

# Terms of Use

Last modified: June 27, 2016

## **1. Definitions**

Banyan Technologies, Inc.'s (herein "Banyan" or "We") Terms of Use (herein "Terms") contains certain words or terms that have specifically defined meanings. Those words, known as defined terms, are denoted through the capitalization of their initial letters throughout the Terms. The meanings of all defined terms used herein are set forth exclusively in the "Definitions" section or elsewhere in the Terms, and no other meaning will apply to those terms. Many of the defined terms appearing in the Terms are listed below in alphabetical order:

**Banyan** means the Delaware C-Corporation, and said company's employees, agents, subcontractors, successors, officers, directors, stockholders, assigns, subsidiaries, and affiliates.

**Sale** means the Seller's accurate, good faith, binding offer to the Buyer to sell, at a certain price and during a certain period of time specified by the Buyer, Commercial Items that conform to the order agreed upon by the Buyer and Seller through Banyan's Services and Websites.

**Buyer** means a restaurant, institution, aggregator, food service provider, or any other potential User that uses Banyan's Services to purchase Commercial Items from Sellers.

**Commercial Item** means products or simple services, typically as defined in the FAR at 48 CFR 2.101, solicited by Buyers from Sellers on the Websites, excluding those products and services removed from offering on the Websites according to Banyan's discretion.

**Information** includes any information provided to Banyan or others by you or Users during registration, payment, or other use of the Services. Information includes, but is not limited to, data contained in product listings by Sellers, descriptions of Commercial Items, all of which may include product descriptions, delivery information, or any other information provided on the Websites.

**Content** includes any text, data files, images or photographs, audio files or other sounds, videos or other images, designs, or software presented to you as part of the Services, including but not limited to advertisements in the Services and sponsored Content within the Services.

**Seller** means an individual, business, authorized representative, or agent of such entity that utilize the Services to sell Commercial Items to Buyers.

**Services** means Banyan’s software, website functions, and all associated activities and transactions, provided through and in connection to the Websites.

**Users** means any individual, business, employee, or agent of a business visiting and using our Website, as well as any individuals or entities given access to Banyan’s Services as a Buyer or Seller subject to these Terms of Use.

**Sub-Users** means any individual, business, employee, or agent of a business visiting and using our Website as well as any individuals, entities, or authorized agents thereof given access to Banyan’s Services as a Buyer or Seller subject to these Terms of Use.

**Websites** mean the web sites at [www.banyanapp.org](http://www.banyanapp.org) , [www.banyansource.com](http://www.banyansource.com) and all associated online web sites through w

hich Services are provided.

## **2. Your Relationship with Banyan**

Your use of Banyan’s Services, excluding any services provided to you by Banyan under a separate written agreement, is subject to the terms and conditions set forth below. The Terms explain the contractual agreement between Users and Banyan regarding your use of the Services and Banyan’s facilitation of any Services provided.

Unless otherwise agreed in writing with Banyan, your entire agreement with Banyan will always include, at a minimum, the terms and conditions set out in this document and the Privacy Policy (<https://banyansource.com/s/BanyanPrivacyPolicy.pdf>) (such Privacy Policy, together with the Terms, may be referred to hereafter as the “Agreement”). The Agreement shall also be deemed to include any legal notices applicable to the Services and disclosed in writing, in addition to the Terms and Privacy Policy.

The Websites and Services comprise a marketplace for Buyers and Sellers to exchange Information and to establish an electronic marketplace for Commercial Items. Banyan does not endorse or approve of any particular Commercial Items, or any particular Buyer or Seller.

It is important that Users take the time to carefully review the Agreement prior to using the Services. Banyan reserves the right to change these Terms at any time without notice to you. It is your responsibility to check these Terms periodically for changes. Use of the Services shall be deemed to be acceptance of the Agreement, as amended or supplemented from time to time, by Users. When these changes are made, Banyan will post any changes we make to the Terms on this page. If we make material changes, we will notify you by e-mail to the e-mail address specified in your account or through a notice upon login to the Websites. You are responsible for

ensuring we have an up-to-date active and deliverable e-mail address for you, and for periodically visiting our Websites and these Terms to check for any changes. You understand and agree that if you use the Services after the date on which the Terms have changed, Banyan will treat your use as acceptance of such updated terms. You should consult this page regularly to review changes to these Terms.

### 3. **Transaction Fees**

Joining Banyan is free to both Buyers and Sellers; however, Banyan may charge any applicable fees for Sales done through the Websites or Services or for access to and/or use of the Services (herein “Fees”). This may include requiring you to prepay the fee, if any. In the event Banyan does charge Fees for access to and/or use of the Services, you will be required to pay such Fees in order to continue to access and/or use the Services.

You agree to pay Banyan Fees as set forth in the Pricing Policy. Each User shall be required to pay Fees via Braintree ([www.braintreepayments.com](http://www.braintreepayments.com)) or Dwolla ([www.dwolla.com](http://www.dwolla.com)). Users shall be required to accept both Braintree’s and Dwolla’s sub-merchant agreement; at which point the terms of every transaction regarding Fees shall be governed by this agreement.

Unless otherwise agreed upon by Banyan and the Buyer or Seller, any resulting Fees shall be charged in thirty (30) day periods starting from the date of registration for use of Banyan’s Services, and so on for each following thirty day period since the last payment charge. You shall also pay all applicable taxes relating to your use of the Services, if any.

Subject to the terms of this Agreement, we reserve the right to change our Fees. If we change our Fees, We will give you fifteen (15) days notice of any change. You will not be permitted to continue to use the Service without accepting the change in Fees. All balances and all Fees, charges, and payments collected or paid through the Service are denominated in US dollars.

BY USING THESE WEBSITES, YOU (A) ACKNOWLEDGE YOUR AWARENESS OF ANY AND ALL FEES APPLICABLE TO YOUR USE (OR THE USE OF YOUR AGENT, SUCESSOR-IN-INTEREST, OR AFFILIATE) OF THE WEBSITES OR SERVICES, (B) WAIVE ANY LACK OF NOTICE OR LIKE DEFENSE TO THE IMPOSITION OF SAID FEES, (C) AGREE TO PAY ALL FEES APPLICABLE TO ANY AND ALL TRANSACTIONS TO WHICH YOU, OR YOUR AGENT(S), SUCCESSOR(S)-IN-INTEREST, OR AFFILIATE(S), IF ANY, ARE A PARTY, AND (D) ACCEPT AND AGREE TO BE BOUND BY THE **PRICING POLICY** AND CONDITIONS AS SET FORTH HEREINAFTER, AS WELL AS ALL OTHER PROVISIONS OF THIS AGREEMENT WHICH ARE INCORPORATED IN THESE TERMS BY REFERENCE.

#### **4. User Relationships in Sales**

Banyan does not represent either Sellers or Buyers in transactions or any Sales, and does not represent or warrant that Information provided by Users on the Websites is accurate, complete, reliable, current, or error-free. Users are entirely responsible for ensuring the accuracy, completeness, reliability, and currentness of such Information. You acknowledge and agree that Banyan shall in no event be liable for any losses or damages of any kind that may arise as a result of or in connection with any inaccurate, incomplete, unreliable, outdated, or erroneous Information provided by Buyers and/or Sellers.

Seller shall be solely responsible for delivering any item purchased through Banyan's Services. Banyan has no control over and has no obligation to guarantee the quality, safety, or legality of Commercial Items listed for sale by Sellers on the Websites; the ability of Sellers to sell and deliver any Commercial Items; the ability of Buyers to pay for products; that Sellers have all necessary licenses and certifications to sell their products in all relevant locations; or that a Buyer or Seller will actually complete a Sale.

Banyan shall in no event be liable for any losses or damages of any kind that may arise as a result of or in connection with any transaction risks. You acknowledge and agree that Banyan does not transfer legal ownership of products from the Seller to the Buyer.

You acknowledge and agree that if you have a dispute with one or more Users, you release Banyan from claims, demands and damages (whether actual or consequential) of every kind and nature, known and unknown, arising out of or in any way connected with such disputes.

Sellers are responsible for providing the price for each Commercial Item sold through Banyan. Seller may include any applicable processing fees in their price when listing an item for sale. Banyan is not directly involved in the transaction between Sellers and Buyers. As a result, Banyan has no control over Commercial Items listed on the site, the validity of claims made by its Users, or the ability of both Sellers and Buyers to carry out any transactions agreed to on the Services. Therefore, Banyan cannot ensure that a User will actually complete a Sale and does not transfer legal ownership of goods from the Seller to the Buyer. Banyan is simply a venue for Sellers and Buyers to agree on purchase terms, it is not responsible for validating, enforcing, or otherwise carrying out any purchases made through the Websites.

Banyan enables all Sellers to accept payments for Sales via Dwolla ([www.dwolla.com](http://www.dwolla.com)) or Braintree ([www.braintreepayments.com](http://www.braintreepayments.com)). Each Seller shall be required to accept either the Dwolla or Braintree sub-merchant agreement, at which point the terms of every sale shall be governed by this agreement. Banyan also enables Sellers to allow Buyers to place orders on the

Website and make payment offline. In such cases, Sellers are responsible for collection of payment.

## **5. Accepting the Terms**

In order to use the Services, you must first agree to the Terms. You may not use the Services if you do not accept the Terms. You can accept the Terms by:

- A. clicking to accept or agree to the Terms, where this option is made available to you by Banyan in the user interface for any Service; or
- B. by actually using the Services or joining as a User. In this case, you understand and agree that Banyan will treat your use of the Services as acceptance of the Terms from that point onwards.

You may not use the Services and may not accept the Terms if (a) you are not of legal age to form a binding contract with Banyan, or (b) you are a person barred from receiving the Services under the laws of the United States or other countries including the country in which you are resident or from which you use the Services. Before you continue, you should print off or save a local copy of the Terms for your records.

## **6. Provision of the Services by Banyan**

Banyan is constantly innovating in order to provide the best possible experience for its Users. You acknowledge and agree that the form and nature of the Services may change from time to time without prior notice to Users. As part of this continuing innovation, you acknowledge and agree that Banyan may stop (permanently or temporarily) providing the Services (or any features within the Services) to you or to Users generally at Banyan's sole discretion, without prior notice to you. Unless otherwise provided herein, you may stop using the Services at any time without notifying Banyan.

You acknowledge and agree that if Banyan disables access to your account, you may be prevented from accessing the Services, your account details, or any files or other content contained in your account. You acknowledge and agree that while Banyan may not currently have set a fixed upper limit on the number of transmissions you may send or receive through the Services or on the amount of storage space used for the provision of any Service, such fixed upper limits may be set by Banyan at any time, at Banyan's discretion.

## **7. Your Use of the Services**

In order to access certain Services, you may be required to provide Information about yourself, such as identification or contact details, as part of the registration process for the Service or as part of your continued use of the Services. You agree that any registration Information you give to Banyan will always be accurate, correct and up to date.

You agree to use the Services only for purposes that are permitted by (a) the Terms and (b) any applicable law, regulation or generally accepted practices or guidelines in the relevant jurisdictions (including any laws regarding the export of data or software to and from the United States or other relevant countries).

You agree not to access or attempt to access any of the Services by any means other than through the interface that is provided by Banyan, unless you have been specifically allowed to do so in a separate agreement with Banyan. You agree that you will not engage in any activity that interferes with or disrupts the Services (or the servers and networks which are connected to the Services). You agree that you are solely responsible for (and that Banyan has no responsibility to you or to any third party for) any breach of your obligations under the Terms and for the consequences (including any loss or damage which Banyan may suffer) of any such breach.

YOU AGREE TO USE THE SERVICES SOLELY FOR YOUR OWN BENEFIT AND USE, AND NOT FOR DIRECT RESALE OR OTHER TRANSFER OR DISPOSITION TO, OR USE BY OR FOR THE BENEFIT OF, ANY OTHER PERSON OR ENTITY. YOU AGREE NOT TO USE, TRANSFER, DISTRIBUTE, OR DISPOSE OF ANY INFORMATION CONTAINED IN THE SERVICES IN ANY MANNER THAT COULD COMPETE WITH THE BUSINESS OF BANYAN OR ANY OF ITS SUPPLIERS. YOU MAY NOT COPY, REPRODUCE, RECOMPILE, DECOMPILE, DISASSEMBLE, REVERSE ENGINEER, DISTRIBUTE, PUBLISH, DISPLAY, PERFORM, MODIFY, UPLOAD TO, CREATE DERIVATIVE WORKS FROM, TRANSMIT, OR IN ANY WAY EXPLOIT ANY PART OF THE SERVICES, EXCEPT THAT YOU MAY DOWNLOAD MATERIAL FROM THE SERVICES FOR YOUR OWN PERSONAL, NONCOMMERCIAL USE.

YOU MAY NOT RECIRCULATE, REDISTRIBUTE OR PUBLISH THE INFORMATION INCLUDED IN THE SERVICE WITHOUT BANYAN'S PRIOR WRITTEN CONSENT. MODIFICATION OF THE SERVICE'S CONTENT WOULD BE A VIOLATION OF THE COPYRIGHTS AND OTHER PROPRIETARY RIGHTS OF BANYAN OR ITS SUBSIDIARIES. ADDITIONALLY, YOU MAY NOT OFFER ANY PART OF THE SERVICES FOR SALE OR DISTRIBUTE IT OVER ANY OTHER MEDIUM INCLUDING BUT NOT LIMITED TO A COMPUTER NETWORK OR HYPERLINK FRAMING ON THE

INTERNET WITHOUT THE PRIOR WRITTEN CONSENT OF BANYAN. THE SERVICES AND THE INFORMATION CONTAINED THEREIN MAY NOT BE USED TO CONSTRUCT A DATABASE OF ANY KIND. THE SERVICES MAY NOT BE STORED (IN ITS ENTIRETY OR IN ANY PART) IN DATABASES FOR ACCESS BY YOU OR ANY THIRD PARTY OR TO DISTRIBUTE ANY DATABASE SERVICES CONTAINING ALL OR PART OF THE SERVICES. YOU MAY NOT USE THE SERVICES IN ANY WAY TO IMPROVE THE QUALITY OF ANY DATA SOLD OR CONTRIBUTED BY YOU TO ANY THIRD PARTY. FURTHERMORE, YOU MAY NOT USE ANY OF THE TRADEMARKS, TRADE NAMES, SERVICE MARKS, COPYRIGHTS, OR LOGOS OF BANYAN, ITS SUBSIDIARIES, SUCCESSORS-IN- INTEREST, OR ASSIGNS IN ANY MANNER WHICH CREATES THE IMPRESSION THAT SUCH ITEMS BELONG TO OR ARE ASSOCIATED WITH YOU OR, EXCEPT AS OTHERWISE PROVIDED HEREIN, ARE USED WITH BANYAN'S CONSENT, AND YOU ACKNOWLEDGE THAT YOU HAVE NO OWNERSHIP RIGHTS IN AND TO ANY OF SUCH ITEMS. YOU WILL NOT USE THE SERVICES OR THE INFORMATION CONTAINED THEREIN IN UNSOLICITED MAILINGS OR SPAM MATERIAL. YOU WILL NOT USE ANY TRADEMARKS, TRADE NAMES, SERVICE MARKS, COPYRIGHTS, OR LOGOS OF BANYAN, ITS SUBSIDIARIES, SUCCESSORS-IN- INTEREST, OR ASSIGNS IN UNSOLICITED MAILINGS OR SPAM MATERIAL. YOU WILL NOT SPAM OR SEND UNSOLICITED MAILINGS TO ANY PERSON OR ENTITY USING THE SERVICES.

#### **8. Your Passwords and Account Security**

You agree and understand that you are responsible for maintaining the confidentiality of passwords associated with any account you use to access the Services. Accordingly, you agree that you will be solely responsible to Banyan for all activities that occur under your account. If you become aware of any unauthorized use of your password or of your account, you agree to notify Banyan immediately at [support@banyansource.com](mailto:support@banyansource.com).

#### **9. Privacy and Your Personal Information**

For information about Banyan's personal data protection practices, please read Banyan's Privacy Policy (<https://banyansource.com/s/BanyanPrivacyPolicy.pdf>). This policy explains how Banyan treats your personal information and protects your privacy when you use the Services. You agree to the use of your Information in accordance with Banyan's Privacy Policy and these Terms.

## **10. Content in the Services**

You understand that all Information (such as data files, written text, computer software, music, audio files or other sounds, photographs, videos or other images) which you may have access to as part of, or through your use of, the Services are the sole responsibility of the person from which such content originated. You should be aware that any Content presented to you as part of the Services may be protected by intellectual property rights which are owned by the sponsors or advertisers who provide that Information to Banyan (or by other persons or companies on their behalf). You may not modify, rent, lease, loan, sell, distribute, or create derivative works based on this Information (either in whole or in part) unless you have been specifically told that you may do so by Banyan or by the owners of that Information, in a separate agreement. Banyan reserves the right (but shall have no obligation) to pre-screen, review, flag, filter, modify, refuse, or remove any or all Information from any Service. You understand that by using the Services you may be exposed to Information that you may find offensive, indecent, or objectionable. You agree that you are solely responsible for (and that Banyan has no responsibility to you or to any third party for) any Information that you create, transmit, or display while using the Services and for the consequences of your actions (including any loss or damage which Banyan may suffer) by doing so.

## **11. Restricted Commercial Items**

You understand that Banyan may restrict the types of Commercial Items available on its Websites as part of any changes in the Terms. Commercial Items do not include any goods or services sold in connection with prohibited businesses. Prohibited businesses include:

- A. the sale of alcoholic beverages,
- B. any product or services that infringes upon the copyright, trademark, and trade secret of third parties,
- C. or any product or service that is deceptive, unfair, predatory, or prohibited by Dwolla and/or Braintree.

## **12. Proprietary Rights**

You acknowledge and agree that Banyan owns all legal right, title and interest in and to the Services, including any intellectual property rights which subsist in the Services (whether those rights happen to be registered or not, and wherever in the world those rights may exist).



You further acknowledge that the Services may contain Information which is designated confidential by Banyan and that you shall not disclose such Information without Banyan's prior written consent. In addition, the contents of the Services and any other products or services provided or sold by Banyan including the Service's likeness, text, graphics, logos, button icons, images, audio, video clips (if any), and software, are the property of Banyan or its content suppliers, and are subject to the copyright or other intellectual property rights of Banyan and to the terms of licenses held by Banyan. Such intellectual property is protected by federal and state law.

Any unauthorized reproduction, modification, distribution, transmission, republication, display, or performance of the content and software of these Services, or of any other products or services sold by Banyan, is strictly prohibited. Users may copy Information from the Services only as may be strictly necessary for Users' own use to view, save, print, or transmit it. Otherwise, no portion of the Services may be reproduced, duplicated, copied, sold, resold, or otherwise exploited for any commercial purpose that is not expressly permitted by Banyan.

**Subject to the Banyan's Privacy Policy, by submitting Information or other material to us you grant Banyan a perpetual, worldwide, royalty-free, irrevocable, non-exclusive license to use, reproduce, modify, adapt, publish, create derivative works, and distribute such materials or portions of such materials, in any form or medium known or later developed, in furtherance of the terms of this Agreement and the actions and transactions contemplated hereby. You agree that this license includes a right for Banyan to make such Information available to other companies, organizations, or individuals with whom Banyan has relationships for the provision of syndicated services.**

**By using Banyan's Sites or Services you consent to the collection, transfer, processing, and sale of all such Information by us, in accordance with our Privacy Policy for the time being. We reserve the right to collect, transfer, process, and sell Information relating to the use of the Sites and Services, and obtained directly or indirectly from Information collected by us, to third parties.**

You understand that Banyan, in performing the required technical steps to provide the Services to other Users, may transmit or distribute your Information over various public networks and in various media; and make such changes to your Information as are necessary to conform and adapt that Information to the technical requirements of connecting networks, devices, services or media. You agree that this license shall permit Banyan to take these actions. YOU CONFIRM AND WARRANT TO BANYAN THAT YOU HAVE ALL THE RIGHTS, POWER AND AUTHORITY NECESSARY TO GRANT THE ABOVE LICENSE.

In addition to these Terms, you agree that you will not and will not allow others to decompile, disassemble, reverse engineer, copy, use, merge, disclose, sell, or transfer, in whole

or in part, the underlying source code, structure or sequence of Banyan's technology or Services, delete or alter author attributes or copyright notices, or otherwise sell or distribute, in whole or in part, the Services or Banyan's technology, including any third-party technology used and/or licensed by Banyan. You shall use the Services solely for your own use and shall not allow others to use the Services under or through your account, unless specifically authorized by you as a Sub-User to use said account. Nothing in the Services or elsewhere should be construed to grant any license or right to use, implied, or otherwise, any mark displayed in the Services without the written permission of Banyan or the third party owner of the mark. Banyan reserves the right, in its sole discretion, to remove any material that infringes or appears to infringe on intellectual property rights owned by others. If you believe that any material contained in the Services infringes your intellectual property, you should promptly notify Banyan in writing of the alleged infringement at [support@banyansource.com](mailto:support@banyansource.com).

### **13. License from Banyan**

Upon your registration of a valid account, Banyan gives you a personal, worldwide, non-assignable and non-exclusive license to use applicable software provided to you by Banyan as part of the Services. This license is for the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Banyan, in the manner permitted by the Terms. You may not sell, transfer, assign, or grant a sub-license of your rights to use the software or Services, grant a security interest in or over your rights to use the software or Services, or otherwise transfer any part of your rights to use the software or Services.

### **14. Ending Your Relationship with Banyan**

The Terms will continue to apply until terminated by either you or Banyan as set forth below (each known as a "Termination"), except that all limitations on liability, limitations on warranty, general disclaimers, indemnification provisions, choice of law provisions, intellectual property provisions, and agreements to arbitrate, as set forth in this Agreement, shall continue and survive any Termination. If you want to terminate your relationship with Banyan, you may do so by (a) notifying Banyan at any time and (b) closing your accounts for all of the Services which you use, where Banyan has made this option available to you. Your notice should be sent, in writing, to [support@banyansource.com](mailto:support@banyansource.com). Banyan may at any time, terminate its relationship with you and your access to the Websites in the event that:

- A. you have breached any provision of the Terms (or have acted in manner which clearly shows that you do not intend to, or are unable to comply with the provisions of the Terms); or

- B. Banyan is required to do so by law (for example, where the provision of the Services to you is, or becomes, unlawful); or
- C. the partner with whom Banyan offered the Services to you has terminated its relationship with Banyan or ceased to offer the Services to you; or
- D. Banyan is transitioning to no longer providing the Services to Users in the State in which you are a resident or from which you use the service; or
- E. the provision of the Services to you by Banyan is, in Banyan's opinion, no longer commercially viable; or
- F. you engage in conduct that, in the opinion of Banyan, does not constitute good faith and fair dealing with and among other Users of the Websites.

Nothing in this Section shall affect Banyan's other rights under these Terms, including, without limitation, the benefit of any disclaimer, limitation on liability, indemnity, or choice of law provision contained herein.

#### **15. Exclusion of Warranties**

NOTHING IN THESE TERMS, INCLUDING SECTIONS 13 AND 14, SHALL EXCLUDE OR LIMIT BANYAN'S WARRANTY OR LIABILITY FOR LOSSES WHICH MAY NOT BE LAWFULLY EXCLUDED OR LIMITED BY APPLICABLE LAW. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR CONDITIONS OR THE LIMITATION OR EXCLUSION OF LIABILITY FOR LOSS OR DAMAGE CAUSED BY NEGLIGENCE, BREACH OF CONTRACT OR BREACH OF IMPLIED TERMS, OR INCIDENTAL OR CONSEQUENTIAL DAMAGES. ACCORDINGLY, ONLY THE LIMITATIONS WHICH ARE LAWFUL IN YOUR JURISDICTION WILL APPLY TO YOU AND OUR LIABILITY WILL BE LIMITED TO THE MAXIMUM EXTENT PERMITTED BY LAW. ANY MATERIAL DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE USE OF THE SITE IS ACCESSED AT YOUR OWN DISCRETION AND RISK, AND YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM THE DOWNLOAD OF ANY SUCH MATERIAL. BANYAN AND ALL OF ITS THIRD-PARTY LICENSORS DISCLAIM ANY AND ALL WARRANTIES AND REPRESENTATIONS, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE AS TO THE SITE, INCLUDING THE INFORMATION, DATA, SOFTWARE, OR PRODUCTS CONTAINED THEREIN, THE RESULTS OBTAINED BY THEIR USE OR AS TO THE

PERFORMANCE THEREOF, OR ANY OF THE SERVICES. THE SERVICES AND THIS SITE AND ALL COMPONENTS THEREOF ARE PROVIDED ON AN “AS IS” BASIS AND YOUR USE OF THE SITE IS AT YOUR OWN RISK.

BANYAN DOES NOT MAKE ANY GUARANTEES OR WARRANTIES AS TO THE ADEQUACY, TIMELINESS, ACCURACY, OR COMPLETENESS OF THE SERVICES, THE SITE, OR ANY RESULTS TO BE OBTAINED FROM, ACCESSING AND USING THE SITE, SERVICES, OR RESULTS TO BE OBTAINED THEREFROM, NOR ANY MATERIAL THAT CAN BE ACCESSED (VIA A DIRECT OR INDIRECT HYPERLINK OR OTHERWISE) THROUGH THE SITE, SERVICES, OR ANY RESULTS OBTAINED THEREFROM. BANYAN SHALL NOT BE LIABLE TO THE USER OR ANYONE ELSE FOR ANY INACCURACY, DELAY, INTERRUPTION IN THE SERVICES, ERROR, OR OMISSION, REGARDLESS OF CAUSE, OR FOR ANY DAMAGES RESULTING THEREFROM. IN NO EVENT WILL BANYAN BE LIABLE FOR ANY INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO, LOST TIME, LOST MONEY, LOST PROFITS, OR GOOD WILL, WHETHER IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, AND WHETHER OR NOT SUCH DAMAGES ARE FORESEEN OR UNFORESEEN WITH RESPECT TO ANY USE OF THE SITE. BANYAN AND ITS THIRD PARTY PROVIDERS MAY DISCONTINUE OR MAKE CHANGES IN THE SITE AT ANY TIME WITHOUT PRIOR NOTICE TO YOU AND WITHOUT ANY LIABILITY TO YOU. ANY DATED INFORMATION IS PUBLISHED AS OF ITS DATE ONLY OR, IF NO DATE IS STATED, THE DATE OF FIRST POSTING. BANYAN DOES NOT UNDERTAKE ANY OBLIGATION OR RESPONSIBILITY TO UPDATE OR AMEND ANY INFORMATION ON THE SITE. FURTHERMORE, NO DISTRIBUTION OR SOLICITATION IS MADE BY BANYAN TO ANY PERSON TO USE THE SITE OR SERVICES IN JURISDICTIONS WHERE THE PROVISION OF THE SITE AND SUCH INFORMATION, PRODUCTS OR SERVICES IS PROHIBITED BY LAW. USER AGREES THAT ANY MONETARY CLAIMS OF WHATEVER KIND ASSESSED AGAINST BANYAN ARISING OUT OR RELATING TO USE OF THE SITE AND/OR SERVICES, IN NO EVENT, SHALL EXCEED THE GREATER OF ONE HUNDRED (\$100) US DOLLARS OR THE TOTAL AMOUNT THE USER PAID TO BANYAN FOR USE OF THE SITE AND/OR SERVICES DURING THE PREVIOUS TWELVE (12) MONTHS. NO ACTION, REGARDLESS OF FORM, ARISING FROM OR PERTAINING TO THE SITE MAY BE BROUGHT BY YOU MORE THAN ONE (1) YEAR AFTER SUCH ACTION HAS ACCRUED. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM THE SITE SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THE AGREEMENT. BANYAN FURTHER EXPRESSLY DISCLAIMS ALL WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER

EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO THE IMPLIED WARRANTIES AND CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

**16. Limitation of Liability**

IN ADDITION TO SECTION 14 ABOVE, YOU EXPRESSLY UNDERSTAND AND AGREE THAT BANYAN, ITS SUBSIDIARIES AND AFFILIATES, AND ITS LICENSORS SHALL NOT BE LIABLE TO YOU FOR:

- A. ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL CONSEQUENTIAL OR EXEMPLARY DAMAGE, WHICH MAY BE INCURRED BY YOU, HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY. THIS SHALL INCLUDE, BUT NOT BE LIMITED TO, ANY LOSS OF PROFIT (WHETHER INCURRED DIRECTLY OR INDIRECTLY), ANY LOSS OF GOODWILL OR BUSINESS REPUTATION, ANY LOSS OF DATA SUFFERED, COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR OTHER INTANGIBLE LOSS;
- B. ANY LOSS OR DAMAGE, WHICH MAY BE INCURRED BY YOU, INCLUDING BUT NOT LIMITED TO LOSS OR DAMAGE AS A RESULT OF:
  - I. ANY RELIANCE PLACED BY YOU ON THE COMPLETENESS, ACCURACY OR EXISTENCE OF ANY ADVERTISING, OR AS A RESULT OF ANY RELATIONSHIP OR TRANSACTION BETWEEN YOU AND ANY ADVERTISER OR SPONSOR WHOSE ADVERTISING APPEARS ON THE SERVICES;
  - II. ANY CHANGES WHICH BANYAN MAY MAKE TO THE SERVICES, OR FOR ANY PERMANENT OR TEMPORARY CESSATION IN THE PROVISION OF THE SERVICES (OR ANY FEATURES WITHIN THE SERVICES);
  - III. THE DELETION OF, CORRUPTION OF, OR FAILURE TO STORE, ANY CONTENT AND OTHER COMMUNICATIONS DATA MAINTAINED OR TRANSMITTED BY OR THROUGH YOUR USE OF THE SERVICES;

- IV. YOUR FAILURE TO PROVIDE BANYAN WITH ACCURATE ACCOUNT INFORMATION;
- V. YOUR FAILURE TO KEEP YOUR PASSWORD OR ACCOUNT DETAILS SECURE AND CONFIDENTIAL;
- VI. ANY DAMAGE RESULTING FROM THE SHIPMENT, OR ANY DELAYS IN THE SHIPMENT OR DELIVERY, OF ANY ITEM PURCHASED THROUGH THE WEBSITES. THE LIMITATIONS ON BANYAN'S LIABILITY TO YOU IN THIS AGREEMENT ABOVE SHALL APPLY WHETHER OR NOT BANYAN HAS BEEN ADVISED OF OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF ANY SUCH LOSSES ARISING.

### **17. Other Content**

The Services may include hyperlinks to other websites or content or resources. Banyan may have no control over any websites or resources, which are provided by companies or persons other than Banyan. In addition to the limitations, disclaimers, and acknowledgments set forth in these Terms, you acknowledge and agree that:

- A. Banyan is not responsible for the availability of any such external or resources, and does not endorse any advertising, products or other materials on or available from such websites or resources, and
- B. Banyan is not liable for any loss or damage which may be incurred by you as a result of the availability of those external websites or resources, or as a result of any reliance placed by you on the completeness, accuracy or existence of any advertising, products or other materials on, or available from, such websites or resources.

### **18. Indemnity**

You agree to indemnify and hold Banyan and its subsidiaries, affiliates, successors-in-interest, assigns, and any of their officers, directors, agents, and employees, harmless from and against any suit, action, claim, demand, penalty or loss, including reasonable attorneys' fees, made by or resulting from any third party due to or arising out of your use of the Services, breach of these Terms or the materials it incorporates by reference, or your violation of any law, regulation, order or other legal mandate, or the rights of a third party.

## **19. Choice of Law; Disputes**

This Agreement is governed by the laws of the State of Delaware, without giving effect to its conflict of laws provisions and as if these Terms were a contract wholly entered into and wholly performed within the State of Delaware. You agree to submit to exclusive jurisdiction and venue in the state and federal courts sitting in Chicago, Illinois for any and all disputes, claims and actions arising from or in connection with the Services, this Agreement and/or these Terms. Notwithstanding this, you agree that Banyan shall still be allowed to apply for injunctive remedies (or an equivalent type of urgent legal relief) in any jurisdiction. In any dispute arising under these Terms and Conditions, the prevailing party will be entitled to reasonable attorneys' fees and expenses.

## **20. Arbitration**

Any dispute, controversy or claim, whether in tort, contract or otherwise, that arises from or relates to this Agreement or the Services, including whether the claims asserted are arbitrable, shall be exclusively and finally determined by a single-arbiter arbitration held in Chicago, Illinois under the rules of the American Arbitration Association in effect from time to time. The claims shall be governed by laws of the State of Delaware, without regard to Delaware's conflict of law rules, and the enforceability of this arbitration agreement shall be governed by the Federal Arbitration Act. The language to be used in the arbitral proceeding will be English. Judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Arbitrations arising from the same or related claims may be consolidated in one arbitral proceeding.

## **21. General Terms and Conditions**

Sometimes when you use the Services, you may (as a result of, or through your use of the Services) use a service or download a piece of software, or purchase goods, which are provided by another person or company. Your use of these other services, software or goods may be subject to separate terms between you and the company or person concerned. If so, the Terms do not affect your legal relationship with these other companies or individuals. The Terms constitute the whole legal agreement between you and Banyan and govern your use of the Services (but excluding any services which Banyan may provide to you under a separate written agreement), and completely replace any prior agreements between you and Banyan in relation to the Services. You agree that Banyan may provide you with notices, including those regarding changes to the Terms, by email, regular mail, or postings on the Services.

You agree that if Banyan does not exercise or enforce any legal right or remedy which is contained in the Terms (or which Banyan has the benefit of under any applicable law), this will

not be taken to be a formal waiver of Banyan's rights and that those rights or remedies will still be available to Banyan. If any court of law, having the jurisdiction to decide on this matter, rules that any provision of these Terms is invalid, then that provision will be removed from the Terms without affecting the rest of the Terms. The remaining provisions of the Terms will continue to be valid and enforceable. You acknowledge and agree that each member of the group of companies of which Banyan is the parent shall be third party beneficiaries to the Terms and that such other companies shall be entitled to directly enforce, and rely upon, any provision of the Terms which confers a benefit on (or rights in favor of) them. Other than this, no other person or company shall be third party beneficiaries to the Terms.