

# **CREATE GROUP CAPITAL**

## **Terms of Service**

**LAST UPDATE: 01/31/2020**

Create Group Capital, LLC (“Create”) provides payment gateway services (“Services”) for merchants either directly, or through arrangements with third parties that resell our Services to their merchant customers. These Terms of Service (the “Terms”) govern your access to and use of the Services. Please read these terms carefully.

The term “you”, as used in these Terms, means any person or entity who accesses or uses the Service. These Terms give you specific legal rights, and you may also have other legal rights in addition, which vary from jurisdiction to jurisdiction. **THE DISCLAIMERS, EXCLUSIONS, MANDATORY AND BINDING ARBITRATION, LIMITATIONS OF LIABILITY, INDEMNIFICATION, WAIVER OF JURY TRIAL, WAIVER OF CLASS ACTION AND WAIVER OF PUNITIVE DAMAGES UNDER THESE TERMS WILL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.** Some jurisdictions do not allow the exclusion of implied warranties or the exclusion or limitation of incidental or consequential damages or other rights, so those provisions of these Terms may not apply to you.

**THESE TERMS ARE A LEGAL AGREEMENT. BY ACCESSING AND USING THE SERVICES, YOU ARE ACCEPTING AND AGREEING TO THESE TERMS. IF YOU DO NOT AGREE WITH ANY OF THE PROVISIONS OF THESE TERMS, YOU SHOULD CEASE ACCESSING OR USING THE SERVICES.**

### **1. OVERVIEW, ELIGIBILITY, CUSTOMER SERVICE, TERM AND TERMINATION**

(a) Overview and Relation to Other Agreements. These Terms govern your use of the Services. Certain features of the Services may be subject to additional guidelines, terms, or rules, which will be posted by Create at its website. All additional guidelines, terms, or rules are incorporated by reference into these Terms and you are agreeing to accept and abide by them by accessing and using the Services.

(b) Our Role. Except for our limited role in directing payment transaction data to applicable payment processors, we are not involved in any underlying transaction between you, any other user, or any other service provider or payment processor. We are not a bank and do not offer banking services. We may use the services of one or more third parties to provide the Services. We do not guarantee payment to you.

(c) Eligibility. (i) You may use the Services only if accept these Terms by accessing or using the Services, and only if you are in compliance with these Terms and all applicable local, state/provincial, national and international laws, rules, and regulations. (ii) The Services are not available to any users previously prohibited from using the Services by Create.

(d) Term and Termination. These terms will remain in full force and effect so long as you continue to access or use the Services, or until terminated in accordance with these Terms. At any time, Create may (i) suspend or terminate your right to access or use the Services, (ii) terminate these Terms with respect to you if Create in good faith believes that that you have used the Services in violation of these Terms, including any incorporated guidelines, terms or rules.

(e) Effect of Termination. Upon termination of these Terms, your right to access and use the Services will automatically terminate. Termination does not relieve you of obligations incurred by you under these Terms.

## 2. ACCOUNTS

(a) When you access and use the Services, you may be required to establish a user account with Create (“Account”).

(b) You represent and warrant that: (i) all required information you submit is truthful and accurate; (ii) you will maintain the accuracy of such information; and (iii) your use of the Services will not violate any U.S. or other applicable law or regulation. You are entirely responsible for maintaining the confidentiality of your Account login information and for all activities that occur under your Account. You agree to maintain your password securely to prevent others from gaining access without your permission. You agree to immediately notify us of any unauthorized use, or suspected unauthorized use, of your Account or any other breach of security. We are not liable for any loss or damage arising from your failure to comply with the above requirements.

(c) You may only use Services to facilitate transactions with your customers.

(d) At any time during the term of these Terms and your use of the Services, we may require additional information from you to verify beneficial ownership or control of the business, validate information you provided, verify you or your representative’s identity, and assess the risk associated with your business. Your failure to provide this information or material may result in suspension or termination of your Create Account. You authorize us to retrieve information about you from our service providers and other third parties, including credit reporting agencies and information bureaus and you authorize and direct such third parties to compile and provide such information to us. You acknowledge that this may include your name, addresses, credit history, and other data about you or your representatives. You acknowledge that we may use your information to verify any other information you provide to us, and that any information we collect may affect our assessment of your overall risk to our business. You acknowledge that in some cases, such information may lead to suspension or termination of your Create Account. Create may periodically update this information as part of our underwriting criteria and risk analysis procedures.

(e) You agree to keep the information in your Create Account current. You must promptly update your Create Account with any changes affecting you, the nature of your business activities, your Representatives, beneficial owners, principals, or any other pertinent information. We may suspend your Create Account or terminate these Terms if you fail to keep this information current.

## 3. YOUR RELATIONSHIP WITH YOUR CUSTOMERS

(a) Create provides Services to you but we have no way of knowing if any particular purchase, sale, donation, order, or other transaction between you and your customers (each a “Transaction”) is accurate or complete, or typical for your business. You are responsible for knowing whether a Transaction initiated by your customer is erroneous (such as a customer purchasing one item when they meant to order another) or

suspicious (such as unusual or large purchases, or a request for delivery to a foreign country where this typically does not occur).

(b) You may only use the Services for legitimate Transactions with your customers.

(c) If you are unsure if a Transaction is erroneous or suspicious, you agree to research the Transaction and, if necessary, contact your customer before fulfilling or completing the Transaction. You are solely responsible for any losses you incur due to erroneous or fraudulent Transactions in connection with your use of the Services.

#### 4. ACCESS TO SERVICES

(a) Access and Use. Subject to these Terms, Create will permit you to access and use the Services for the purpose of enabling (i) the direction of payment transaction data to applicable payment processors and (ii) ancillary processes and activities directly related thereto (the "Permitted Purpose") and for no other purposes.

(b) Certain Restrictions. The rights granted to you in these Terms are subject to the following restrictions: (i) you agree not to license, sell, rent, lease, transfer, assign, distribute, host, or otherwise commercially exploit the Services; (ii) you agree not to modify, make derivative works of, disassemble, reverse compile, or reverse engineer any part of the Services; (iii) you agree not to access the Services in order to build a similar or competitive service or product; (iv) except as expressly stated herein, no part of the Services may be copied, reproduced, distributed, republished, downloaded, displayed, posted, or transmitted in any form or by any means; (v) you agree not to upload, transmit, or distribute any computer viruses, worms, or any software intended to damage or alter a computer or communication network, computer, handheld mobile device, data, the Services, or any other system, device or property; (vi) you agree not to interfere with, disrupt, or attempt to gain unauthorized access to, the servers or networks connected to the Services or violate the regulations, policies, or procedures of such networks; and (vii) you agree not to access (or attempt to access) any of the Services by means other than through application programming interface(s) provided by Create. Any future release, update, or other addition to functionality of the Services shall be subject to these Terms.

(c) Security. Create cares about the integrity and security of your personal information. However, Create cannot guarantee that unauthorized third parties will never be able to defeat our security measures or use your personal information for improper purposes.

(d) Modification. Create reserves the right, at any time, to modify the Services or any part thereof with or without notice. You agree that Create will not be liable to you or to any third party for any modification, of the Services or any part thereof.

#### 5. AGREED USAGE AND LIMITATIONS OF CREATE SERVICES

(a) Interruption of Services. While we aim for the Services to be highly reliable and available, they are not intended to be reliable or available 100% of the time. The Services are subject to sporadic interruptions and failures for a variety of reasons beyond Create's control, including, without limitation, power disruptions,

service provider uptime, mobile notifications and carriers, among others. You acknowledge these limitations and agree that Create is not responsible for any damages allegedly caused by the failure or delay of the Services.

(b) Reliability of Services. You acknowledge that the Services are not error-free or 100% reliable and 100% available, and may be interrupted, delayed, refused, or otherwise limited for a variety of reasons, including insufficient coverage, power outages, termination of service and access, environmental conditions, interference, non-payment of applicable fees and charges, unavailability of radio frequency channels, system capacity, upgrades, repairs or relocations, and priority access by emergency responders in the event of a disaster or emergency (collectively "Service Interruptions"). You understand that Service Interruptions may result in the Services being unreliable or unavailable for the duration of the Service Interruption. We cannot and do not guarantee that you will receive notifications in any given time or at all.

(c) Service Interruptions; no refund or rebate. The Services may be suspended temporarily without notice for security reasons, system failure, maintenance and repair, or other circumstances. You agree that you will not be entitled to any refund or rebate for such suspensions. Create does not offer any specific uptime guarantee for the Services.

(d) System Requirements. It is your responsibility to ensure that you have all required system elements and that they are compatible and properly configured. You acknowledge that the Services may not work as described when the requirements and compatibility have not been met. If you modify, substitute, move, or otherwise change any of the required system elements, it is your sole duty and responsibility to be sure they are compatible and properly configured to work with the Services.

(e) Data Reliability. You are solely responsible for the accuracy and completeness of all data transmitted by you using the Services.

(f) Representations. You warrant, represent and agree that you will not transmit any data or other information via the Services, or otherwise use the Services in a manner that, (i) violates rights of publicity or privacy, or other rights of any third party; (ii) violates any law, statute, ordinance or regulation or is otherwise illegal; (iii) contains a virus, Trojan horse, worm, time bomb, or other harmful computer code, file, or program; (iv) jeopardizes the security of your Account or anyone else's Account (such as allowing someone else to log in to the Services as you); (v) attempts, in any manner, to obtain or access the password, account, products, devices, systems, or other security information from any other user or third party; (vi) violates the security of any computer network, or cracks any passwords or security encryption codes; (vii) interferes with the proper working of the Services (including by placing an unreasonable load on the Services infrastructure); or (viii) denigrates or disrupts any network capacity or functionality.

## 6. LIMITATIONS OF CREATE SERVICES DUE TO THIRD PARTIES

(a) General. The Services rely on or interoperate with third party products and services. These third-party products and services are beyond Create's control, but their operation may impact or be impacted by the use and reliability of the Services. You acknowledge and agree that: (i) the use and availability of the Services is dependent on third party product vendors and service providers, (ii) these third-party products and services may not operate in a reliable manner 100% of the time, and they may impact the way that the

Services operate, and (iii) Create is not responsible for damages and losses due to the operation of these third-party products and services.

(b) Third Party Service Providers Used by Create. You acknowledge that Create uses third party service providers to enable some aspects of the Services and is not responsible for such third party service providers, their services, or their systems.

(c) Equipment, ISP, and carrier. You acknowledge that the availability of the Services is dependent on (i) your computer, internet network, and other related equipment and (ii) your Internet service provider ("ISP"). You acknowledge that you are responsible for all fees charged by your ISP in connection with your use of the Services. You also acknowledge that you are responsible for compliance with all applicable agreements, terms of use/service, and other policies of your ISP.

(d) Release Regarding Third Parties. Create is not responsible for third parties or their products and services. Create hereby disclaims and you hereby discharge, waive and release Create and its licensors and suppliers from any past, present, and future claims, liabilities, and damages, known or unknown, arising out of or relating to your interactions with such third parties and their products and services.

## 7. SUSPICION OF UNAUTHORIZED OR ILLEGAL USE

We may refuse, condition, or suspend any Transactions that we believe: (i) may violate these Terms or other agreements you may have with Create; (ii) are unauthorized, fraudulent or illegal; or (iii) expose you, Create, or others to risks unacceptable to Create. If we suspect or know that you are using or have used the Services for unauthorized, fraudulent, or illegal purposes, we may share any information related to such activity with the appropriate financial institution, regulatory authority, or law enforcement agency consistent with our legal obligations. This information may include information about you, your Create Account, your customers, and Transactions made through your use of the Services.

## 8. PROCESSING TRANSACTIONS; DISPUTES, REFUNDS, REVERSALS

(a) To enable us to process Transactions for you, you authorize and direct us, our affiliates, the Payment Method Providers and Payment Method Acquirers to receive and settle any payment processing proceeds owed to you through the Services. "Payment Method" means a type of payment method that Create accepts as part of the Services, such as credit card, debit card, and ACH. "Payment Method Acquirer" means a financial institution that is authorized by a Payment Method Provider to enable the use of a Payment Method by accepting charges from Customers on behalf of the Payment Method Provider, and routing these charges to the Payment Method Provider. "Payment Method Provider" means the provider of a Payment Method, such as Visa, MasterCard, Discover, and American Express.

(b) Except where Create and a customer have otherwise agreed, you maintain the direct relationship with your customers and are responsible for: (i) acquiring appropriate consent to submit charges through the Services on their behalf; (ii) providing confirmation or receipts to customers for each charge; (iii) verifying customers' identities; and (iv) determining a customer's eligibility and authority to complete Transactions. However, even authorized Transactions may be subject to a dispute. Create is not responsible for or liable

to you for authorized and completed Charges that are later the subject of a dispute, refund, or reversal, are submitted without authorization or in error, or violate any laws.

#### 9. OWNERSHIP AND INTELLECTUAL PROPERTY

You acknowledge that all intellectual property rights, including without limitation copyrights, patents, trademarks, and trade secrets, in the Services are owned by Create or our affiliates or licensors. Your access to and use of Services do not transfer to you or any third party any rights, title, or interest in or to such intellectual property rights. Create and its affiliates and licensors and suppliers reserve all rights not granted in these Terms.

#### 10. INDEMNITY FOR THIRD PARTY ACTIONS

TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, YOU AGREE TO INDEMNIFY, DEFEND, RELEASE AND HOLD CREATE AND ITS LICENSORS AND SUPPLIERS (COLLECTIVELY THE "CREATE PARTIES") HARMLESS FROM AND AGAINST (I) ALL CLAIMS, ACTIONS, LAWSUITS AND ANY OTHER LEGAL ACTION BROUGHT BY ANY THIRD PARTY AGAINST ANY OF THE CREATE PARTIES ARISING FROM OR RELATING TO (A) YOUR ACCESS TO AND USE OF THE SERVICES, (B) YOUR VIOLATION OF THESE TERMS, (C) YOUR VIOLATION OF ANY LAW OR THE RIGHTS OF ANY THIRD-PARTY (COLLECTIVELY "THIRD PARTY ACTIONS"); AND (II) ANY AND ALL RELATED LOSSES, DAMAGES, SETTLEMENTS AND JUDGMENTS (INCLUDING PAYMENT OF THE CREATE PARTIES' ATTORNEYS' FEES AND COSTS) INCURRED BY ANY OF THE CREATE PARTIES, ASSESSED OR FOUND AGAINST ANY OF THE CREATE PARTIES, OR MADE BY ANY OF THE CREATE PARTIES, RELATING TO OR ARISING FROM ANY SUCH THIRD PARTY ACTION ("THIRD PARTY RELATED LOSSES"). YOU UNDERSTAND AND AGREE THAT YOUR INDEMNIFICATION OBLIGATION TO THE CREATE PARTIES APPLIES EVEN IF SUCH THIRD-PARTY ACTION AND THIRD PARTY RELATED LOSSES ARISE FROM THE NEGLIGENCE OF ANY KIND OR DEGREE, BREACH OF CONTRACT OR WARRANTY, STRICT LIABILITY, NON-COMPLIANCE WITH APPLICABLE LAW, OR OTHER FAULT OR WRONGDOING OF ANY OF THE CREATE PARTIES. Create reserves the right to assume the exclusive defense and control of any matter for which you are required to indemnify Create and you agree to cooperate with our defense of such claims. You agree not to settle any such claim without Create's prior written consent. Create will use reasonable efforts to notify you of any such claim, action or proceeding upon becoming aware of it.

#### 11. WARRANTY DISCLAIMERS

(a) THE SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE" AND CREATE AND ITS LICENSORS AND SUPPLIERS EXPRESSLY DISCLAIM ANY WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING THE WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, AND NON-INFRINGEMENT.

(b) CREATE AND ITS LICENSORS AND SUPPLIERS MAKE NO WARRANTY THAT DEFECTS WILL BE CORRECTED OR THAT THE SERVICES: (I) WILL MEET YOUR REQUIREMENTS; (II) WILL BE

COMPATIBLE WITH YOUR NETWORK OR COMPUTER SYSTEM; (III) WILL BE AVAILABLE ON AN UNINTERRUPTED, TIMELY, SECURE, OR ERROR-FREE BASIS; OR (IV) WILL BE ACCURATE OR RELIABLE. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM CREATE OR THROUGH THE SERVICES SHALL CREATE ANY WARRANTY.

#### 12. WAIVER OF SUBROGATION

You should protect against any risk of loss with the appropriate insurance coverage, and you are responsible for obtaining all insurance coverage you believe is necessary. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW AND THE APPLICABLE POLICY OR POLICIES OF INSURANCE YOU OBTAIN AND MAINTAIN, YOU RELEASE CREATE AND ITS LICENSORS AND SUPPLIERS FROM ALL LIABILITY FOR ANY LOSS, OCCURRENCE, EVENT OR CONDITION COVERED BY YOUR INSURANCE.

#### 13. LIMITATION OF LIABILITY

IN NO EVENT SHALL CREATE OR ANY OF ITS DIRECTORS, OFFICERS, EMPLOYEES, SHAREHOLDERS, PARTNERS, OR AGENTS BE LIABLE FOR ANY INCIDENTAL, INDIRECT, PUNITIVE, EXEMPLARY, CONSEQUENTIAL OR OTHER SIMILAR DAMAGES WHATSOEVER (INCLUDING DAMAGES FOR LOSS OF PROFITS, INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR ANY OTHER PECUNIARY LOSS) IN CONNECTION WITH ANY CLAIM, LOSS, DAMAGE, ACTION, SUIT OR OTHER PROCEEDING ARISING UNDER OR OUT OF THE PRODUCTS OR SERVICES, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER THE ACTION IS BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE), INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OR OTHERWISE.

IN EVERY EVENT, CREATE'S TOTAL MAXIMUM AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THE PRODUCTS OR SERVICES SHALL BE LIMITED TO ONE MONTH OF FEES PAID BY YOU FOR THE SERVICES.

THE CONSIDERATION BEING PAID HEREUNDER DOES NOT INCLUDE ANY CONSIDERATION FOR CREATE TO ASSUME ANY RISKS BEYOND THOSE EXPRESSLY ASSUMED HEREIN AND IF ANY SUCH RISKS WERE TO BE ASSUMED BY CREATE, CREATE WOULD NOT HAVE ENTERED INTO THIS AGREEMENT WITHOUT CHARGING SUBSTANTIALLY HIGHER FEES.

SOME STATES AND JURISDICTIONS DO NOT ALLOW FOR THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES MAY NOT APPLY TO YOU.

#### 14. ACCOUNT SECURITY; DATA

(a) You agree to:

a. Not allow anyone else to have or use your password details and to comply with all reasonable instructions we may issue regarding account access and security. In the event you share your password details, Create will not be liable to you for losses or damages;

b. Keep your personal details up to date. We may be unable to respond to you if you contact us from an address, telephone number or email account that is not registered with us; and

c. Take all reasonable steps to protect the security of the personal electronic device through which you access the Services (including, without limitation, using PIN and/or password protected personally configured device functionality to access the Services and not sharing your device with other people).

(b) You agree to comply with applicable data privacy and security requirements under the Payment Card Industry Data Security Standard (“Association PCI DSS Requirements”) and any applicable Association data security requirements (including those made available by Visa, MasterCard, American Express and Discover) with regards to your use, access, and storage of certain credit card non-public personal information. Additionally, you agree to comply with its obligations under any applicable law or regulation as may be in effect or as may be enacted, adopted or determined regarding the confidentiality, use, and disclosure of cardholder information. You must report any customer data breach or incident affecting the Services to Create and Associations immediately after discovery of the incident. You also agree to ensure data quality and that any Customer Data is processed promptly, accurately and completely, and complies with the Associations’ technical specifications. “Associations” means, collectively, Visa, MasterCard, Discover, American Express, any ATM or debit network, and the other financial service card organizations.

## 15. FEES AND PAYMENT; TAXES

Certain Services may be provided for a fee. You shall pay all applicable fees regarding the Services.

You shall pay, indemnify, and hold Create harmless from (i) any sales, use, excise, import or export, value-added, or similar tax or duty, and any other tax or duty not based on Create’s income, and (ii) all government permit fees, customs fees and similar fees which Create may incur with respect to these Terms. Such taxes, fees and duties paid by you shall not be considered a part of, a deduction from, or an offset against, payments due to Create hereunder.

## 16. GOVERNING LAW

These Terms are governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania and the United States of America, without regards to their respective principles of conflicts of law. You agree to the exclusive personal jurisdiction by the federal and state courts located in Pittsburgh, Commonwealth of Pennsylvania, United States of America, in any matter arising from or related to these Terms and your use of the Products and Services, including any disputes relating to the existence or validity of these Terms, and you waive any jurisdictional, venue, or inconvenient forum objections to such courts.

## 17. GENERAL

We reserve the right to make changes to these Terms. Any changes we make to these Terms will be effective immediately upon notice, which we may provide by any means including, without limitation, posting on the Create websites or the Web-based Services. Your use of the Products and Services after such notice will be deemed acceptance of such changes.

If any provision of these Terms is found to be unlawful, void, or for any reason unenforceable, then that provision shall be deemed severable from these Terms and shall not affect the validity and enforceability of any remaining provisions.

These Terms set out the entire agreement between us relating to the subject matter herein and supersede and any all prior or contemporaneous written or oral agreements between us. These Terms are not assignable, transferable or sub-licensable by you except with Create's prior written consent. These Terms shall not be construed as a teaming, joint venture, or other such arrangement, unless the parties expressly and explicitly execute an agreement to that effect. No waiver by either party of any breach or default hereunder shall be deemed to be a waiver of any preceding or subsequent breach or default. Any heading, caption or section title contained in these Terms is inserted only as a matter of convenience and in no way defines or explains any section or provision hereof.