Itopia Reseller Agreement

This Agreement is made effective on the date first accepted by and between Itopia, Inc., a Delaware corporation ("Itopia") and Service Provider. ("Service Provider") (each individually a "Party" and collectively, the "Parties").

RECITALS

Service Provider desires to be appointed as a non-exclusive reseller of certain Itopia products and services as described in this Agreement and an applicable Order Form (collectively, the "Service"), and represents itself as having the ability and resources to effectively market, resell and sublicense the Service.

Itopia is willing to appoint Service Provider to resell access to the Services pursuant to the terms and conditions of this Agreement.

Now, therefore, in consideration of their mutual promises and obligations contained in this Agreement, the Parties agree as follows:

1. **APPOINTMENT OF SERVICE PROVIDER; LICENSE AND RESTRICTIONS; PERFORMANCE; PROPRIETARY RIGHTS**

   1.1 <u>Appointment</u>. Subject to the terms and conditions of this Agreement, Itopia appoints Service Provider, and Service Provider accepts such appointment, as a non-exclusive reseller to market, advertise and resell the Services solely to Customers, on a stand-alone basis or packaged with Service Provider's existing services. Service Provider will not make the Service available to any Customer unless the Service Provider has entered into an enforceable Service Provider Service Agreement with the Customer that contains at a minimum the provisions set forth in Section 4. Service Provider may not appoint any sub-resellers or sublicense any of Service Provider's reseller rights pursuant to this Agreement to any third party without the prior written approval of Itopia. Service Provider acknowledges that its appointment under this Agreement is non-exclusive and revocable. Service Provider also acknowledges Itopia's right (i) to appoint additional Itopia service providers, in Itopia's sole discretion and (ii) to license and sell the Service through other service providers to any Customer without liability or obligation to Service Provider.

   1.2 <u>Restrictions</u>. Service Provider will not, and will not allow any Customer or other third party to, directly or indirectly: (a) modify, translate, create derivative works of the Service, except as expressly authorized by Itopia in writing; (b) reverse assemble, decompile, reverse engineer or otherwise attempt to derive source code or object code or the underlying ideas, algorithms, structure or organization of the Service or components thereof; (c) disseminate performance information or analysis (including, without limitation, benchmarks) from any source relating to Service; (d) reproduce, copy, distribute, display, perform, sell, offer for sale, make, import the Service in whole or in part, except as expressly authorized by this Agreement or in a separate writing by Itopia. Service Provider agrees not to market, offer for sale, distribute access to, or sell any service or offering directly competitive to the Service during the Term without Itopia's prior written consent.

   1.3 <u>Performance</u>. Service Provider understands that Itopia's performance is dependent in part on third-party actions and the actions of Service Provider or Customers. Accordingly, Itopia shall be excused from performing under this Agreement to the extent it is unable to perform as a result of such actions or inactions, including, without limitation, Service Provider's or a Customer's failure to provision or maintain a Circuit. Itopia reserves the right to substitute Services that are different from, but substantially equivalent to, the Services ordered by the Service Provider or its Customer on an Order Form. If the Services necessary to meet Service Provider's or Customer's requirements are subject to charges in addition to those set forth in an Order Form, Itopia will notify the Service Provider of any additional or increased charges and Service Provider shall have ten (10) business days to cancel the Order Form and avoid the additional or increased charges. Failure to cancel within such period will be deemed acceptance of the additional or increased charges.

   1.4 <u>No Franchise Agreement</u>. The Parties hereby acknowledge and agree that this Agreement is not a

franchise or business opportunity agreement and does not create a franchise or business opportunity relationship between the Parties. If any provision of this Agreement is deemed to create a franchise relationship or business opportunity between the Parties, then at Itopia's option, Itopia may either terminate this Agreement or negotiate in good faith with Service Provider to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as a reseller agreement and not a franchise or business opportunity agreement.

1.5 Proprietary Rights

1.5.1. License of Work Product. Subject to Service Provider's performance of its obligations hereunder, Itopia hereby grants to Service Provider, as applicable, a worldwide, non-exclusive, non-transferable license during the term of this Agreement to use the Work Product solely for Service Provider's business purposes. Service Provider shall not, without the written consent of Itopia: (i) decompile, disassemble or otherwise reverse engineer the Work Product or any portion thereof; or (ii) rent, lease, sublicense, sell, transfer or otherwise grant rights in or to the Work Product (in whole or in part) to any third party in any form.

1.5.2. Ownership of Content. Itopia acknowledges and agrees that, as between Itopia and Service Provider, Service Provider or the Customer (as applicable), is the exclusive owner of all rights in and to the Content and that, except as may be otherwise provided in this Agreement or an Order Form, nothing in this Agreement grants to Itopia any rights in or to such Content.

1.5.3. Reservation of Rights. Except as otherwise expressly provided herein, nothing in this Agreement shall be deemed to grant, directly or by implication, estoppel or otherwise, any right or license with respect to any technology or other intellectual property rights, and each Party retains all right, title and interest in and to their respective technologies and other intellectual property rights.

2. **ITOPIA'S RESPONSIBILITIES**

2.1 Sales Literature. Itopia agrees to make available to Service Provider the Itopia sales literature and marketing documentation for the Service..

2.2 Support Services. Itopia will make support services available to Service Provider in accordance with the processes and procedures set forth in Exhibit A, which is attached hereto and incorporated herein.

2.3 Export Controls. Service Provider agrees not to distribute or provide the Service to any person or entity if Service Provider has reason to believe that such person or entity intends to export, re-export or otherwise transfer the same to, or use the same in any country for which an export license has not yet been obtained.

2.4 Changes to the Services. Upon no less than 60 days prior written notice, Itopia may add, suspend, change or modify the Services at any time, in its sole and absolute discretion. Itopia will not be liable to Service Provider for any modifications to the Service pursuant to this Agreement.

3. **SERVICE PROVIDER'S OBLIGATIONS**

3.1 Marketing of Service. Service Provider shall use commercially reasonable efforts to promote, market and sell the Service to current and prospective Customers through various media and methods and shall not perform any act that may hinder or interfere with the supply and/or licensing of the Service. Service Provider agrees to include the Service in its marketing communications activities, including website, tradeshows, brochures, and presentations.

3.2 Itopia Brands. Service Provider may, but is not required to, use Itopia Brands during the Term, solely in connection with the marketing obligations and efforts set forth herein, provided that any such marketing materials have been reviewed and approved by Itopia, such approval not to be unreasonably withheld, conditioned or delayed. All use of the Itopia Brands will strictly comply with such usage guidelines as Itopia may specify from time-to-time, and any use of the Itopia Brands by Service Provider shall also inure to the benefit of Itopia. Itopia expressly prohibits any other direct or indirect use, reference to, or employment of Itopia's trademarks, logos, trade names or any other logos, trademarks or trade names confusingly similar to Itopia's unless otherwise authorized in writing by Itopia. Service Provider agrees to refrain from registering or applying to register such trademarks, logos, or trade names in its own name and agrees that

any attempt to do so will constitute an event of default under this Agreement. Notwithstanding the foregoing, Service Provider shall have the right to market and resell the Service under its own brand.

3.3 Qualifications. Service Provider represents that it has and will maintain the facilities, resources, personnel and experience to promote, advertise, market and sublicense the Service, and to perform its obligations under this Agreement. Service Provider represents that it has and will maintain the personnel and capabilities required to provide support for the Service as more specifically identified in Exhibit A to this Agreement.

3.4 Professional Standards. Service Provider shall not make: (i) any false or misleading representations about the Service to Customers or others or (ii) any representations, warranties or guarantees with respect to the Service, Itopia or any of Itopia's obligations to Customers or any third party that are not consistent with the terms of this Agreement. Service Provider acknowledges and agrees that Itopia derives substantial value from the goodwill associated with the Service. Service Provider will undertake all commercially reasonable measures necessary to ensure that its marketing and promotional activities hereunder conform to all applicable laws and industry standards of professionalism and fair practices.

3.5 Compliance With Laws. Prior to importing, licensing or selling the Service in any country or jurisdiction, Service Provider shall obtain at its sole expense any required authorizations, licenses, certifications permits, registrations and other governmental or regulatory agency approvals for use and sale of the Service.

3.6 Import and Export Compliance. Service Provider shall secure any required import certificates, and shall perform all activities requested or required to legally import the Service. Service Provider shall comply with all applicable international and national laws that apply to the Service, including the U.S. Export Administration Regulations, as well as customer and destination restrictions issued by the U.S. and other governments.

3.7 Business Conduct. Service Provider understands that Itopia is committed to acting in accordance with the highest level of business and professional ethics in connection with the licensing of the Service and that Itopia requires the Itopia service providers to also meet these standards. By signing this Agreement, Service Provider warrants that: (a) it is familiar with the provisions and restrictions contained in the OECD Convention and United States Foreign Corrupt Practice Act of 1977, as amended ("FCPA"); (b) it shall comply with the FCPA in marketing, selling and/or providing the Service; and (c) it shall not, in the course of its duties under this Agreement, offer, promise, give, demand, seek or accept, directly or indirectly, any gift or payment, consideration or benefit in kind that would or could be construed as an illegal or corrupt practice.

3.8 Content. Service Provider shall be solely responsible for obtaining, and for bearing all costs, obligations and liabilities associated with, any licenses, releases or waivers related to the Content required by any third party or any act or regulation of any government, and any necessary rebroadcast or retransmission rights or permissions. Itopia exercises no control over, and accepts no responsibility for, the Content transmitted in connection with the Service, and use of any such Content is at Service Provider's and its Customer's own risk. As between Service Provider and Itopia, Service Provider shall be solely responsible for the license, security and confidentiality of all Content and shall indemnify, defend and hold Itopia harmless from any claims related to Service Provider's failure to comply with this provision.

3.9 Itopia Acceptable Use Policy. Service Provider shall comply with the AUP and shall cause its Customers to comply with the AUP. With reasonable written notice, Itopia reserves the right to suspend or cancel any Service with respect to which Service Provider or a Customer is found to be in violation of the AUP. "AUP" means the Acceptable Use Policy, as revised by Itopia from time to time and incorporated by reference herein, which is available as part of the Documentation, and can be found at http://www.itopia.us/legal.

3.10 Security Breaches. Service Provider will promptly notify Itopia of any security breach of the Service or in the event it becomes aware of a breach of the AUP.

3.11 Insurance. Service Provider will maintain commercial, property, contractual liability, casualty and personal injury insurance coverage in amounts customary for businesses operating in Service Provider's industry, including without limitation(i) comprehensive general liability insurance with a combined single limit in an amount not less than

$1,000,000 per occurrence, and $2,000,000 aggregate (or equivalent coverage under an "umbrella" policy), including comprehensive form premises and operations, independent contractors, products and completed operations, personal injury, contractual, and broad form property damage liability coverage, and (ii) workers' compensation insurance covering such Party's employees in an amount not less than that required by law

4. **SERVICE PROVIDER'S CONTRACTING REQUIREMENTS**.

4.1 <u>Required Provisions</u>. Service Provider acknowledges that the provision of the Service to Customers shall be pursuant to a Service Provider Customer Agreement between itself and its Customers and that such Service Provider's Service Agreement shall include, at a minimum, the following terms, conditions and exhibits and other terms specifically mentioned in this Agreement as being part of such Service Provider Customer Agreements including, but not limited to, the Customer billing and collection terms set forth in Exhibit B and the following:

4.1.1. <u>Non-exclusive, Non-transferable License; Retention of Rights</u>. The Service Provider Service Agreement shall clearly specify that the license to use the Service granted to the Customer is nonexclusive and nontransferable, and shall prohibit use of the Service by any third party other than Customer for such Customer's internal business purposes. The Service Provider Service Agreement shall expressly disclaim any passing of title to the Service, any trade names, trade dress, trademarks, service marks, commercial symbols, copyrightable material, designs, logos and/or any other intellectual property of Itopia to the Customer.

4.1.2. <u>Execution</u>. The Service Provider Service Agreement must be signed by the Customer before the Service is provided to the Customer.

4.1.3. <u>Third Party Beneficiary</u>. The Service Provider Service Agreement must contain a provision stating that Customer agrees that Itopia is a third party beneficiary of the Service Provider Service Agreement and Itopia may enforce Service Provider Service Agreement directly against the Customer.

4.1.4. <u>Restrictions</u>. The Service Provider Service Agreement must specifically include provisions that specify that Customer shall not: (i) copy or adapt the Service for any purpose, except as specifically permitted under this Agreement; (ii) use the Service except in accordance with all applicable laws and regulations, and except as set forth in the Documentation; (iii) reverse engineer, translate, decompile, or disassemble the Service; (iv) use the Service in any outsourcing, application service provider, time-sharing or service bureau arrangement, including, without limitation, any use to provide services or process data for the benefit of, or on behalf of, any third party other than the Customer; (v) cause or permit the disabling or circumvention of any security mechanism contained in or associated with the Service; or (vi) delete, alter, cover, or distort any copyright or other proprietary notices or trademarks.

4.2 <u>Warranty</u>. Service Provider shall not make any representations concerning the warranty offered by Itopia with respect to the Service, unless they are consistent with the warranty set forth herein. The Service Provider Service Agreement shall disclaim any and all direct warranties, express or implied, or liabilities of Itopia to such Customer for all damages, whether direct or indirect, incidental or consequential, arising from the use of the Service.

4.3 <u>Service Provider's Enforcement</u>. Service Provider shall be responsible for the enforcement of the Service Provider Service Agreement. If a material breach of the Service Provider Service Agreement occurs, Service Provider shall promptly notify Itopia and will institute legal action against the Customer if requested by Itopia. If Itopia elects to proceed to enforce the Service Provider Service Agreement directly against the Customer, it may do so in its sole discretion.

5. **CUSTOMER SUPPORT**

5.1 <u>Service Provider Provided Support</u>. Service Provider shall provide Level 1 support and trouble ticket handling support for all Customers after the activation of Services as more specifically provided in Exhibit A. Level 1 support includes, but is not necessarily limited to, (i) logging initial report or inquiry detail from Customer, (ii) initial triage to identify the process the call should follow, (iii) billing inquiries, order status, etc., (iv) isolation

testing to sectionalize troubles, and (v) trouble resolution process management.

5.2 <u>Itopia Provided Support</u>. Itopia shall be responsible for providing support solely to Service Provider in accordance with the terms and conditions set forth Exhibit A. Itopia will not provide any support directly to Customers.

6. **REPRESENTATIONS AND WARRANTIES; DISCLAIMER**

6.1 <u>Itopia's Representations and Warranties</u>. Itopia warrants and represents that it has the full power and authority to enter into the Agreement and to perform its obligations hereunder. Itopia further represents and warrants that (i) it will comply with all applicable laws and regulations in performing its obligations hereunder, (ii) it will perform its obligations hereunder and otherwise conduct its business in a professional and workmanlike manner; and (iii) it will refrain from deceptive, misleading or unethical business practices of any kind.

6.2 <u>Service Provider's Representations and Warranties</u>. Service Provider warrants and represents that it has the full power and authority to enter into the Agreement and to perform its obligations hereunder. Service Provider further represents and warrants that (i) it will comply with all applicable laws and regulations in performing its obligations hereunder, (ii) it will perform its obligations hereunder and otherwise conduct its business in a professional and workmanlike manner that reflects favorably upon Itopia and the Service; and (iii) it will refrain from deceptive, misleading or unethical business practices of any kind.

6.3 <u>Warranty Disclaimer</u>. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, ALL SERVICES HEREUNDER ARE PROVIDED ON AN "AS IS" BASIS, AND ALL USE THEREOF IS AT SERVICE PROVIDER'S AND ITS CUSTOMER'S OWN RISK. ITOPIA DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY AND ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND TITLE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, ITOPIA DOES NOT WARRANT THAT THE SERVICES OR CIRCUITS WILL PERFORM AT A PARTICULAR SPEED, OR WILL BE UNINTERRUPTED, ERROR-FREE, OR SECURE. THE SERVICE MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. ITOPIA IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS. ITOPIA DOES NOT GUARANTEE THAT ITS PROCEDURES AND SERVICES WILL PREVENT LOSS, ALTERATIONS OR UNAUTHORIZED ACCESS TO SERVICE PROVIDER DATA OR CONTENT HOSTED, DISTRIBUTED OR DELIVERED THROUGH ANY FACILITY EMPLOYED IN THE DELIVERY OF THE SERVICES.

6.4 <u>No Guarantees</u>. Service Provider acknowledges and agrees that Itopia makes no promise or guarantee that Service Provider will obtain or receive any minimum revenue or profits as a result of this Agreement or selling or offering for sale the Service.

7. **LIMITATION OF LIABILITY AND DAMAGES**.

7.1 <u>Limitation of Liability</u>. EXCEPT FOR THE INDEMNITY PROVISIONS SET FORTH IN SECTION 12, SERVICE PROVIDER'S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS SET FORTH HEREIN, AND FEES OWED TO ITOPIA BY SERVICE PROVIDER, NEITHER PARTY WILL BE LIABLE UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY FOR ANY LOST REVENUE, LOST PROFITS, SPECIAL, INCIDENTAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL DAMAGES WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO SERVICES. IN NO EVENT WILL ITOPIA OR ITS AGENTS OR SUPPLIERS BE LIABLE TO SERVICE PROVIDER, ANY CUSTOMER OR USER, OR ANY THIRD PARTY FOR THE COST OF SUBSTITUTE SERVICES OR FOR ANY CLAIMS ARISING OUT OF OR RELATED TO SERVICE PROVIDER'S BUSINESS, ITS RELATIONSHIP WITH ITS CUSTOMERS OR USERS, OR OTHERWISE. NEITHER ITOPIA NOR ITS AGENTS OR SUPPLIERS SHALL BE LIABLE FOR ANY DAMAGES ASSOCIATED WITH THE INTERRUPTION, UNAVAILABILITY, OR LOSS

OF USE OF SERVICES OR LOSS OF DATA, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NEITHER ITOPIA NOR ITS AGENTS OR SUPPLIERS WILL BE LIABLE FOR UNAUTHORIZED ACCESS TO SERVICE PROVIDER'S TRANSMISSION FACILITIES OR PREMISES EQUIPMENT OR FOR UNAUTHORIZED ACCESS TO OR ALTERATION, THEFT OR DESTRUCTION OF SERVICE PROVIDER'S DATA FILES, PROGRAMS PROCEDURES OR INFORMATION THROUGH ACCIDENT, FRAUDULENT MEANS OR DEVICES, OR ANY OTHER METHOD. EXCEPT FOR INDEMNIFICATION CLAIMS BASED ON INTELLECTUAL PROPERTY INFRINGEMENT AS SET FORTH IN SECTION 12 BELOW, ITOPIA'S MAXIMUM AGGREGATE LIABILITY RELATED TO A CLAIM ARISING UNDER THIS AGREEMENT, UNDER ANY CONTRACT, NEGLIGENCE, TORT, STRICT LIABILITY OR OTHER THEORY, WILL BE LIMITED TO THE THREE MONTHS OF FEES PAID TO ITOPIA UNDER THIS AGREEMENT IMMEDIATELY PRECEEDING THE EVENT GIVING RISE TO SUCH LIABILITY; PROVIDED, HOWEVER, THAT SERVICE PROVIDER PROVIDES ITOPIA WITH WRITTEN NOTICE OF SUCH CLAIM WITHIN SIX (6) MONTHS OF THE OCCURRENCE GIVING RISE TO SUCH CLAIM. THESE LIMITATIONS OF LIABILITY ARE INTENDED TO APPLY WITHOUT REGARD TO WHETHER OTHER PROVISIONS OF THIS AGREEMENT HAVE BEEN BREACHED OR HAVE PROVEN INEFFECTIVE.

7.2 In addition to, but not in limitation of, the above disclaimer, neither Itopia nor its agents or suppliers shall have any liability under any provision of this Agreement with respect to any performance problem, claim of infringement or other matter to the extent attributable to (a) any unauthorized or improper use or modification of the Services; (b) any unauthorized combination of the Services with other equipment or services; (c) any use of any version of the Services other than the latest release of the Services; or (d) any breach of this Agreement or the AUP. Itopia (and Itopia's agents and suppliers) shall not be liable to Service Provider for any of the following resulting from, or in any way related to, the Services: (i) viruses, worms, Trojan Horses, or other undesirable data or software produced or initiated by third parties; or (ii) the attempt by unauthorized users (e.g., hackers) to obtain access to Service Provider's data, website, computers, private network or other networks.

8. **ORDERING; PRICES AND DISCOUNTS**

8.1 Ordering. Service Provider shall purchase the Services in accordance with the pricing and related terms set forth on Exhibit C attached hereto and issue Order Forms to Itopia for the Service, whether to be sold to Customers or to be used for its own internal or demonstration purposes. Itopia shall acknowledge Service Provider's Order once an Order Form is submitted.

8.2 Price Increases. In the event of an Itopia price increase, all orders delivered on or after the effective date of such price increase shall be filled at the new higher price. Itopia shall, however, honor all Itopia accepted and scheduled Service Provider Order Forms received prior to notice of the price increase by Itopia at the prices in effect as of the date the order(s) was received.

8.3 Price Decreases. In the event of an Itopia price decrease, all orders delivered on or after the effective date of such price decrease shall be filled at the new lower price regardless of when the order was received. However, in no event will a price decrease be applied to Services previously delivered to Service Provider.

9. **INVOICING AND PAYMENT**

9.1 Invoicing. Itopia will begin charging Service Provider for each Service immediately following Itopia's notification to Service Provider that such Service has been provisioned by Itopia. If Services are purchased prior to the 15th of the month, charges are applied retroactively for the entire month in which the Service was purchased. If Services are purchased after the 15th of the month, charges are applied starting at the beginning of the following month.

9.2 Payment Terms; Suspension. Service Provider agrees to pay all invoices submitted by Itopia within thirty (30) days of the date of the invoice. Non-receipt of payment from a Service Provider's Customer shall not excuse or delay payment to Itopia. In the event that Service Provider fails to make any payment when due, Itopia may suspend further performance until such time as the past-due payment is received, and may, at its discretion, require that subsequent orders be paid in full prior to performance. If an

Order Form includes specific payment terms, such terms shall take precedence over the terms of this Section 9.2.

9.3 Other Terms. Itopia reserves the right to impose other commercially reasonable payment, collection and credit terms, including, but not limited to, direct Customer billing and collection, payment upon delivery or letter of credit terms in the event Itopia's sole judgment, such terms are warranted. In the event that Itopia elects to require payment by letter of credit, such letter of credit shall be an irrevocable letter of credit issued by a U.S. Bank. In the event Service Provider elects to implement Itopia's direct Customer billing and collection, or in the event that Itopia imposes direct Customer billing and collection, it shall be in accordance with the terms and conditions set forth on Exhibit B attached hereto.

9.4 Late Fees. Itopia reserves the right to impose a late payment charge of one and one half percent (1 ½%) per month, or the maximum allowed by law, whichever is less, on any invoice, which is not timely paid, until such invoice is paid in full.

9.5 Taxes. Prices do not include taxes. Except for taxes based on Itopia's net income, Service Provider shall pay any applicable sales, use, excise, value added or other taxes, or amounts levied in lieu of such taxes, now or later imposed under the authority of any national, state or local taxing authority, based on sales of the Services to or by Service Provider. In the event that Service Provider is required to withhold an amount for taxes from a payment that Service Provider is required to make to Itopia under this Agreement, Service Provider shall notify Itopia. Service Provider agrees to provide such assistance as Itopia reasonably requests in connection with any filing that Itopia determines to make either to avoid the withholding or to recoup any money that is withheld.

9.6 Service Provider Operating Expenses. Service Provider will bear all of its expenses incurred in connection with resale of the Service and Service Provider's obligations under this Agreement.

10. **DELIVERY**. Itopia shall use commercially reasonable efforts to meet the delivery date indicated on Service Provider's Order Form. However, Itopia shall not be liable for delivery delays. The Service shall be delivered electronically by Itopia.

11. **TERM AND TERMINATION**

11.1 Term of Agreement. The initial term of this Agreement ("Initial Term") shall be from the Effective Date until the second anniversary thereof unless earlier terminated in accordance with the terms of this Agreement. At the conclusion of the Initial Term, this Agreement will automatically renew for additional one-year terms (each, an "Additional Term", and together with the Initial Term, the "Term") unless either Party gives written notice to the other Party within thirty (30) days of the end of the then-current Initial Term or Additional Term of its intention not to renew the Agreement.

11.2 Order Term. In the event any Order Term (as defined below) extends beyond the expiration of the Term, the applicable Service will remain in effect for the agreed upon Order Term, subject to all of the terms and conditions of this Agreement as if it were still in effect with respect to such Service. Unless otherwise stated in the applicable Order Form, each Order Form shall have an initial term of one (1) year (the "Initial Order Term"), beginning on the first date upon which any Services governed by such Order Form are available for Service Provider's (or its Customer's) use, as reasonably determined by Itopia. In the event there is no renewal term stated in the Order Form, the term of the ordered Service(s) shall automatically renew for successive renewal periods of one (1) year unless either Party provides thirty (30) days' written notice of termination to the other Party prior to the expiration of any service period; provided, however, that an Order Term shall not renew after expiration of the Term. The Initial Order Term together with any renewal period shall be referred to as the "Order Term".

11.3 Cancellation of Order Form. If Service Provider desires to cancel or disconnect any Service ordered on an Order Form, Service Provider shall provide Itopia with written notice of such desire, and Itopia shall cancel or disconnect such Service within thirty (30) days after receiving such notice. If Service Provider elects to cancel or disconnect any Service during the applicable Order Term, Service Provider shall pay to Itopia the full amount of all past due charges and interest thereon, if any.

11.4 Termination Without Cause. Either Party may, at its discretion, terminate this Agreement after the Initial Term by notifying the other Party in writing not less than one hundred twenty (120) days prior to the effective date of termination. Such termination is subject to the additional terms and conditions stated

below dependent upon which Party has initiated the termination.

11.5 <u>Termination by Itopia</u>. If this Agreement is terminated by Itopia, for any reason whatsoever, Itopia shall demand payment from Service Provider on any invoice that is delinquent at the time of termination or becomes delinquent after the date of termination.

11.6 <u>Termination by Breach</u>. If Service Provider is in material breach of this Agreement, Itopia shall give Service Provider thirty (30) days' written notice of any such breach. If such breach has not been cured to Itopia's satisfaction within such thirty (30) day period, then this Agreement shall automatically terminate at the end of the applicable notice period without further notice. If this Agreement is terminated for reasons of Service Provider's breach then the provisions included in Section 11.8 of this Agreement shall apply. If Service Provider fails to pay the fees for Services within thirty (30) calendar days after the date of the invoice, or if Service Provider fails to meet any of its other obligations under an Order Form, Itopia may in its discretion, and without any further notice, stop provisioning Services not yet installed and suspend all Services. If Service Provider fails to pay the fees for Services within sixty (60) calendar days after the date of the invoice ("Payment Default") or if Service Provider fails to meet any of its other obligations under this Agreement, Itopia may do any combination of the following in its discretion and without notice: (i) terminate any or all of the Services provided under this Agreement, (ii) disconnect any applicable Circuit(s) or Service(s) and treat such disconnection as a disconnection for purposes of Section 11.3 above, (iii) terminate the applicable Order Form, and/or (iv) enforce any and all rights it may have under this Agreement (including, without limitation, collecting all accounts receivable directly from Customers), at law or in equity.

11.7 <u>Termination due to Cessation</u>. This Agreement may be terminated by either Party upon thirty (30) days' written notice to the other Party, in the event that the other Party: (i) shall become insolvent; (ii) admits in writing its inability to pay its debts as they mature; or (iii) ceases to function as a going concern or to conduct its operations in the normal course of business, if such event is not cured within the thirty (30) day period.

11.8 <u>Effect of Termination by Service Provider</u>. If this Agreement is terminated by the Service Provider, for any reason whatsoever, the Service Provider shall:

11.8.1. Pay all amounts outstanding on invoices issued, and invoices to be issued, not later than fifteen (15) calendar days after the termination date for Services rendered prior to the effective date of such termination.

11.8.2. Issue cancellation orders for any Orders Forms that have been previously placed but for which the Service has not yet been activated and for which it no longer wishes Itopia to deliver the Service previously ordered. Such Order Form cancellation will be subject to cancellation fees.

11.8.3. For any Orders Form that have been previously placed but for which the Service has not yet been delivered and Service Provider does not issue a cancellation order, whether or not the Service Provider intended to cancel the Order Form, Itopia shall be entitled to deliver the ordered Service and invoice the Service Provider and Service Provider shall be obligated to pay such invoice(s).

11.8.4. Service Provider shall not place any new Order Forms against this Agreement after the notice of termination has been provided even though the termination date may not have yet occurred except for Customers under term agreements which require additional services, providing the Service Provider's account is not in arrears.

11.8.5. Service Provider shall continue to be obligated to provide support services to Service Provider's Customers in accordance with the support agreement entered into between Service Provider and such Customers

11.9 <u>Effect of Any Termination</u>. Upon any termination or expiration of this Agreement, (i) Service Provider will immediately discontinue provision of the Service (as well as any use of the Itopia Confidential Information); (ii) Service Provider will promptly pay all accrued and outstanding amounts due under this Agreement; (iii) each Party will delete any of the other Party's Confidential Information from computer storage or any other media including, but not limited to, online and off-line libraries; and (iv) each Party will return to the other Party or, at the

other Party's option, destroy, all physical copies of any the other Party's Confidential Information.

11.10 <u>Survival</u>. The termination or expiration of this Agreement shall in no case relieve either Party from its obligation to pay to the other any sums accrued under this Agreement prior to such termination or expiration. Termination of this Agreement shall not affect Sections 1.3, 1.5, 3.6 ,3.7, 3.8, 3.12, 6, 7, 8, 10, and 12 through and including 15, which shall survive termination of this Agreement. In addition, the sublicenses granted by Service Provider to Customers, and all provisions governing Service Provider's obligation in performing services to Customer shall remain in effect following the termination of this Agreement.

12. **INDEMNIFICATION**.

12.1 Subject to Section 7, each Party (the "Indemnifying Party") shall, at its own expense, indemnify and hold the other Party, its affiliates, successors and assigns, and each of their respective directors, officers, partners, contractors, employees and agents (collectively the "Indemnified Parties") harmless from and against any third party damage, loss, deficiency, cost, liability and expenses, including reasonable attorneys' fees, and amounts paid in settlement resulting from or arising out of any claim, suit action or proceeding (each a "Claim") made or brought by a third party against any of the Indemnified Parties in connection with: (a) in the case of Service Provider as the Indemnifying Party, (i) a claim that the Content infringes on the intellectual property or other rights of any third party or misappropriates the trade secrets of any third party, (ii) Service Provider's gross negligence or intentional misconduct, including, without limitation, Claims for damage to property and/or personal injuries (including death) due to such gross negligence or willful misconduct, (iii) the unauthorized disclosure by Service Provider of any Itopia Confidential Information; or (b) in the case of Itopia as the Indemnifying Party, (i) Itopia's gross negligence or intentional misconduct in performing its obligations hereunder, including, without limitation, Claims for damage to property and/or personal injuries (including death) due to such gross negligence or willful misconduct, or (ii) the unauthorized disclosure by Itopia of any Service Provider Confidential Information; or (iii) any claim that the Service infringes a patent, copyright, or trade secret of any third party. The indemnification

obligations hereunder shall be subject to the Indemnified Party providing the Indemnifying Party with prompt written notice of any Claim, the Indemnified Party giving the Indemnifying Party sole control and authority with respect to the defense or settlement of any Claim, and the Indemnified Party reasonably cooperating (at the Indemnifying Party's expense) with the Indemnifying Party in the defense of any Claim. The Indemnifying Party shall not enter into any settlement which imposes liability or restrictions on the Indemnified Party without the prior written approval of such Indemnified Party.

12.2 <u>Entire Obligation</u>. The provisions of this Article 12 set forth the entire obligation of Itopia with respect to any claim of intellectual property infringement.

13. **CONFIDENTIAL INFORMATION**

13.1 <u>Confidential Information</u>. All written or oral information, disclosed by a Party hereunder, related to the operations of Party or a third party that has been identified as confidential or that by the nature of the information or the circumstances surrounding disclosure ought reasonably to be treated as confidential, including non-public technical information, programming, code, trade secrets, marketing strategies, customer data, product development plans, documentation, and software and other proprietary information ("Confidential Information") shall constitute the Confidential Information of such Party. The receiving Party, except as specifically authorized in writing by the disclosing Party, shall: (i) not disclose any such Confidential Information to any person or entity, and will restrict access to the Confidential Information to such of its personnel, agents, and/or consultants, if any, who have a need to have access for purposes of performing such Party's obligations hereunder and who have been advised of and have agreed in writing to treat such information in accordance with the terms of this Agreement; (ii) not reproduce any such Confidential Information, in whole or in part; and (iii) not use any such Confidential Information for any other purpose than performing its rights and obligations pursuant to the terms of this Agreement. However, Service Provider may disclose the Confidential Information of Itopia to a Customer or potential Customer, provided that there is a Non-Disclosure Agreement in place between Service Provider and such Customer that is no less restrictive than the confidentiality terms contained herein. Each Party will protect the Confidential Information of the

other from dissemination to, and use by, any third party using the same standard of care that it uses to protect its own confidential information, but in no event less than reasonable care.

13.2 <u>Return of Confidential Information</u>. Upon termination of this Agreement, regardless of cause, each Service Provider shall immediately return to Itopia all Confidential Information and Documentation.

13.3 <u>Exceptions</u>. The requirement of either Party to hold the Confidential Information of the other Party in confidence does not apply to information which (i) was publicly known at the time of disclosure or becomes publicly known thereafter through no fault or negligence of the receiving Party; (ii) was already in the possession of the receiving Party at the time of disclosure as evidenced by the receiving Party's records as of the time of such disclosure; (iii) was received by the receiving Party from a third party without breach of any duty to the disclosing Party; (iv) was independently developed by the receiving Party without use of or reference to the disclosing Party's Confidential Information, as demonstrated by written records; (v) was properly furnished to a third party by the disclosing Party without restriction on confidentiality; or (vi) is required under authority of law, regulation or court order to be disclosed by the receiving Party, so long as the receiving Party shall (a) as soon as possible after becoming aware of such requirement and prior to disclosing Confidential Information pursuant thereto, notify the disclosing Party in writing of such required disclosure so that the disclosing Party may seek a protective order or other appropriate remedy or waive its rights under this Section 13, (b) at the disclosing Party's expense, use reasonable efforts not to release such Confidential Information pending the outcome of any measures taken by the disclosing Party to contest, oppose or limit such compelled disclosure or any further disclosure or use of Confidential Information that may result therefrom; (c) cooperate with and provide assistance to the disclosing Party in connection with any measures taken by the Disclosing Party and, if a protective order or other remedy is not obtained or the Disclosing Party waives compliance with this Section 13, use reasonable efforts at the disclosing Party's expense to obtain assurance that the Confidential Information will be accorded confidential treatment; and (d) disclose only the portion of Confidential Information that it is legally required to produce to the minimum extent required by applicable Law.

14. **GENERAL**

14.1 <u>Binding Agreement</u>. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns, but neither Party shall have the right to assign or otherwise transfer its rights under this Agreement without receiving the express prior written consent of the other Party. Itopia may, however, assign this Agreement to an affiliate or in the event of a merger or sale of all or substantially all of Itopia's assets.

14.2 <u>Entire Agreement</u>. This Agreement, including all Exhibits attached hereto, together with terms and conditions set forth in any Order Form, sets forth the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersedes and merges all prior oral and written agreements, discussions and understandings between the Parties with respect to the subject matter hereof.

14.3 <u>Notices</u>. All notices, requests, demands, and other communications provided for under this Agreement shall be in writing and in English to be sent by recognized courier delivery, or registered or certified mail, postage prepaid, to the receiving Party at its address as set forth below or to any other address that the receiving Party may have provided to the sending Party in writing. A copy of any such notice, request, demand or other communication shall also be transmitted by facsimile or email as follows or to such other facsimile number or email address as provided by the receiving Party in writing:

To Service Provider:

[SERVICE PROVIDER NAME]
[SERVICE PROVIDER ADDRESS]
[CITY, STATE ZIP]
 [EMAIL]

To Itopia:

Itopia, Inc.
200 1st Street, Suite 400
Miami, FL 33131
jlieberman@itopia.us

With a Copy to:

Itopia, Inc.
Chief Financial Officer

200 SE 1st Street, Suite 400
Miami, FL 33131
accounting@itopia.us

14.4 <u>Jurisdiction</u>. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida, U.S.A., excluding its principles of choice of law or conflicts of law. Except for arbitration pursuant to this Agreement, exclusive jurisdiction and venue for any and all disputes hereunder, including any actions to interpret this Agreement, shall lie solely in state or federal courts having jurisdiction over Miami-Dade County, Florida, USA.

14.5 <u>Counterparts</u>**.** This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which taken together shall constitute one and the same instrument. Headings in this Agreement are included for reference only and shall not constitute a part of this Agreement for any other purpose.

14.6 <u>Independent Contractors</u>. Service Provider and its agents will be independent contractors with respect to services they provide to Itopia hereunder. Service Provider and its agents will not hold themselves out to third parties as having the power to contractually bind Itopia with respect to any matter, and will be responsible for their own employees and agents, and such employees and agents will not be deemed to have an employment relationship with Itopia.

14.7 <u>Force Majeure</u>. Except for Service Provider's payment obligations pursuant to this Agreement, neither Party shall be liable to the other Party for any loss, injury, delay, expenses, damages, or other casualty suffered or incurred by the other Party arising out of any cause or event not within a Party's reasonable control and without its fault or negligence including, but not limited to: riots, wars or hostilities between any nations, Acts of God, fires, storms, floods or earthquakes; strikes, labor disputes, vendor delays, labor, power or other utility services; government restrictions or trade disputes.

14.8 <u>Assignment</u>. Service Provider may not assign or transfer part or all of its rights and obligations under this Agreement without the written consent of Itopia, which shall not be unreasonably withheld. Itopia may assign or transfer part or all of their respective rights and obligations under this Agreement without notice, including without limitation, to any entity that is a subsidiary or affiliate of Itopia or to any entity that is the survivor of a merger with Itopia and any entity that acquires all or substantially all of the assets of Itopia. This Agreement shall apply to, bind, and inure to the benefit of, any permitted transferees, assignees or successors, all of whom shall execute counterparts of this Agreement, and Service Provider shall remain liable for the payment of all charges due under this Agreement.

14.9 <u>Modification</u>. This Agreement may be changed only by a written document signed by authorized representatives of Itopia and Service Provider.

14.10 <u>Severability</u>. If any provision of this Agreement, as applied to either party or to any circumstance, is adjudged by a court or arbitrator to be invalid, illegal, or unenforceable, the same will not affect the validity, legality, or enforceability of any other provision of this Agreement. All terms and conditions of this Agreement will be deemed enforceable to the fullest extent permissible under applicable law.

14.11 <u>No Waiver; All Rights Cumulative</u>. The failure by either Party to enforce any rights hereunder shall not constitute a waiver of such right(s) or of any other or further rights hereunder. The waiver of any breach or default of this Agreement will not constitute a waiver of any subsequent breach or default.

14.12 <u>Arbitration</u>. ANY DISPUTE BETWEEN THE PARTIES WILL BE SUBMITTED TO BINDING ARBITRATION UNDER THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THE PLACE OF ARBITRATION WILL BE FLORIDA. THE DECISION OF THE ARBITRATORS WILL BE FINAL AND BINDING ON THE PARTIES AND MAY BE ENTERED AND ENFORCED IN ANY COURT OF COMPETENT JURISDICTION BY EITHER PARTY.

15. **DEFINITIONS**

15.1 **"Itopia Brands"** means any one or more of the trademarks, service marks, trade names, domain names, logos, business and product names, slogans, and registrations and applications for registration thereof owned by Itopia and provided to Service Provider.

15.2 **"Content"** means the data, including audio and video content, transmitted using the Service.

15.3 **"Circuit"** means the digital data telecommunications service between Itopia's point-of-presence and the Service Provider or Customer premises utilizing DSL, frame relay, ATM, leased line or other data communications technologies.

15.4 **"Customer"** means any entity who acquires access to the Service either directly from Itopia, or from an authorized Itopia service provider, including Service Provider.

15.5 **"Order Form"** means a form describing the Services ordered by Service Provider which must be completed and submitted by authorized representatives of Service Provider.

15.6 **"Service Provider Service Agreement"** means a written agreement between Service Provider and a Customer under which such Customer acquires a license for the Service that contains, at a minimum, those terms set forth in Section 5.

15.7 **"Work Product"** means any and all work product of every kind and nature including, but not limited to, all materials, software, tools, data, inventions, works of authorship (and any drafts of the foregoing), intellectual property rights of every kind and nature, and other innovations of any kind (including, without limitation, any deliverable and any improvements, modifications or derivative works of Itopia's proprietary computer software programs, Service, Documentation and related materials) that Service Provider, or personnel working for or through Service Provider, may create, prepare, make, conceive, develop or reduce to practice, alone or jointly with others, in the course of performing the services or as a result of such service pursuant to this Agreement, whether or not eligible for patent, copyright, trademark, trade secret or other legal protection and any other materials expressly included as Work Product herein.

IN WITNESS WHEREOF, authorized representatives of Service Provider and Itopia have read the foregoing Agreement and agree to be bound thereby as of the Effective Date.

EXHIBIT A

Support and Maintenance

Service Provider is responsible for:

    (a) Service order fulfillment to its Customers;

    (b) Provisioning Customers and Customer devices;

    (c) Physical network connectivity to the Services; and

    (d) All initial support (i.e., administering all calls from Customers) and troubleshooting of Customers. Itopia will not accept calls from any Customer, but only from Service Provider designated operations personnel. If the Service Provider engages itopia for support and has not conducted the minimum troubleshooting as described below, and if the problem reveals the Services are working properly, then itopia reserves the right to charge the Service Provider at customary time and materials rates.

    (e) Customer training;

    (f) Marketing the Service;

    (g) Billing Customers for the Service.

Itopia is responsible for:

    (a) Providing the Service.

    (b) Level 2, 3 and 4 support to Service Provider.

EXHIBIT B

Service Provider Customer Billing and Collection

The terms and conditions set forth in this Exhibit B apply when Service Provider is solely responsible for the billing Service Provider's Customers and collecting all payments from Service Provider's Customers.

Service Provider shall ensure that its Service Provider Customer Agreement between itself and its Customers expressly addresses the terms of this Exhibit B.

Invoicing Customer and Receiving Service Provider Funds

Service Provider will invoice Customers for the Services on a monthly basis. After receipt of the applicable payment from Customers, Service Provider will process all Customer credit card ("Card"), check and ACH payments ("Payments"). Once a month, , or per any other periodic schedule as mutually agreed upon by the Parties ("Processing Date") Service Provider will remit payments due to Itopia set forth in Exhibit B and the Agreement. Service Provider is solely responsible for refunds, returns, and liable for Customer disputes ("Chargebacks"), and such Chargebacks shall not decrease the fees due to Itopia from Service Provider pursuant to this Agreement.

Termination

Termination of the Agreement does not alter Service Provider's liability for processed payments or related Chargebacks.

Payment Methods

Service Provider will only process Card transactions that have been authorized by the applicable Card Network or Card issuer. Service Provider is solely responsible for verifying identity of Service Provider's Customers and determining the Customer's eligibility to purchase Service Provider and Itopia products and services. Itopia does not guarantee or assume any liability for transactions authorized and completed which may later be reversed or charged back (see Chargebacks above). Service Provider is solely responsible and liable for all reversed or charged back transactions, regardless of the reason for, or timing of the reversal or chargeback.

Data Security Obligations

Service Provider is fully and solely responsible for the security of Data (defined below) in Service Provider's possession. Service Provider agrees to comply with all applicable state and federal laws and rules in connection with collection, security and dissemination of any personal, financial, Card, or transaction information (defined as "Data"). Service Provider hereby agrees that at all times Service Provider shall be compliant with the Payment Card Industry Data Security Standards (PCI-DSS), the Payment Application Data Security Standards (PA-DSS), as applicable. Information on the PCI DSS can be found on the [PCI Council's website.](#)