

**ZOES.COM**  
**TERMS OF USE AGREEMENT**

**IMPORTANT - READ CAREFULLY**

This document constitutes a legal agreement ("Agreement") between you ("Customer", "You", "Your") and Zoes.com. ("ZOES.COM") for Web Server Administration services. By using ZOES.COM as your Web Server Administrator, you agree to be bound by all of the terms and conditions of this agreement.

1. **ELIGIBILITY FOR SERVICES** Our Services are available only to business entities (including but not limited to sole proprietorships) in good legal standing that can form legally binding contracts under applicable law. Customer hereby represents and warrants that it is duly licensed to do business and is in good legal standing in the jurisdictions in which it does business (during the term of this Agreement) that it is not a competitor of ZOES.COM, and that the person agreeing to this Agreement for Customer is at least eighteen years of age and otherwise capable of and authorized to enter binding contracts for Customer.
  
2. **TERM, RENEWAL, and CANCELLATION.**
  - 2.1 The term of this Agreement is monthly.
  
  - 2.2 ZOES.COM will activate CUSTOMER's account once credit card payment for the monthly service fees is authorized. Subsequent monthly fees will be processed on the same day of the month as CUSTOMER's activation date.
  
  - 2.3 All payments are due in full on the first day of CUSTOMER's billing cycle via ACH debit or credit card. It is your responsibility to insure CUSTOMER's bank or credit card information is valid.
  
  - 2.4 ZOES.COM reserves the right to increase fees with 30 days written notice.
  
  - 2.5 CUSTOMER are responsible for payment of any applicable sales taxes, however levied or designated, including state and local privileges or excise taxes, directly to the appropriate taxing entities.
  
  - 2.6 CUSTOMER may cancel their Web Server Administration service agreement at any time with 30 days written notice to ZOES.COM .
  
3. **SERVICE**

**3.1 Access.** ZOES.COM will provide you with Login IDs and Passwords to access your licensed software for the term of the Agreement.

**3.2 Upgrades.** During the term of this agreement, if ZOES.COM upgrades the version of the Software you are using under this Agreement, you will not be charged an upgrade fee. In the future, should ZOES.COM offer optional software applications that complement the Software, You may elect to subscribe to optional software applications for an additional fee, however, You have no obligation to do so.

**3.3 No Title.** This agreement confers no title or ownership in the Software and is not a sale of any rights in the Software. This Software is owned by ZOES.COM and is protected by copyright law and international copyright treaty.

4. **SUPPORT** During the term of this Agreement, ZOES.COM agrees to provide you with email and telephone access to our Support Center during our standard support hours of Monday – Friday, 8:00 AM – 5:00 PM (Central Standard Time) except for standard U.S. Business Holidays. You will appoint a primary technical contact person who will contact our Support Team directly on behalf of Your other users. All support items/issues must be initially submitted via email at [suppor@zoes.com](mailto:suppor@zoes.com). ZOES.COM will use its best efforts to respond to Support items within 4 hours.

## 5. **PRIVACY**

**5.1 Ownership of Data.** ZOES.COM considers Your business information to be Your personal property. ZOES.COM will not examine Your business information except at Your request and only for the purposes of providing You with technical support. ZOES.COM will not use Your business information for ZOES.COM's benefit or the benefit of a third party.

**5.2 No Spamming.** ZOES.COM has a zero-tolerance policy against email 'spamming'. As a condition of using ZOES.COM, You agree not to send unsolicited email to individuals other than your organization's own employees, partners and current customers.

**5.3 Analysis.** ZOES.COM reserves the right to perform statistical analysis on all of our software and hosting systems. We do this to measure effectiveness, optimize performance, and to ensure Web Server Service Agreement compliance.

## 6. **SERVICE LEVEL COMMITMENT**

**6.1** ZOES.COM will use commercial best efforts to ensure that your ZOES.COM Web Site is available 24 hours a day, 7 days a week. ZOES.COM will also provide nightly backups of Customer data in the unlikely event that emergency recovery is required.

**6.2** In the event that Your ZOES.COM Web Site availability falls to below 90% for a given month, ZOES.COM will credit Your account as follows: for 80% to 89.9% availability the credit is (50%) of the monthly Web Server fee; for 79.9% availability or below the credit is 100% of the monthly Web Server fee. This credit will be in the form of extending the Term of this Agreement and will not result in a refund of any Customer fees due or previously paid.

**6.3** You agree to notify ZOES.COM immediately if You suspect ZOES.COM Web Site is unavailable due to a failure of the web servers. You agree to provide reasonable information as requested by ZOES.COM for proper diagnosis/repair and for proper calculation of any applicable credit.

**6.4** Credit for unavailability of the ZOES.COM web-site does not apply as a result of:

- a. Unavailability due to Scheduled Maintenance as defined below.
- b. Periods of unavailability during which Your account is not in good financial standing or You are in violation of this Agreement.
- c. Circumstances beyond ZOES.COM's control including, without limitation, acts of any governmental body, war, sabotage, embargo, fire, flood, extended unavailability of Public Utility Service or unavailability or delay in telecommunications, or third party Internet Service Providers.
- d. Your misuse of the ZOES.COM software.

**6.5** Scheduled Maintenance shall mean any maintenance at our data center at which Your ZOES.COM application is located. ZOES.COM will notify You via email at least 24 hours in advance of any scheduled maintenance. ZOES.COM agrees to make reasonable attempts to perform scheduled maintenance during historically low use hours based on average use by its Customers. ZOES.COM is permitted to conduct emergency maintenance on an 'as needed' basis.

**6.6** ZOES.COM reserves the right to amend the service level commitment from time to time effective upon written notice to You. In the event of any amendment resulting in a material reduction of the service level commitments, You may elect to cancel Your Web Server Service Agreement by providing ZOES.COM written notice, via email, of such cancellation within 30 days following notice of such amendment. The service level commitments set forth in this section constitute Your sole remedies for any service level claims.

**6.7** ZOES.COM's records and data shall be the basis for all credit calculations and determinations. Other than as set forth in Section 5.1, and notwithstanding anything else to the contrary, the maximum amount of credit in any calendar month under the Agreement shall not exceed the Monthly Fee, which absent the credit, would have been charged for ZOES.COM service that period.

**6.8** ZOES.COM uses Secure Socket Layer (SSL) technology to provide security for sensitive transmissions. Customer's Authorized Users can check their browsers to determine those pages on which SSL has been activated. In addition, ZOES.COM uses firewall technology to secure Customer data stored on our computers. Although we have implemented and follow these technical measures to protect against unauthorized access to and unlawful interception of your Customer data, Customer acknowledges that neither we nor any other internet service can fully eliminate these security risks.

7. **WARRANTY OF TITLE.** ZOES.COM hereby represents and warrants to You that ZOES.COM is the owner of the Software or otherwise has the right to grant to You the rights set forth in this Agreement. As Your sole remedy, in the event any breach or threatened breach of the foregoing representation and warranty, ZOES.COM shall, at its option, either: procure, at ZOES.COM's expense, the right for You to use the Software, replace the Software or any part thereof that is in breach with Software of comparable functionality that does not cause any breach or refund to You the full amount of any fees paid by you to ZOES.COM.

## 8. **CUSTOMER RESPONSIBILITIES**

**8.1** You are responsible for properly maintaining all workstation equipment including connectivity to the Internet.

**8.2** ZOES.COM runs using Chrome and Safari browsers. You are responsible for maintaining an up-to-date version.

**8.3** You are solely responsible and liable for any and all access to and use of the Services (including all activities and transactions) by any Authorized User and/or User ID registered under your account. It is your responsibility, through your primary technical contact, to set the appropriate access and security levels for each of your Authorized Users. Each User has the ability to change their password, and is responsible for properly maintaining security of their User ID and Password.

**8.4** You are responsible for maintaining up-to-date customer profile information including company address, phone number, credit card and expiration date, technical contact email, billing contact email.

**8.5** You shall not (a) license, sublicense, sell, resell, transfer, assign, distribute, or otherwise commercially exploit or make available to any third party the Service or the Content in any way; (b) modify or make derivative works based upon the Service or the Content; (c) create Internet "links" to the Service or "frame" or "mirror" any Content on any other server or wireless or Internet-based device; or (d) reverse engineer the Service in order to (i) build a competitive product or service, (ii) build a product using similar ideas, features, functions or graphics of the Service, or (iii) copy any ideas, features, functions or graphics of the Service. Any violation or attempt to reverse engineer the ideas, features, functions, or graphics in zoes.com, zoes.com reserves the right to prosecute and hold liable all parties involved.

## **9. TERMINATION BY ZOES.COM.**

**9.1** ZOES.COM may elect to terminate this agreement upon written notice via email to Customer of a breach of obligations by Customer regarding this Agreement unless the breach is cured within 10 days after such notice. All disclaimers of warranties and limitations of liability shall survive any termination of this Agreement.

**9.2** ZOES.COM may, at its option and where permissible by law, elect to restrict your access and/or terminate this Agreement for failure to pay any fees associated with use of this software.

**10. NO WARRANTY.** ZOES.COM does not guarantee continuous, uninterrupted or secure access to ZOES.COM services. The services are provided "as is" and with all faults, and the entire risk as to satisfactory performance, accuracy, and effort is with Customer. ZOES.COM and its suppliers specifically disclaim any and all warranties, express or implied, or statutory, including the merchantability, fitness for a particular purpose, and non-infringement.

**11. LEGAL COMPLIANCE.** Customer will comply with all applicable laws, statutes, ordinances and regulations regarding Customer's use of ZOES.COM Services. Customer will not use the Services either directly or indirectly to support any activity that is illegal, pornographically or sexually oriented, related to gambling, or otherwise objectionable (in ZOES.COM's sole discretion), or without limiting the foregoing, no activity for which you use the Services, nor any information that you store or make available to others using the Services, will: (a) be false, inaccurate or misleading; (b) be fraudulent or involve the sale of counterfeit or stolen items; (c) infringe any third party's copyright, patent, trademark, trade secret or other proprietary rights or rights of publicity or privacy; (d) be defamatory, trade libelous, unlawfully threatening or harassing; (e) be obscene, pornographic or, otherwise objectionable; (f) contain any viruses, Trojan horses, worms, time bombs, cancel bots or other computer programming routines that are intended to

damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information; or (g) create liability for us or cause us to lose (in whole or in part) the services of our ISPs or other suppliers. Although it does not monitor Customer's use of the Services, ZOES.COM may investigate complaints against Customer. If appropriate, ZOES.COM will refer complaints to law enforcement authorities.

**12. LIMITATION OF LIABILITY.** ZOES.COM assumes no liability for its actions undertaken pursuant to instructions from authorized users or persons with apparent authority to bind Customer. In no event shall ZOES.COM or its suppliers be liable for any special, incidental or consequential damages (including damages for lost profits, loss of goodwill, work stoppage, computer failure or malfunction, or any and all other commercial damages or losses) arising out of or in connection with ZOES.COM services or this agreement (however arising, including negligence), even if ZOES.COM has been advised of the possibility of such damages. ZOES.COM will not be responsible for or deemed to be in default under this agreement due to any delay or failure in performance resulting directly or indirectly from any cause beyond its reasonable control.

**13. INDEMNITY.** Customer agrees to indemnify and hold ZOES.COM and its subsidiaries, affiliates, officers, directors, agents, and employees, harmless from any claim or demand, including reasonable attorneys' fees, made by any third party due to or arising out of Customer's breach of any provision of this Agreement or the documents it incorporates by reference, or Customer's violation of any law or the rights of any third party.

#### **14. ENTIRE AGREEMENT**

**14.1 Law; Jurisdiction; Legal Fees; Actions** This Agreement shall be governed in all respects by the laws of the State of Texas. Both parties hereby submit to the personal jurisdiction of the state and federal courts located in the Texas. All claims arising out of or relating to this Agreement or our Services shall be brought in courts of competent jurisdiction exclusively in San Antonio, Texas. In any action between the parties, the losing party shall bear the expenses and attorney's fees for both parties. No action by Customer arising under this Agreement may be brought at any time more than twelve (12) months after the facts occurred upon which the cause of action arose.

**14.2 Relationship.** Customer and ZOES.COM are independent contractors, and no agency, partnership, joint venture, employee-employer or franchiser-franchisee relationship is intended or created by this Agreement.

**14.3 Assignment.** Customer may not assign any of its rights, or delegate any of its duties, under this Agreement, and any attempted assignment will be null and void.

**14.4 Amendments.** ZOES.COM may amend this Agreement at any time by posting the amended terms on its site. Except as stated below, all amended terms shall automatically be effective 30 days after they are initially posted on the site. Customer's continued use of ZOES.COM services after any amended terms have been posted by ZOES.COM will signify Customer's agreement to those terms.

**14.5 Notices.** Except as explicitly stated otherwise, any notices shall be given: (a) if addressed to ZOES.COM, by email or postal mail; or (b) if addressed to Customer, to the current billing contact email address maintained by the Customer in their Customer profile (notice shall be deemed given 24 hours after email is sent).

**14.6 Force Majeure.** Operation of our Services may be interfered with by numerous factors outside of our control and we shall not be liable to you for any delay or failure in performance under this Agreement resulting directly or indirectly from causes beyond ZOES.COM's control.

**14.7 Interpretation.** If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck, as narrowly as possible, and the remaining provisions shall be enforced. Headings are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section.

**14.8 Waiver.** ZOES.COM's failure to act with respect to a breach by Customer or others does not waive ZOES.COM's right to act with respect to subsequent or similar breaches.

**14.9 Entire Agreement.** This Agreement sets forth the entire understanding and agreement between the parties with respect to the subject matter hereof.