of these Terms and Conditions shall not relieve either Party from its obligation to pay any amounts due to the other Party for any period prior to the effective date of termination.

Section 7: Indemnification.

7.1 Indemnification by the Client. The Client will defend, indemnify and hold Constant Retail, its Affiliates, and their respective Representatives harmless from and against any and all Damages resulting from, arising out of or in connection with (whether a result of any third party claims, actions or demands or otherwise): (a) Constant Retail

Intellectual Property; (b) any breach by Client of any covenant, representation, warranty or obligation to be performed by Client hereunder; or (c) the design, manufacture or sale of any Merchandise or other products sold or offered through the Hosted Site. In furtherance and not in limitation of the foregoing, the Client shall defend, indemnify and hold harmless Constant Retail from and against any and all Damages resulting from any actual or threatened tort claims or product liability claims relating to Merchandise or other products sold or offered through the Hosted Site.

7.2 Procedures for Indemnification. Constant Retail will promptly notify Client of any claim subject to Section 7.1 above, but failure to promptly notify Client will only affect Client's obligations under Section 7.1 to the extent that such failure materially prejudices Client's ability to defend the claim. Client may: (a) use counsel of its own choosing to defend against any claim, subject first to Constant Retail's written consent and Client's written acknowledgement of its liability for its obligations under Section 7.1 with respect to such claim; and (b) settle the claim as the Client may deem appropriate, provided that Client obtain Constant Retail's prior written consent before entering into any such settlement. Constant Retail may also assume control of the defense and settlement of any such claim at any time, with counsel of its choosing.

Section 8: Disclaimers; Limitations on Liability.

8.1 Disclaimer of Warranties. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THESE TERMS AND CONDITIONS, NEITHER PARTY MAKES, AND EACH PARTY HEREBY WAIVES AND DISCLAIMS, ANY REPRESENTATIONS OR WARRANTIES REGARDING THE TRANSACTIONS CONTEMPLATED HEREBY, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OR IMPLIED WARRANTIES ARISING OUT OF COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, EACH PARTY SPECIFICALLY DISCLAIMS ANY REPRESENTATION OR WARRANTY REGARDING (A) THE AMOUNT OF SALES REVENUES THAT MAY OCCUR DURING THE TERM, AND (B) ANY ECONOMIC OR OTHER BENEFIT THAT IT MIGHT OBTAIN THROUGH ENTRANCE INTO THESE TERMS AND CONDITIONS (OTHER THAN THE SPECIFIC SUMS TO BE PAID PURSUANT TO THESE TERMS AND CONDITIONS).

8.2 Compliance with Laws. In its performance of these Terms and Conditions, each Party will comply in all material respects with all applicable laws, regulations, orders and other requirements, now or hereafter in effect, of governmental authorities having jurisdiction.

8.3 Limitation of Liability. NEITHER PARTY WILL BE LIABLE (IN TORT (INCLUDING NEGLIGENCE), CONTRACT OR OTHERWISE) FOR ANY INDIRECT, CONSEQUENTIAL, PUNITIVE OR SPECIAL DAMAGES (INCLUDING LOST BUSINESS, REVENUE OR DATA) ARISING OUT OF OR IN CONNECTION WITH THESE TERMS AND CONDITIONS (INCLUDING ANY BREACH HEREOF), EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY THEREOF. THE MAXIMUM AGGREGATE LIABILITY OF EACH PARTY UNDER ANY THEORY, INCLUDING, CONTRACT, NEGLIGENCE OR STRICT LIABILITY,

WILL NOT EXCEED THE TOTAL PAYMENTS OF MONTHLY FEES MADE TO CONSTANT RETAIL DURING THE THIRTY (30) DAYS PRIOR TO THE DATE THE LIABILITY AROSE. NOTWITHSTANDING ANYTHING ELSE HEREIN, THE LIMITATIONS ON LIABILITY IN THE FOREGOING TWO SENTENCES SHALL IN NO EVENT APPLY TO EITHER (A) CLIENT'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 7; AND (B) ANY OBLIGATION OF THE CLIENT TO MAKE PAYMENT OF A MONTHLY FEE OR OF ANY OTHER CHARGES FOR ANY SERVICE PROVIDED BY CONSTANT RETAIL OR ANY OF ITS AFFILIATES IN CONNECTION WITH THESE TERMS AND CONDITIONS.

8.4 No Guarantee of Traffic. The Client acknowledges and agrees that Constant Retail has made no representation, warranty or guarantee regarding the number of visitors to the Hosted Site, the amounts of purchases through the Hosted Site, the amounts of revenues from Merchandise sold to Customers or any other projection relating to the performance of the Hosted Site, and Constant Retail hereby disclaims any and all such representations, warranties or guarantees.

Section 9: Miscellaneous.

9.1 Independent Contractors. The Parties are entering into these Terms and Conditions as independent contractors, and these Terms and Conditions will not be construed to create a partnership, joint venture or employment relationship between them. Neither Party will represent itself to be an employee or agent of the other or enter into any agreement or legally binding commitment or statement on the other's behalf of or in the other's name (other than to the extent that Customer orders of Merchandise through the Hosted Site shall obligate the Client to fulfill and ship such orders and otherwise honor the agreement formed by the Client and such Customer due to such order).

9.2 Governing Law and Venue. These Terms and Conditions shall be construed according to the laws of the State of California without giving consideration to principles of conflict of law. All disputes arising hereunder shall be resolved in Los Angeles, California and at no other place. Client (a) irrevocably consents to the jurisdiction and venue of the State and Federal courts located in the City of Los Angeles, California, (b) agrees that any action relating to the services provided by Constant Retail shall only be brought in said courts, (c) consents to the exercise of *in personam* jurisdiction by said courts over it, and (d) further agrees that any action to enforce a judgment may be instituted in any jurisdiction.

9.3 Entire Agreement. These Terms and Conditions, along with the Fee Addendum as well as any terms and conditions regarding "Freight Club" accepted and agreed to by the Client, represent the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements and communications of the Parties with respect to the subject matter hereof, oral or written.

9.4 Similar Agreements. Nothing herein will be deemed to limit or restrict either Party or its Affiliates from entering into agreements with any other Person covering

services similar to those contemplated by these Terms and Conditions or from offering such similar services itself.

9.5 Press Releases. Neither Party will make or issue any external press statement regarding these Terms and Conditions unless: (a) it has received the express written consent of the other Party, which will not be unreasonably withheld, or (b) it is required to do so by law or the rules of any securities market; provided that Constant Retail and its Affiliates shall be permitted to identify the Client, using the Client's name and logo, if any, as a client of its business in any promotional materials, including, without limitation, on the Constant Retail website, and Client consents to such use.

9.6 Notices. All notices, requests and other communications to any Party will be in writing (including electronic mail, facsimile transmission or similar writing) and will be given in accordance with, in the case of Client, such contact information provided in connection with the Enrollment Process, and in the case of Constant Retail, such contact information provide by Constant Retail in connection with confirmation of Client's engagement for the services to be provided hereunder, or as such Party may thereafter specify for such purposes. Each such notice, request or other communication will be effective (a) if given by electronic mail or facsimile, when confirmation of receipt is obtained, or (b) if given by any other means when received by a Party at its specified address.

9.7 Amendments; Waivers. Except for the Fee Addendum, these Terms and Conditions may not be amended, modified or superseded, unless expressly agreed to in writing by both Parties. No provision of these Terms and Conditions may be waived except by an instrument in writing executed by the Party against who the waiver is to be effective. The failure of either Party at any time or times to require full performance of any provision hereof will in no manner affect the right of such Party at a later time to enforce the same.

9.8 Severability. If any provision or term of these Terms and Conditions, not being of a fundamental nature, is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remainder of these Terms and Conditions will not be affected.

9.9 Force Majeure. Neither Party will be responsible for any failure or delay in its performance under these Terms and Conditions due to cause beyond its reasonable control, including but not limited to, labor disputes, strikes, lockouts, shortages or inability to obtain labor, energy, raw materials or supplies, war, riot, act of God or governmental action.

9.10 Assignment; Successors. Neither Party may assign these Terms Conditions without the prior written consent of the other Party and any such assignment without prior written consent shall be null and void, except that Constant Retail may assign these Terms and Conditions without prior written consent (a) to an Affiliate or (b) as part of a bona fide corporate reorganization or a sale of its business and, in connection therewith, Constant Retail may, and Client consents to, transfer of Customer Information as part of

any such transaction. For the avoidance of doubt, any acquirer of Constant Retail or any of its Affiliates, or of their respective business or all or substantially all of their respective assets, whether by direct purchase of capital stock or equity, merger, consolidation, reorganization, amalgamation or similar transaction, or other similar successor shall, for all purposes herein, be deemed to be “Constant Retail” or an “Affiliate” as applicable.

9.11 Headings. The headings of the Sections of these Terms and Conditions have been included for the convenience of the Parties and are not part of the Agreement, nor are the headings to be used to alter or interpret the terms hereof.

Section 10: Definitions.

Whenever used in these Terms and Conditions, the following capitalized terms shall have the following specified meanings:

10.1 “Additional Brands” means any brands related to and associated with particular products of a Vendor that is not an Authorized Brand.

10.2 “Advertising” means any third-party-and/or Client-generated advertising displayed on the Hosted Site.

10.3 “Advertising Revenue” means revenues generated by Advertising on the Hosted Site, including, without limitation, any as a result of Customers visiting the Hosted Site where such Customers click on or otherwise interact with such Advertising and any product placements.

10.4 “Affiliate” means, as to any Person, any other Person that, directly or indirectly, is controlled by, is under common control with or controls such Person. For this purpose, control means ownership or voting rights over at least 50% of the outstanding voting or equity securities of the Person in question or the power to direct or cause the direction of management or policies of such Person, whether through voting securities, by contract or otherwise.

10.5 “Applicable Sales Tax Rates” means those rates of sales, use, transfer or similar tax payable to any governmental authority, whether federal, state, municipal or local, on any sale of Merchandise through the Hosted Site as well as on any other charge made in connection with such sale, as determined by the Sales Tax Consultant and reflected and incorporated into the payment calculation processes of the Hosted Site.

10.6 “Authorized Brands” means the brands related to and associated with particular products offered through the Constant Retail Platform that may be selected by the Client during the Enrollment Process as those the underlying products of which may be offered on the Hosted Site.

10.7 “Client” means the Person transacting with Constant Retail and accepting these Terms and Conditions in connection with the enrollment for the services of

Constant Retail through the Constant Retail Platform, whether at the time of enrollment or a subsequent time.

10.8 “Constant Retail Content” means any and all content or information owned or controlled (e.g., by license or otherwise) by Constant Retail or its Affiliates, including, without limitation, text, graphics, photographs, video and audio.

10.9 “Constant Retail-Furnished Item” means any Constant Retail Content or any other Intellectual Property owned or controlled (e.g., by license or otherwise) by Constant Retail or its Affiliates, as the case may be, that is furnished by Constant Retail or its Affiliates in connection with generation of the Hosted Site or otherwise in connection with the performance of Constant Retail’s obligations under these Terms and Conditions.

10.10 “Constant Retail Intellectual Property” means, collectively, the Hosted Site (other than the Designated URLs), the Constant Retail Platform, the Constant Retail-Furnished Items, the Constant Retail-Owned Developments, and all Intellectual Property associated with any of the foregoing.

10.11 “Constant Retail-Owned Developments” means any technology (including any adaptation, modification, improvement or derivative work of any Constant Retail-Furnished Item) that is developed by, or on behalf of, Constant Retail or any of its Affiliates, for use in connection with the Hosted Site or to implement the activities contemplated by these Terms and Conditions or that is developed by, or on behalf of, Constant Retail or any of its Affiliates for use on other websites hosted and maintained by Constant Retail or its Affiliates, besides the Hosted Site, along with all adaptations, modifications, improvements or derivative works thereof.

10.12 “Constant Retail Platform” means the proprietary online platform of Constant Retail and/or its Affiliates for the generation, operation and management of hosted e-commerce websites.

10.13 “Customer” means a Person who accesses the Hosted Site in any manner, whether or not a purchase is made.

10.14 “Customer Information” means, with respect to any order of Merchandise made through the Hosted Site by a Customer, collectively, the name of the Customer, the Customer’s email address, the Customer’s billing and ship to addresses, the Customer’s phone number(s), and the credit card, bank account or other payment information for such order. For the avoidance of doubt, no customer data that does not contain any of the foregoing information shall be deemed Customer Information.

10.15 “Damages” means liabilities, damages, awards, settlements, losses, claims and expenses, including reasonable attorney’s fees and expenses and costs of investigation.

10.16 “Designated URLs” means those uniform resource locators registered to the Client or its Affiliates (or any successor or replacement URL thereof) identified by the

Client and entered into the Constant Retail Platform in connection with the Enrollment Process.

10.17 *“Enrollment Process”* means the process of the Client enrolling for the provision of the services contemplated by these Terms and Conditions through the Constant Retail website, including, without limitation, the Client’s selection of the Selected Brands, identification of the Designated URLs, provision of credit card account information, and the preauthorization of charges thereon to be made by Constant Retail, and, in connection with such process, the Client is accepting and agreeing to be bound by these Terms and Conditions, whether simultaneously or at a subsequent time.

10.18 *“Fee Addendum”* means the schedule setting forth the charges to the Client for the services contemplated hereunder and the method of calculation thereof, including, without limitation: (a) Monthly Fees, including without limitation the fixed monthly charge for hosting the Hosted Site depending on the number of Selected Brands offered on it and for any services pursuant to Section 2, if elected by the Client, (b) charges for inclusion of any Additional Brands on the Hosted Site, (c) costs and expenses related to marketing and advertising services pursuant to Section 2 to be passed onto Client, and (d) the then-applicable percentage of Net Sales Revenue payable to Constant Retail as a charge for the services hereunder. The Fee Addendum is subject to change from time to time by Constant Retail and its Affiliates, which updated form Constant Retail shall make available to Clients, and the current Fee Addendum in effect can be viewed [here]¹ and is incorporated and made part of these Terms and Conditions by reference.

10.19 *“Hosted Site”* means the e-commerce web site designated by, and accessible via, the Designated URLs, generated by the Constant Retail Platform and hosted by Constant Retail in accordance with these Terms and Conditions.

10.20 *“Intellectual Property”* means any and all now known or hereafter known tangible and intangible intellectual property and rights related thereto, including without limitation: (a) rights associated with works of authorship throughout the universe, including but not limited to copyrights, moral rights, and mask-works, (b) trademark, service mark, trade dress and trade name rights and similar rights, (c) trade secret rights, (d) technology, (e) patents, designs, algorithms and other industrial property rights, (f) all other intellectual and industrial property rights of every kind and nature throughout the universe and however designated (including domain names, logos, “rental” rights and rights to remuneration), whether arising by operation of law, contract, license, or otherwise, and (g) all registrations, initial applications, renewals, extensions, continuations, divisions or reissues hereof now or hereafter in force (including any rights in any of the foregoing).

10.21 *“Merchandise”* means products offered for sale on the Hosted Site.

10.22 “Monthly Fee” means the monthly charge to the Client for the services contemplated hereunder and as calculated in accordance with and set forth on the Fee Addendum. The current Fee Addendum in effect can be viewed [here]².

10.23 “Net Return” means the original amount paid for Merchandise that has been returned, including Customer charge backs.

10.24 “Net Sales Revenue” means all revenues from the Hosted Site, including without limitation: (a) all Advertising Revenue, and (b) revenues generated by Merchandise sales through the Hosted Site, including, without limitation, as a result of Customers visiting the Hosted Site where such Customers purchase Merchandise through the Hosted Site using Constant Retail’s automated ordering system, provided such Customers accept delivery of Merchandise at the shipping destination and remit full payment therefore to the Client. Net Sales Revenue includes all shipping charges paid by Customers but does not include taxes or Net Returns. Depending on the particular choices made by the Client during the Enrollment Process, the Client shall be charged a fee based on a percentage of Net Sales Revenue, with such percentage being set forth on the Fee Addendum, payable immediately upon completion of a transaction generating Net Sales Revenue by pre-authorized charge to the Client’s credit card.

10.25 “Person” means any individual, corporation, limited-liability company, partnership, firm, joint venture, association, joint-stock company, trust, or other entity or organization, including a government or political subdivision or an agency or instrumentality thereof.

10.26 “Privacy Policy” means a standard privacy policy for the Hosted Site, governing the collection, use and protection of all information provided and collected through the Hosted Site.

10.27 “Representatives” means, with respect to any Person, any and all directors, officers, employees, consultants, financial advisors, counsel, accountants and other agents of such Person

10.28 “Sales Tax Consultant” means such third party tax consultant retained by either Constant Retail or one of its Affiliates to identify the applicability of and determine the Applicable Sales Tax Rates. Constant Retail shall be entitled to rely upon in good faith for all purposes any findings, reports, determinations, calculations or advice of the Sales Tax Consultant, including without limitation its determination of Applicable Sales Tax Rates and, notwithstanding anything else herein, neither Constant Retail, any of its Affiliates nor any of their respective Representatives shall have any liability whatsoever, and the Client waives and releases, on behalf of itself and its Affiliates, each of them from any such liability or claim, where there has been such good faith reliance.

10.29 “Selected Brands” means, collectively, (a) the Authorized Brands selected by the Client during the Enrollment Process, and (b) any Additional Brands also identified

and selected by the Client and whose products may be marketed through the Hosted Site, as established in accordance with Section 1.2 of these Terms and Conditions, subject to (x) Constant Retail, from time to time and its sole discretion, no longer offering any Authorized Brand or Additional Brand through the Hosted Site, or (y) Client notifying Constant Retail that it no longer wishes to offer an Authorized Brand or Additional Brand, in which case such Authorized Brand and/or Additional Brand, as the case may be, shall no longer be included in this definition of Selected Brands.

10.30 "Term" means the period of time during which these Terms and Conditions are in full force and effect and not terminated pursuant to Section 6 of these Terms and Conditions.

10.31 "User Data" means all data and information derived by any means from the Hosted Site, including, without limitation, regarding visits to and use of the Hosted Site and all data and information regarding transactions effected on the Hosted Site, other than, in each case, Customer Information. User Data is tracked and collected through the Constant Retail Platform and as such is the Intellectual Property of Constant Retail, and may be used by Constant Retail and its Affiliates for any purpose whatsoever.

10.32 "Vendor" means a seller of products that may be offered through the Hosted Site, whether under an Authorized Brand or Additional Brand.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the **Effective Date** _____

CYMAX SERVICES USA LLC

By: _____

Name: Chris Carroll
Title: Vice President – Sales

Address for Notices:

By: _____

Name:
Title:

Address for Notices:

Appendix 1. – Fee Addendum

Select an Option:

Up to 3 Brands

- \$199 Per Month
- Transaction fee – 6.75 %
- SSL security certificate \$125 per year

Initial below for this selection

Up to 10 Brands

- \$399 Per Month
- Transaction fee – 5.75 %
- SSL security certificate \$125 per year
- No set up fee and no customization fee

Initial below for this selection

Up to 20 Brands

- \$699 Per Month
- Transaction fee – 4.75%
- SSL security certificate \$125 per year
- No set up fee and no customization fee

Initial below for this selection