

## Terms and Conditions

THESE TERMS AND CONDITIONS GOVERN CUSTOMER'S ACQUISITION AND USE OF ODEN'S TECHNOLOGY AND SERVICES (EACH AS DEFINED BELOW). CAPITALIZED TERMS HAVE THE DEFINITIONS SET FORTH HEREIN. IF CUSTOMER REGISTERS FOR A FREE TRIAL OF ODEN SERVICES OR FOR FREE SERVICES, THE APPLICABLE PROVISIONS IN THE AGREEMENT WILL ALSO GOVERN THAT FREE TRIAL OR THOSE FREE SERVICES. BY ACCEPTING THIS AGREEMENT, BY (1) CLICKING A BOX INDICATING ACCEPTANCE, (2) EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, OR (3) USING FREE SERVICES, CUSTOMER AGREES TO THE TERMS OF THIS AGREEMENT. IF THE INDIVIDUAL ACCEPTING THIS AGREEMENT IS ACCEPTING ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, SUCH INDIVIDUAL REPRESENTS THAT THEY HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS, IN WHICH CASE THE TERM "CUSTOMER" SHALL REFER TO SUCH ENTITY AND ITS AFFILIATES. IF THE INDIVIDUAL ACCEPTING THIS AGREEMENT DOES NOT HAVE SUCH AUTHORITY, OR DOES NOT AGREE WITH THESE TERMS AND CONDITIONS, SUCH INDIVIDUAL MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT USE THE SERVICES.

THIS AGREEMENT CONSISTS OF THESE TERMS AND CONDITIONS ("**TERMS**") (INCLUDING ALL ATTACHMENTS, SCHEDULES, AND EXHIBITS REFERENCED IN THESE TERMS) TOGETHER WITH ALL ORDER FORMS (DEFINED BELOW) EXECUTED BY THE PARTIES (TOGETHER, THE "**AGREEMENT**"). THIS AGREEMENT IS WITH ODEN TECHNOLOGIES INC., A DELAWARE CORPORATION WITH PRIMARY OFFICES AT 50 W. 17<sup>TH</sup> STREET, 4<sup>TH</sup> FLOOR, NEW YORK, NY 10011 ("**PROVIDER**") AND CONTAINS THE TERMS UNDER WHICH PROVIDER WILL PROVIDE TO CUSTOMER (1) SUBSCRIPTION ACCESS TO AN INSTANCE OF PROVIDER'S PROPRIETARY ARTIFICIAL INTELLIGENCE POWERED INDUSTRIAL MANAGEMENT PLATFORM ("**PLATFORM**") AND (2) SERVICES (DEFINED BELOW) RELATED TO CUSTOMER'S USE OF THE PLATFORM, EACH AS AGREED TO BY THE PARTIES IN ONE OR MORE ORDER FORMS. THIS AGREEMENT IS EFFECTIVE AS OF THE ORDER EFFECTIVE DATE OF THE INITIAL ORDER FORM EXECUTED BY THE PARTIES ("**EFFECTIVE DATE**").

### 1. DEFINITIONS

1.1 "**Authorized User**" means an employee, contractor, or agent, of Customer that uses or otherwise interacts with the Platform.

1.2 "**Customer Data**" means any customer or third-party data or other materials or information provided by Customer to Provider under this Agreement.

1.3 "**Documentation**" means Provider-provided user documentation, in all forms, relating to the Platform (e.g., user manuals, on-line help files).

1.4 "**Machine Learning**" means machine learning systems with features and implementations designed to generate statistics, calibrate data models, and improve algorithms in the course of processing Customer Data, such resulting statistics, calibrations, models, and algorithms, any improvements, modifications, upgrades, enhancements, and derivatives thereof, and other information derived or refined (e.g., analytics) as a result Customer's use of the Platform and/or Services

1.5 "**Maintenance**" means (i) maintenance conducted from 12:00 am Saturday until 12:00 am Monday (New York time) that is necessary to perform preventative and other routine system maintenance and functions, and (ii) any maintenance that is critical and cannot be reasonably delayed.

1.6 "**Order Form**" means a written description of Platform or Professional Services (or both) to be provided to Customer by Provider under this Agreement that refers to this Agreement and is executed by both parties.

1.7 "**Professional Services**" means the Site Scanning Services, to the extent ordered by Customer pursuant to an Order Form, as well as other professional services ordered pursuant to an Order Form.

1.8 "**Reports**" means reports, analyses, visualizations, and other representations of data generated from Customer's use of the Platform or reports, analyses visualizations, and other representations of data or other deliverables developed by Provider as part of Professional Services.

1.9 "**Scope Limitations**" means the limitations on Customer's access and use of, and Provider's provision of, the Platform identified in the applicable Order Form.

1.10 "**Services**" means the Professional Services and Support Services.

1.11 "**Subscription Term**" means the period during which Customer is authorized to use the Platform, which period is set forth in the applicable Order Form.

1.12 "**Support Services**" means the support services described in Section 5.

1.13 "**Technology**" means the Platform, Documentation, Machine Learning, and Reports.

### 2. CUSTOMER DATA;

2.1 **Provision.** To enable Provider to provide the Platform and the Professional Services, Customer will provide the required Customer Data as specified in the applicable Order Form or as otherwise reasonably requested by Provider (e.g., in the file formats and via the delivery procedure specified). Customer acknowledges that Provider's ability to provide the Platform and Services in a timely manner may be affected if Customer does not provide Customer Data in accordance with this Agreement. Provider and Customer will cooperate in good faith to facilitate Customer's delivery of the Customer Data to Provider.

2.2 **Platform Implementation.** Provider will use commercially reasonable efforts to integrate Customer Data into the Platform and configure and make available the Platform in accordance with timeline for implementation set forth in the applicable Order Form (if any). Provider will give Customer notice once the Platform is live and available for use by Authorized Users.

2.3 **License.** (i) Customer hereby grants to Provider a non-exclusive, worldwide, royalty-free, irrevocable license throughout the term of this Agreement to store, record, host, copy, analyze, display, use, modify, and prepare derivative works and collective works of the Customer Data to the extent necessary to provide the Platform to Customer and to perform the Services, including to clean, sort, tag, process, transform, adapt, and improve the Customer Data and to test, improve, and otherwise develop new Technology, including the generation of Machine Learning. (ii) Customer hereby grants Provider a worldwide, non-exclusive, perpetual, irrevocable, royalty-free, sublicensable, and transferable license to store, record, host, copy, analyze, display, use, modify, and prepare derivative works and collective works of the Customer Data in a de-identified, anonymous, and/or aggregated format for the improvement of the Technology, and Provider's other products and services (as may exist now or in the future) and for such other lawful purposes as Provider sees fit.

2.4 **Ownership.** Provider will not have any rights to the Customer Data except as expressly granted or reserved in this Agreement. Customer reserves to itself and its third party providers all rights, including intellectual property rights, in and to the Customer Data not expressly granted to or reserved by Provider under this Agreement. Provider reserves the right to store, host, copy, display, use, modify, distribute, disclose, prepare derivative works and collective works of, and otherwise exploit all Machine Learning for any purpose and in any manner that does not associate the Machine Learning with Customer. Provider is the sole owner of all Machine Learning, but Provider will use reasonable efforts not to disclose to a third party any Machine Learning in a manner that could reasonably be expected to associate the Machine Learning with Customer.

### 3. PLATFORM

3.1 Access to Platform. Subject to the terms of this Agreement, Provider grants to Customer a limited, worldwide, non-exclusive, non-transferable, non-sublicensable right during the applicable Subscription Term for Authorized Users to access and use the Platform solely for Customer's internal use and the other uses, if any, specified in the applicable Order Form. To avoid doubt, the preceding rights to access and use the Platform are subject to the applicable Scope Limitations and contingent upon Customer's compliance with the applicable Scope Limitations.

3.2 Availability. Oden shall use commercially reasonable efforts to make the Platform available without interruption, except that the Platform will not be deemed unavailable if the unavailability results from (a) Maintenance, (b) any use of the Platform by Customer or the Authorized Users that is inconsistent with the Documentation or terms of this Agreement, (c) any fault in or failure of equipment or software (including IT Systems) not supplied to Customer by Provider, (d) any failure or fluctuation of Customer's electrical supplies or systems or access to the Internet, (e) inadequate cooling, fire, flood, accident or other natural disaster, (f) any change in the industrial environment from the date Platform implementation with respect to Customer's systems, (g) Customer's breach of this Agreement or negligent act or omission, or (h) Customer's failure to install or use an update, or follow reasonable backup and restoration procedures for its IT Systems. For purposes of this Agreement, Provider shall notify Customer promptly upon scheduling any Maintenance that cannot be delayed.

3.3 Use of the Documentation. Subject to the terms and conditions of this Agreement, Provider grants to Customer a limited, worldwide, non-exclusive, non-transferable, non-sublicensable license during the term of this Agreement to reproduce, without modification, and internally use a reasonable number of copies of the Documentation solely in connection with Customer's permitted access and use of the Platform under this Agreement.

3.4 Use Restrictions. Except as otherwise explicitly provided in this Agreement, Customer will not, and will not permit or authorize third parties to: (a) modify or reverse engineer any portion of the Technology; (b) rent, lease, loan, or otherwise permit third parties to access or use any portion of the Technology; (c) use any portion of the Technology to provide services to third parties; (d) circumvent or disable any security or other technological features or measures of any portion of the Technology; nor (e) use any portion of the Technology in any manner that adversely affects Provider or any of its customers, agents, or their data or security. Provider reserves the right to suspend Customer's access or use of the Platform at any time if Provider reasonably believes that Customer has failed to comply with this Agreement or is using the Technology in a manner that violates this Agreement, applicable law or could otherwise damage Provider's customers, business, or reputation.

3.5 Protection against Unauthorized Use. Customer is responsible for all activity associated with its Platform accounts. Customer will use its best efforts to prevent any unauthorized use of the Technology and immediately notify Provider in writing of any unauthorized use that comes to Customer's attention. If there is unauthorized use by anyone who obtained access to the Technology directly or indirectly through Customer, Customer will take all steps reasonably necessary to terminate the unauthorized use. Customer will cooperate and assist with any actions taken by Provider to prevent or terminate unauthorized use of any Technology.

3.6 Compliance with Laws. Customer's use of the Technology, and any result obtained from Customer's use of the Technology, must be in compliance with all applicable laws and regulations, and Customer will refrain from any unethical conduct or any other conduct that tends to damage the reputation of Provider.

3.7 No Warranties. Customer will not make or publish any representations, warranties, guarantees, or commitments on behalf of Provider concerning any matter.

3.8 End User License Agreement. The parties agree that Authorized Users' use of the Platform will at all times be subject to Provider's Terms of Use, available at [www.oden.io/terms-of-use/](http://www.oden.io/terms-of-use/), as updated by Provider from time to time.

3.9 Reservation of Rights. Provider grants to Customer a limited right to use the Technology under this Agreement. Customer will not have any rights to the Technology except as expressly granted in this Agreement. Provider reserves to itself all rights to the Technology not expressly granted to Customer in accordance with this Agreement.

3.10 Suggestions. All feedback, suggestions, improvements, corrections, and other contributions provided by Customer regarding the Technology ("Suggestions") will be owned by Provider, and Customer hereby assigns to Provider all Suggestions and any intellectual property or other proprietary rights in the Suggestions. Provider may use, in any manner and for any purpose, the Suggestions and any know-how, techniques, or procedures acquired or used by Provider in the performance of Services under this Agreement without providing any consideration to Customer.

3.11 Modifications. Provider may make modifications to the Platform. Provider will Customer at least as much notice of modifications materially affecting the Platform as Provider generally provides to any of its other customers. If a modification materially adversely affects Customer, Customer will have the right, as its sole remedy and Provider's sole liability, to terminate the applicable Order Form(s), in which case Provider will promptly refund to Customer amounts prepaid for periods of Platform access under that Order Form that, as of termination, had yet to occur.

3.12 Data Security. Provider will ensure that all facilities used to process Customer Data will employ at least commercially reasonable administrative, physical, and technical safeguards, to secure such data from unauthorized access, disclosure, alteration, and use. Without limiting the foregoing obligations of Provider, (i) such measures will be no less protective than those used to secure Provider's own data of a similar type, and in no event less than reasonable in view of the type and nature of the data involved, and (ii) Provider will employ commercially reasonable measures designed to ensure that Customer Data and account(s) are not accessed by any other customer of Provider.

#### 3.13 Suspension.

(a) Provider will have the right to suspend an Authorized User's or Customer's access to the Services only (i) if such Authorized User's or Customer's use of the Services represents or reasonably appears to represent a threat to Provider's network; (ii) if such Authorized User's or Customer's use of the Services creates or reasonably appears to create liability for Provider; (iii) to prevent unauthorized access to Customer Data; (iv) where Customer has failed to pay fees owed to Provider under this Agreement and does not cure such failure within fifteen (15) days after receipt of notice from Provider that such fees have not been timely paid; (v) to the extent necessary to comply with applicable law; or (vi) if there is a security emergency.

(b) Provider will provide Customer with (x), to the extent practicable under the circumstances reasonable advance notice of any suspension and the reason for such suspension, and (y) an opportunity to discuss the matter with Provider before such suspension occurs, unless such delay appears reasonably likely to harm Provider's network, or enable unauthorized access to Customer Data (in which cases Provider will promptly notify Customer of such suspension once it has occurred).

(c) If Provider determines in Provider's sole discretion that any Authorized User's account should be permanently terminated as a result of such Authorized User's misconduct, Provider may request that Customer terminate such account, and if Customer fails to promptly terminate such account, then Provider may do so; provided, however, that Provider will upon Customer's request discuss with Customer the reasons that Provider deems termination of such Authorized User's account to be appropriate.

### 4. PROFESSIONAL SERVICES

4.1 Performance and Changes. Subject to the terms and conditions of this Agreement, Provider will perform the Professional Services in accordance with the applicable Order Form. To the extent Professional Services involve the presence of Provider personnel on Customer's premises (e.g., on site at a project), Provider will ensure that those personnel abide by the workplace safety and similar policies instructed by Customer.

4.2 Project Management. Each Order Form will designate a project leader as a single point of contact within each party's organization to manage the parties' relationship with respect to the activities contemplated by that Order Form ("**Project Leader**"). The Project Leaders will meet as necessary to manage the provision of the Platform and Services. Disputes will be escalated to more senior executives if the Project Leaders are unable to resolve a problem.

4.3 Customer's Responsibilities and Permissions. Customer will provide all reasonable assistance, cooperation, information, and personnel reasonably necessary to enable Provider to perform the Professional Services. Customer acknowledges that Provider's ability to provide Professional Services may be affected if Customer does not provide this reasonable assistance.

## 5. SUPPORT SERVICES

5.1 Support Services. For so long as Customer is current with its payment of all fees under this Agreement, the Customer's support lead (i.e., the individual designated by Customer from time to time) ("**Customer Support Lead**") will be entitled to receive Provider's standard email support via [support@oden.io](mailto:support@oden.io) or standard phone support via 800-230-9063 during Provider's regular business hours (8am – 6pm ET). Customer is solely responsible for providing support to Authorized Users during the Term.

5.2 Error Reporting. Customer will document and promptly report all detected errors in the Technology to Provider with enough detail to permit Provider to reproduce the error. Customer will assist Provider with recreating and diagnosing each error. Customer will provide Provider with reasonable access to all necessary personnel to answer questions regarding errors and other problems reported by Customer.

5.3 Error Corrections. Provider will use reasonable efforts to correct performance errors affecting Customer's use of the Technology with a level of effort commensurate with the severity of the error.

5.4 Exclusions. Unless otherwise expressly agreed to by Provider in a Order Form, the Support Services do not include: (a) visits to Customer's site; (b) any work with or relating to any third party equipment or software; or (c) consultation with any Customer personnel except the Customer Support Lead.

## 6. FEES AND PAYMENT

### 6.1 Fees and Payment Terms

(a) Customer will pay Provider the fees and any other amounts owed under this Agreement, plus any applicable sales or other taxes, as specified in each Order Form and in accordance with the schedule set forth in each Order Form. All amounts payable under this Agreement are non-refundable. Unless otherwise specified in the Order Form, Customer will pay all amounts due within 30 days of the date of the applicable invoice.

(b) Any amount not paid when due will be subject to finance charges equal to 1.5% of the unpaid balance per month or the highest rate permitted by applicable usury law, whichever is less, determined and compounded daily from the date due until the date paid. Customer will reimburse any costs or expenses (including, but not limited to, reasonable attorneys' fees) incurred by Provider to collect any amount that is not paid when due.

6.2 Taxes. Other than federal and state net income taxes imposed on Provider by the United States, Customer will bear all taxes, withholding taxes, and other governmental charges resulting from this Agreement.

## 7. TERM AND TERMINATION

7.1 Term of Agreement. The term of this Agreement will begin on the Order Effective Date of the initial Order Form executed by the parties and continue until the Agreement is terminated in accordance with its terms. Termination of the Agreement will automatically terminate all active Order Forms.

7.2 Term of Order Forms. The term of each Order Form will begin on the date that it is fully executed and continue until the later of the end of the Subscription Term set forth on such Order Form (including any automatic renewals, if any) and completion of the specified Professional Services.

7.3 Termination for Convenience. Either party may terminate this Agreement on 30 days' notice to the other party if no Order Forms are in effect.

7.4 Termination for Cause. If either party materially breaches any of its duties or obligations under this Agreement and such breach is not cured, or the breaching party is not diligently pursuing a cure to the non-breaching party's sole satisfaction, within 30 calendar days after written notice of the breach, then the non-breaching party may terminate this Agreement in its entirety or the relevant Order Form, or both, for cause as of a date specified in the notice.

7.5 Post-Termination Obligations. If this Agreement or a Order Form is terminated for any reason: (a) Customer will pay to Provider any fees or other amounts that have accrued prior to the date of termination; (b) any and all liabilities accrued prior to the effective date of the termination will survive; (c) Customer will, promptly after Provider's request, provide Provider with a written certification signed by an authorized Customer representative certifying that all copies of Documentation in Customer's possession have been destroyed; and (d) Sections 1, 2.4, 3.9, 3.10, 6, 7.1, 8.3, 10, 11, 12, and 13 will survive termination.

## 8. WARRANTIES AND DISCLAIMER

8.1 Mutual Warranties. Each party represents and warrants to the other that: (a) this Agreement has been duly executed and delivered and constitutes a valid and binding agreement enforceable against such party in accordance with its terms; (b) no authorization or approval from any third party is required in connection with such party's execution, delivery, or performance of this Agreement; (c) the execution, delivery, and performance of this Agreement does not violate the laws of any jurisdiction or the terms or conditions of any other agreement to which it is a party or by which it is otherwise bound; and (d) it will comply with all applicable laws in connection with this Agreement including, for Customer, all applicable employment laws.

8.2 Customer Warranties. Customer represents and warrants that: (a) it has the right to provide the Customer Data to Provider under this Agreement; (b) the exercise by Provider of the rights granted under this Agreement to Customer Data as provided by Customer and Provider's retention of rights to the Machine Learning as set forth in Section 2.4 do not, and will not, infringe any intellectual property rights, privacy rights, or other rights of any third party or give rise to any obligation for the payment of any sums to any third party by Provider or any of its affiliates; (c) the Customer Data will comply with all reasonable requirements communicated in writing to Customer by Provider; and (d) the Customer Data will not, when used by Provider in accordance with this Agreement, subject Provider to any liability or cause Provider to violate any contract or applicable laws.

8.3 Disclaimer. EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES STATED IN THIS SECTION 8, PROVIDER MAKES NO ADDITIONAL REPRESENTATION OR WARRANTY OF ANY KIND WHETHER EXPRESS, IMPLIED (EITHER IN FACT OR BY OPERATION OF LAW), OR STATUTORY, AS TO ANY MATTER WHATSOEVER. PROVIDER EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, QUALITY, ACCURACY, TITLE, AND NON-INFRINGEMENT. PROVIDER EXERCISES NO CONTROL OVER AND EXPRESSLY DISCLAIMS ANY LIABILITY ARISING OUT OF OR BASED UPON THE CUSTOMER'S USE OF THE TECHNOLOGY OR MACHINE LEARNING.

## 9. INFRINGEMENT INDEMNIFICATION

9.1 **Defense of Infringement Claims.** Provider will, at its expense, either defend Customer from or settle any claim, proceeding, or suit ("**Claim**") brought by a third party against Customer alleging that Customer's use of the Platform infringes or misappropriates any United States patent, copyright, or trade secret during the applicable Subscription Term if: (a) Customer gives Provider prompt written notice of the Claim; (b) Customer grants Provider full and complete control over the defense and settlement of the Claim; (c) Customer provides assistance in connection with the defense and settlement of the Claim as Provider may reasonably request; and (d) Customer complies with any settlement or court order made in connection with the Claim (e.g., relating to the future use of the Platform). Customer will not defend or settle any Claim relating to the Technology without Provider's prior written consent. Customer will have the right to participate in the defense of the Claim at its own expense and with counsel of its own choosing, but Provider will have sole control over the defense and settlement of the Claim.

9.2 **Indemnification of Infringement Claims.** Provider will indemnify Customer from and pay (a) all damages, costs, and attorneys' fees finally awarded against Customer in any Claim under Section 9.1; (b) all out-of-pocket costs (including reasonable attorneys' fees) reasonably incurred by Customer in connection with the defense of a Claim under Section 9.1 (other than attorneys' fees and costs incurred without Provider's consent after Provider has accepted defense of the Claim); and (c) all amounts that Provider agrees to pay to any third party to settle any Claim under Section 9.1.

9.3 **Exclusions from Obligations.** Provider will have no obligation under this Section 9 for any infringement or misappropriation to the extent that it arises out of or is based upon (a) use of the Platform in combination with Customer Data or any other products, services, or materials if such infringement or misappropriation would not have arisen but for such combination; (b) the Platform to the extent it is provided to comply with designs, requirements, or specifications required by or provided by Customer, if the alleged infringement or misappropriation would not have arisen but for the compliance with such designs, requirements, or specifications; (c) use of the Platform by Customer for purposes not intended or outside the scope of the limited right to use the Platform granted to Customer; (d) Customer's failure to use the Platform in accordance with instructions provided by Provider, if the infringement or misappropriation would not have occurred but for such failure; or (e) any modification of the Platform not made or authorized in writing by Provider where such infringement or misappropriation would not have occurred absent such modification.

9.4 **Conditions to Infringement Indemnity.** Provider's infringement obligations under this Section 9 are conditioned on Customer's agreement that if the Platform becomes, or in Provider's opinion is likely to become, the subject of a Claim covered by this Section 9, Provider, at Provider's option and expense, may either procure the right for Customer to continue using the Platform or replace or modify the same with a non-infringing functional equivalent. If the foregoing alternatives are not available to Provider on terms that, in its judgment, are reasonable, Provider will have the right to require Customer to cease using the Platform, in which case Provider will refund to Customer that portion of the fees paid for periods of time which had yet to occur.

9.5 **Limited Remedy.** This Section 9 states Provider's sole and exclusive liability, and Customer's sole and exclusive remedy, for the actual or alleged infringement or misappropriation of any third party intellectual property right by the Platform or any other materials or information provided under this Agreement.

## 10. CUSTOMER INDEMNIFICATION

10.1 **Defense.** Customer will defend Provider from any actual or threatened Claim arising out of or based upon the Customer Data or Customer's use of the Technology, Machine Learning, or Customer's breach of any of the provisions of this Agreement, excluding any claims for which Provider is responsible under Section 9. Provider will: (a) give Customer prompt written notice of the claim; (b) grant Customer full and complete control over the defense and settlement of the claim; (c) assist Customer with the defense and

settlement of the claim as Customer may reasonably request and at Customer's expense; and (d) comply with any settlement or court order made in connection with the claim.

10.2 **Indemnification.** Customer will indemnify Provider against: (a) all damages, costs, and attorneys' fees finally awarded against Provider in any Claim under Section 10.1; (b) all out-of-pocket costs (including reasonable attorneys' fees) reasonably incurred by Provider in connection with the defense of such Claim (other than attorneys' fees and costs incurred without Customer's consent after Customer has accepted defense of such Claim); and (c) all amounts that Customer agrees to pay to any third party to settle any Claim under Section 10.1. This Section 10.2 will apply regardless of any insurance coverage held by Provider or any affiliate.

## 11. LIMITATIONS OF LIABILITY

11.1 **Disclaimer of Indirect Damages.** NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, EACH PARTY WILL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO THE OTHER PARTY FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, OR EXEMPLARY DAMAGES ARISING OUT OF OR RELATED TO THE TRANSACTION CONTEMPLATED UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO LOST PROFITS OR LOSS OF BUSINESS, EVEN IF PROVIDER IS APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. THE FOREGOING EXCLUSION OF LIABILITY WILL NOT APPLY TO A PARTY'S OBLIGATIONS UNDER SECTIONS 9 OR 10

11.2 **Cap on Liability.** UNDER NO CIRCUMSTANCES WILL A PARTY'S TOTAL LIABILITY OF ALL KINDS ARISING OUT OF OR RELATED TO THIS AGREEMENT (INCLUDING BUT NOT LIMITED TO WARRANTY CLAIMS), REGARDLESS OF THE FORUM AND REGARDLESS OF WHETHER ANY ACTION OR CLAIM IS BASED ON CONTRACT, TORT, OR OTHERWISE, EXCEED THE TOTAL AMOUNT PAID BY CUSTOMER TO PROVIDER UNDER THIS AGREEMENT IN THE 12 MONTHS IMMEDIATELY PRECEDING THE EVENTS GIVING RISE TO THE CLAIM (DETERMINED AS OF THE DATE OF ANY FINAL JUDGMENT IN AN ACTION). THE PRECEDING LIMITATION OF LIABILITY WILL NOT APPLY TO A PARTY'S OBLIGATIONS UNDER SECTIONS 9 AND 10 (AS APPLICABLE).

11.3 **Independent Allocations of Risk.** EACH PROVISION OF THIS AGREEMENT THAT PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES, OR EXCLUSION OF DAMAGES IS TO ALLOCATE THE RISKS OF THIS AGREEMENT BETWEEN THE PARTIES. THIS ALLOCATION IS REFLECTED IN THE PRICING OFFERED BY PROVIDER TO CUSTOMER AND IS AN ESSENTIAL ELEMENT OF THE BASIS OF THE BARGAIN BETWEEN THE PARTIES. EACH OF THESE PROVISIONS IS SEVERABLE AND INDEPENDENT OF ALL OTHER PROVISIONS OF THIS AGREEMENT. THE LIMITATIONS IN THIS SECTION 11 WILL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY IN THIS AGREEMENT.

## 12. CONFIDENTIALITY

12.1 **Definition.** "**Confidential Information**" means any trade secrets or other information of a party, whether of a technical, business, or other nature (including information relating to a party's technology, software, products, services, designs, methodologies, customers, prospects, and other affairs), that is disclosed to a party during the term of this Agreement and that such party knows or has reason to know is confidential, proprietary, or trade secret information of the disclosing party. Confidential Information does not include any information that: (a) was known to the receiving party prior to receiving the same from the disclosing party in connection with this Agreement; (b) is independently developed by the receiving party without use of or reference to the Confidential Information of the disclosing party; (c) is acquired by the receiving party from another source without restriction as to use or disclosure; or (d) is or becomes part of the public domain through no fault or action of the receiving party.

12.2 **Restricted Use and Nondisclosure.** During and after the term of this Agreement, each party will: (a) use the other party's Confidential Information solely for the purpose for which it is provided; (b) not disclose the other party's Confidential Information to a third party unless the third party must access the



Confidential Information to perform in accordance with this Agreement and the third party has executed a written agreement that contains terms that are substantially similar to the terms contained in this Section 12; and (c) maintain the secrecy of, and protect from unauthorized use and disclosure, the other party's Confidential Information to the same extent (but using no less than a reasonable degree of care) that it protects its own Confidential Information of a similar nature.

12.3 Required Disclosure. If either party is required by law to disclose the Confidential Information or the terms of this Agreement, the disclosing party must give prompt written notice of such requirement before such disclosure (to the extent permitted by applicable law) and assist the non-disclosing party in obtaining an order protecting the Confidential Information from public disclosure.

12.4 Return of Materials. Upon the termination or expiration of this Agreement, or upon earlier request, each party will deliver to the other all Confidential Information that it may have in its possession or control. Notwithstanding the foregoing, neither party will be required to return materials that it must retain in order to receive the benefits of this Agreement or properly perform in accordance with this Agreement.

### 13. GENERAL

13.1 Relationship. Provider is an independent contractor (and not an agent or representative of Customer) in the performance of this Agreement. This Agreement will not be interpreted or construed as: (a) creating or evidencing any association, joint venture, partnership, or franchise between the parties; (b) imposing any partnership or franchise obligation or liability on either party; or (c) prohibiting or restricting Provider's performance of any services for any third party or the provision of products to any third party. Except as expressly set forth in a Order Form, this Agreement is nonexclusive and Provider may provide the Technology to, and perform the Services for, any third party, even if considered a competitor of Customer.

13.2 Assignability. Customer may not assign its rights, duties, or obligations under this Agreement without Provider's prior written consent. If consent is given, this Agreement will bind Customer's successors and assigns. Any attempt by Customer to transfer its rights, duties, or obligations under this Agreement except as expressly provided in this Agreement is void. Provider may assign this Agreement without Customer's consent.

13.3 Subcontractors. Provider may utilize one or more subcontractors or other third parties to perform its duties under this Agreement as long as Provider remains responsible for all of its obligations under this Agreement.

13.4 Reference. Subject to Section 12 regarding confidentiality, Customer will: (a) make one or more representatives reasonably available for reference inquiries from potential Provider customers, partners, and investors; (b) permit Provider to create and publish a case study describing in general terms the nature of Customer's use of the Platform; and (c) permit Provider to issue and publish a press release containing a quotation from a representative of Customer announcing that Customer has subscribed to use the Platform and the general context of the intended use. In addition, Customer hereby consents to Provider's display of Customer's logo on Provider's web site where Provider displays the names and logos of its customers.

13.5 Notices. Any notice required or permitted to be given in accordance with this Agreement will be effective if it is in writing and sent by certified or registered mail, or insured courier, return receipt requested, to the appropriate party at the address set forth on the signature page of this Agreement and with the appropriate postage affixed. Either party may change its address for receipt of notice by notice to the other party in accordance with this Section. Notices are deemed given two business days following the date of mailing or one business day following delivery to a courier.

13.6 Force Majeure. Provider will not be liable for, or be considered to be in breach of or default under this Agreement on account of, any delay or failure to perform as required by this Agreement as a result of any cause or

condition beyond Provider's reasonable control, so long as Provider uses all commercially reasonable efforts to avoid or remove such causes of non-performance.

13.7 Governing Law. This Agreement will be interpreted, construed, and enforced in all respects in accordance with the local laws of the State of New York. Except as specified in Section 13.8, each party hereby irrevocably consents to the exclusive jurisdiction and venue of the federal, state, and local courts in the Southern District of New York in connection with any action arising out of or in connection with this Agreement.

13.8 Arbitration. Except for the right of either party to apply to a court of competent jurisdiction for a temporary restraining order, a preliminary injunction, or other equitable relief to preserve the status quo or prevent irreparable harm, any dispute as to the interpretation, enforcement, breach, or termination of this Agreement will be settled by binding arbitration in the Southern District of New York under the Rules of the American Arbitration Association by one arbitrator appointed in accordance with such rules, provided that the arbitrator must have significant relevant industry experience and be mutually acceptable to the parties. All other disputes (excluding the right of either party to apply to a court of competent jurisdiction for a temporary restraining order, a preliminary injunction, or other equitable relief to preserve the status quo or prevent irreparable harm) will be resolved by a court specified in Section 13.7. Judgment upon the award rendered by the arbitrators may be entered in any court of competent jurisdiction. The prevailing party will be entitled to receive from the other party its attorneys' fees and costs incurred in connection with any arbitration or litigation instituted in connection with this Agreement.

13.9 Waiver. The waiver by either party of any breach of any provision of this Agreement does not waive any other breach. The failure of any party to insist on strict performance of any covenant or obligation in accordance with this Agreement will not be a waiver of such party's right to demand strict compliance in the future, nor will the same be construed as a novation of this Agreement.

13.10 Severability. If any part of this Agreement is found to be illegal, unenforceable, or invalid, the remaining portions of this Agreement will remain in full force and effect. If any material limitation or restriction on the use of the Technology under this Agreement is found to be illegal, unenforceable, or invalid, Customer's right to use the Technology will immediately terminate.

13.11 Commencing Legal Action. Customer's action for breach of this Agreement or any other action otherwise arising out of this Agreement must be commenced within one year from the date the right, claim, demand, or cause of action first occurred.

13.12 Interpretation. The parties have had an equal opportunity to participate in the drafting of this Agreement and the attached exhibits, if any. No ambiguity will be construed against any party based upon a claim that that party drafted the ambiguous language. The headings appearing at the beginning of several sections contained in this Agreement have been inserted for identification and reference purposes only and must not be used to construe or interpret this Agreement. Whenever required by context, a singular number will include the plural, the plural number will include the singular, and the gender of any pronoun will include all genders.

13.13 Counterparts. This Agreement may be executed in any number of identical counterparts with the same effect as if the parties had signed the same document.

13.14 Entire Agreement. This Agreement, including Exhibit A and all Order Forms, is the final and complete expression of the agreement between these parties regarding the Technology. This Agreement supersedes, and the terms of this Agreement govern, all previous oral and written communications regarding these matters, all of which are merged into this Agreement, except that this Agreement does not supersede any prior nondisclosure or comparable agreement between the parties executed prior to this Agreement being executed. No employee, agent, or other representative of Provider has any authority to bind Provider with respect to any statement, representation,

warranty, or other expression unless the same is specifically set forth in this Agreement. No usage of trade or other regular practice or method of dealing between the parties will be used to modify, interpret, supplement, or alter the terms of this Agreement. This Agreement may be changed only by a written agreement signed by an authorized agent of the party against whom enforcement is sought. Provider will not be bound by, and specifically objects to,

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any term, condition or other provision that is different from or in addition to this Agreement (whether or not it would materially alter this Agreement) that is proffered by Customer in any receipt, acceptance, confirmation, correspondence, or otherwise, unless Provider specifically agrees to such provision in writing and signed by an authorized agent of Provider.