

# EMAPP MARKETPLACE TERMS & CONDITIONS

AFAXYS MARKETPLACE TERMS & CONDITIONS

**CONFIDENTIAL**

**Effective: September 28, 2017**

THIS MARKETPLACE TERMS AND CONDITIONS (COLLECTIVELY WITH THE PARTICIPATION AGREEMENT FORM MAY BE REFERRED TO AS THE "AGREEMENT" OR THE "TERMS") IS A LEGAL CONTRACT BETWEEN YOU ("PARTICIPANT") AND AFAXYS MARKETPLACE LLC. ("COMPANY," "US," "OUR"). PARTICIPANT AND COMPANY TOGETHER, "THE PARTIES." BY CLICKING AN "ACCEPT" BUTTON, EXECUTING A MARKETPLACE PARTICIPATION AGREEMENT FORM THAT INCLUDES THESE TERMS BY REFERENCE OR USING THE MARKETPLACE (AS DEFINED BELOW), PARTICIPANT ACKNOWLEDGES THAT PARTICIPANT HAS REVIEWED AND ACCEPTS THESE TERMS. IF YOU ARE AGREEING TO THESE TERMS AS A REPRESENTATIVE OF AN ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND THAT ENTITY AND "PARTICIPANT" REFERS TO THAT ENTITY AND ALL THE USERS OF THAT ENTITY ACCESSING OR USING THE MARKETPLACE. IF PARTICIPANT DOES NOT AGREE WITH ALL OF THESE TERMS, DO NOT ACCESS OR OTHERWISE USE THE MARKETPLACE. COMPANY MAY MAKE CHANGES TO THE MARKETPLACE AT ANY TIME. IN ADDITION, COMPANY MAY MAKE CHANGES TO THESE TERMS AT ANY TIME, AND COMPANY WILL POST NOTICE OF THE CHANGES AND THE UPDATED TERMS OR SEND E-MAIL NOTIFICATION TO THE E-MAIL ADDRESS OF RECORD FOR PARTICIPANT. PARTICIPANT'S CONTINUED USE OF THE MARKETPLACE AFTER SUCH CHANGES HAVE BEEN POSTED WILL SIGNIFY PARTICIPANT'S ASSENT TO AND ACCEPTANCE OF THE REVISED TERMS.

## 1. DEFINITIONS

**"Affiliates"** means collectively the parents, sister companies, subsidiaries, and affiliates of Company and their respective officers, directors, employees and contractors.

**"Aggregated Data"** means any non-personally identifiable, technical, statistical or analytical data gathered or generated directly by the Services and/or by use of the Marketplace, and which Company owns, collects, gathers and aggregates periodically as part of its services. Aggregated Data includes **"Metadata,"** i.e. all the data, content, and/or information recorded and/or created by the Marketplace and its systems regarding the access, use and performance of the Marketplace by Participants. Aggregated Data does not include non-aggregated Participant Data.

**"Agreement"** means and includes collectively, these Terms and Conditions, any Marketplace Participation Agreement Form executed by Participant, and any amendment or revisions to them as provided herein.

**"Authorized User"** or **"User"** means any individual authorized, by virtue of such individual's relationship to, or permissions from, Participant, to access the Services, including initiating purchases and orders on behalf of the Participant pursuant to Participant's rights under this Agreement and solely for Participant's "Own Use" (as defined in Participant's GPO Agreement, defined below). Authorized Users can be employees, contractors or agents of Participant. The term Participant includes its Authorized Users. **"Administrative User"** means an Authorized User that has been designated as the Participant's technical point of contact with authority to add, modify or delete the rights of other Authorized Users under the same Participant, as well as executing Participant's technical interactions with the Services.

**"Authorized Representative"** means an Authorized User that has been authorized by the Participant to execute the Agreement and any amendment or revision, and to approve, designate and change Authorized Users and Administrative Users on behalf of Participant.

**"Buyer"** means Participants that are authorized to access the Marketplace to view Supplier Data and initiate orders or make purchases from Suppliers.

**"Go Live Date"** means the date in which the Marketplace Setup is complete and Participant is able to initiate transactions through the Marketplace..

**"GPO Agreement"** refers to the separate membership agreement executed by a Participant (either as Buyer or Supplier) to become a member of a Group Purchasing Program ("GPO") under which such Buyer can acquire products and services from Suppliers and such Supplier can offer products and services for sale within the GPO network.

**"Intellectual Property Rights"** means all intellectual property rights or similar proprietary rights, including (a) patent rights and utility models, (b) copyrights and database rights, (c) trademarks, trade names, domain names and trade dress and the goodwill associated therewith, (d) trade secrets and data rights, (e) mask works, and (f) industrial design rights; in each case, including any registrations of, applications to register, and renewals and extensions of, any of the foregoing in any jurisdiction in the world.

**"Marketplace"** refers to the online platform which features are offered as a convenience by Company to Participants with the purpose of enabling Suppliers and Buyers to exchange information regarding Supplier's products and services, and to initiate and communicate information pertaining to purchases by Buyer of Supplier's products and services.

**"Marketplace AUP"** means the Marketplace Acceptable Use Policy provided at [emapp.com/acceptable-use-policy](http://emapp.com/acceptable-use-policy).

**"Marketplace Privacy Notice"** means the Marketplace Privacy Notice provided at [emapp.com/privacy-notice](http://emapp.com/privacy-notice).

**"Participation Agreement Form"** means the document (in executable or online format) through which Participant contracts the Services and related use of the Marketplace under this Agreement.

**"Participant Data"** means all the data, content and/or information provided, uploaded, recorded and/or posted by Participant (or any of its Authorized Users) during and in connection with its authorized use of the Services and the Marketplace, including any content published or displayed on or through the Services, or transmitted to or shared with other users. Participant Data does not include any Aggregated Data.

**"Services"** refers collectively to the services provided by Company to Participants on or through the Marketplace and by means of accessing and using the features and functions of the Marketplace platform, as contemplated in this Agreement.

**"Supplier(s)"** means entities that allow Buyers' access to descriptions, pricing, ordering and/or purchasing of their products and/or services available from or through the Marketplace.

**"Supplier Data"** means all the data, content and/or information provided, uploaded, recorded and/or posted by or on behalf of Suppliers during and in connection with the use of the Services and the Marketplace, including any content published or displayed on or through the Services, or transmitted to or shared with other users about the Supplier and any product or service offered by or through the Supplier.

**"Marketplace Providers"** means, collectively, service providers, sellers, distributors, vendors, licensors, and contractors of Company and their respective officers, directors, employees and contractors. As a non-exhaustive list, Marketplace Providers include Third-Party Hosting Providers and providers of payment processing services.

## **2. PURPOSE OF THE MARKETPLACE**

**2.1. Scope.** Company provides Services and, as a convenience, related access to the Marketplace to Participants, through the exercise of rights granted to Company through one of its Marketplace Providers (e.g. its Third-Party Hosting Provider), and solely as an online location to facilitate communication between Buyers and Suppliers, for the sale and purchase of products and services between those Buyers and Suppliers. Participants agree and understand that when Buyers make a purchase through the Marketplace, they are purchasing the products and/or services from Suppliers and not from Company or any of its Affiliates. Participant agrees that Company is not an agent for either Supplier or Buyer and has no authority to act on behalf of either. The use of the Marketplace is conditioned upon Participant's adherence to the terms and conditions of the applicable Participant's agreements and/or of any GPO Agreement under which Participant has been authorized to become a Participant (or allowed pricing and/or other

benefits within the Marketplace). In the event of a conflict between a GPO Agreement and the terms of this Agreement, the terms of this Agreement shall control when referencing the use of the Marketplace platform.

**2.2. Enrollment and Initiation.** Enrollment and access to the Services and the Marketplace are granted following the execution of a Participation Agreement Form (either online or executable by signature) and is subject to approval and acceptance by Company, which shall provide notice of acceptance to Participant. The terms "Company" and "Participant" as used in this Agreement will be deemed to refer to the entities that execute the Participation Agreement Form, and Company will invoice the Participant named in the Participation Agreement Form (or any other agreement enrollment process that may be provided by Company) for the applicable fees and charges. During the enrollment process, Participant will provide any information required for use of the Marketplace, including identification of Authorized Representatives, Administrative Users and other Users. The Parties may also agree to ancillary terms, including configuration and setup services ("**Setup**"), training, Go Live Date and other applicable timelines. The Parties agree to reasonably cooperate to complete the Setup, training and Go Live Date in a timely manner.

### **3. ACCESS AND RESPONSIBILITIES**

**3.1. Access Rights.** Subject to all terms and conditions of this Agreement, Company grants Participant during the Term a nonexclusive, nontransferable right and license (without right to sublicense) to use the Services and access the Marketplace solely for Participant's internal business purposes. The Marketplace is made available to Participant as convenience and solely as hosted on behalf of Company, and nothing in this Agreement shall be construed to grant Participant any right to receive or review any copy of any software. Participant's receipt of the Services and access to the Marketplace platform shall comply with this Agreement and with all other conditions set forth in any documentation that is provided or made available by Company to Participant in electronic or other form ("**Documentation**"). Participant acknowledges and agrees that any act or omission of its Authorized Users (or any activity undertaken through the use of Access Codes (see Section 3.2) assigned to its Authorized Users or through access by the computers or systems operated by or on behalf of Participant) in connection with the Services or with the use of, or access to the Marketplace, shall constitute a binding action by and on behalf of the Participant. Any act or omission by an Authorized User that would constitute a breach of this Agreement if undertaken by Participant, shall be considered a material breach by Participant hereunder.

**3.2. Access Credentials and Security.** Participant will provide reasonable cooperation, assistance, information and access to Company as may be necessary to initiate Participant's use of the Services. Access to the Marketplace will be via the Internet through a password-protected website. Subject to all terms and conditions of this Agreement, Company will provide Participant with access to the Marketplace. As part of the implementation process, Participant shall identify an administrative user name and password for its designated Authorized Representative and/or Administrative User that will be used to set up Participant's account. Participant's Authorized Representative and/or Administrative User shall use the administrative user name and password to create subaccounts for its Authorized Users, each with unique login IDs and passwords ("Access Codes"), which shall conform to any policies on user name and passwords that may be in effect at the time. Each Authorized User's Access Code is only for use by such Authorized User and may not be transferred to any other person or entity. Participant shall be responsible for the acts or omissions of any person who accesses the Marketplace using Access Codes provided to or created by Participant, or for the access by any system operated by or on behalf of Participant. Company (and its Third-Party Hosting Provider) reserve the right, at any time and without notice, to refuse registration of, or to suspend or cancel Access Codes, or to restrict access to the Services to any Participant (or Authorized User), or to suspend transactions in the event of any access or use that violates the terms and conditions set forth in this Agreement, its [Marketplace AUP](#) or in the event Company (and/or its Third-Party Hosting Provider) deem in good faith that such action is warranted to protect the security, stability and operations of the Marketplace or any accounts within the Marketplace. Participant is responsible for maintaining the security and confidentiality of all Access Codes provided to Participant and its Authorized Users and for any access to the Marketplace through any system used by them or Participant. Participant shall promptly notify Company of any unauthorized use of any Access Code or of any other security breach or unauthorized access or use of the Marketplace by Participant, any Authorized User or any third party.

### **3.3. Company's Responsibilities**

**3.3.1. Services.** Company will provide the Services in a manner consistent with reasonable industry standards and shall exercise commercially reasonable efforts to grant access to the Marketplace.

**3.3.2. Hosting.** Participant agrees and understands that Company has entered into arrangements with one or more third parties for the provision and hosting of the Marketplace platform, (our "**Third-Party Hosting Provider**") whereby any such third party will perform the hosting obligations, provided that Company shall ensure that any such third party shall be contractually bound to provide substantially the same level of protection with respect to Participant Data as is provided by the terms of this Agreement. Participant acknowledges and agrees that the Third-Party Hosting Provider's service levels, use policies and terms of service will apply to Participant use of the Marketplace platform and that Participant is bound by such terms of service and use policies as may be provided within the Marketplace under the link "Use Policies".

**3.3.3. Participant Data.** As between Company and Participant, Participant and its licensors own all rights, title and interest in and to Participant Data. Participant hereby grants to Company a royalty-free, nonexclusive, worldwide, right and license (with the right to sublicense through multiple tiers) to use, copy, store, process, modify, adapt, create derivative works, transmit and display Participant Data as necessary to provide the Services hereunder, to create Aggregated Data, or to use as otherwise provided in Company's [Privacy Notice](#). We respect the information that You provide to Us, and want to be sure You fully understand exactly how We use that information. So, please review Our [Privacy Notice](#) that explains our privacy policies. Participant agrees that (i) the Services depend on the availability of the Participant Data; and (ii) Company does not assume any responsibility for, or undertake to verify, the accuracy or completeness of Participant Data. Participant acknowledges and consents that the Marketplace stores and transmits Participant Data in the United States of America, and that it may store data outside of the United States of America as necessary, in territories which may be different from the country where the Participant Data originated. Participant may receive access to certain information concerning other Marketplace users when Participant uses the Marketplace. Participant hereby represents, warrants and agrees (1) not to use any information regarding other Marketplace users which is accessible from the Marketplace or that may be disclosed to Participant by Company, except to enter and complete transactions, and (2) not to use any such information for purposes of solicitation, sending unsolicited email or spamming, harassment, or other conduct Company deems unacceptable or objectionable.

**3.3.4. Aggregated Data.** Participant acknowledges and agrees that Company compiles Aggregated Data. As between Participant and Company, Company exclusively owns Aggregated Data and Participant hereby grants Company a royalty-free, fully paid, nonexclusive, irrevocable, transferable and sublicenseable right and license (with the right to sublicense through multiple tiers) to develop anonymous Aggregated Data from Participant's use of the Marketplace and to disclose and use such Aggregated Data in its sole discretion.

**3.3.5. Support and Service Levels.** Company will use commercially reasonable efforts to provide Participant with customer service and technical support for the Services and the Marketplace in accordance with its regular business practices. Participant agrees that Company (or its Marketplace Providers) may charge Participant in accordance with their then current policies for any support service resulting from problems, errors or inquiries caused by Participant or by Participant's systems. Other than to verify whether communications intended to be posted or placed through the Marketplace have been successfully transmitted or posted and/or to help troubleshoot any Marketplace access and use issues, Company does not provide any customer support for transactions made through the Marketplace and Participant agrees that Company is not responsible to provide any such support. Company and its Marketplace Providers may offer support and consulting services under separate agreements for such services at additional charges.

### **3.4. Participant Responsibilities**

**3.4.1. Obligations and Restrictions.** Participant agrees, represents and warrants that Participant's use of the Services and Marketplace will comply with applicable laws, ordinances and regulations, including as provided in the applicable GPO Agreement. Participant agrees, represents and warrants that Participant's use of the Services and Marketplace will comply with Our [Marketplace AUP](#), which is hereby incorporated by reference. Participant (and its Authorized Users) shall not directly or indirectly (i) modify, copy, reproduce, adapt or create derivative works based on the Marketplace, the Services, or use any of Company's Confidential Information (as defined below) to create any service, software or documentation that performs substantially the same functionality as the Services; (ii) create Internet "links" to or reproduce any content forming part of the Services, other than for its own internal business purposes; (iii) disassemble, reverse engineer, decompile or use any other means to attempt to gain unauthorized access to, or attempt to discover any source code, algorithms or trade secrets underlying the Marketplace or the

Services or any part thereof, or access it in order to copy any ideas, features, content, functions or graphics of the Marketplace or the Services; (iv) interfere with or disrupt the integrity or performance of the Marketplace or the Services, to install or allow the operation or connection of any API, automated tool connector, interface, plugin, screen scraper or screen or data capture, or punch-out code that is not expressly authorized by Company in writing; (v) permit any third parties other than Authorized Users to use or access the Marketplace or any Marketplace information or Supplier Data; (vi) use the Marketplace to process or permit to be processed the data of any third party; (vii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material via the Marketplace or the Services; (ix) send or store viruses or malicious code via the Marketplace or the Services; (x) use any components provided with the Marketplace separately from the Services; (xi) encumber, sublicense, transfer, distribute, rent, lease, time-share or use the Marketplace or the Services in any service bureau arrangement or otherwise for the benefit of any third party; or (xii) use or allow the transmission, transfer, export, re-export or other transfer of any product, technology or information it obtains or learns in connection with Participant's use of the Marketplace or the Services in violation of any export control or other laws and regulations of the United States of America or any other relevant jurisdiction.

**3.4.2. Participant Data.** Participant agrees that it is solely responsible for Participant Data transmitted through the Services, and it shall cause Authorized Users not to misuse the Marketplace or to post, transmit, or share Participant Data on the Marketplace or through the Services that they do not have permission or rights to post. Participant agrees and accepts that it is solely responsible at its sole cost and expense for creating backup copies and replacing any Participant Data posted or stored on the Marketplace or provided to Company. Participant represents and warrants (i) that it has the right to disclose and provide to Company any data provided through use and access of the Marketplace or the Services, and that no materials of any kind submitted as Participant Data or otherwise posted, transmitted, or shared on or through the Marketplace or the Services will violate or infringe upon the rights of any third party, including copyright, trademark, trade secret, privacy, publicity or other personal or proprietary rights; or contain libelous, defamatory or otherwise unlawful material; and (ii) that Participant's (and that of its Authorized Users') use of and access to the Marketplace or the Services complies with all applicable laws, rules and regulations.

**3.4.3. Participant Systems.** Participant is responsible for ensuring that Participant systems are compatible with the Marketplace and that they comply with all Marketplace configurations and specifications. Participant assumes full responsibility, including expenses, for remote connectivity necessary for the transmission/receipt of data and to access and use the Marketplace. Participant represents and covenants that Participant systems are in compliance with any applicable security requirements. Participant shall be responsible for and shall maintain, in connection with its and its Authorized Users' use of the Marketplace, adequate technical, physical, and procedural controls and system security requirements and devices to ensure that access to the Marketplace is limited to its Authorized Users and to ensure privacy, confidentiality, integrity, authorization, authentication, virus and other malware detection and eradication, and other data and network security of Participant Systems.

**3.4.4. Eligibility for Transactions.** Participant represents and warrants the completeness and accuracy of Participant Data and identifiers provided for billing, medical pharmacy and other licenses to purchase products or services, eligibility for 340B covered entity, GPO and other contractual discounts, and that it shall make all transactions within the Marketplace in accordance with applicable law and contractual obligations. Participant agrees that Company is hereby authorized to transmit through the Marketplace Participant Data to other Participants to the extent necessary to carry out the Services, including Participant's qualification for purchases, pricing, discounts, and transactions.

#### **4. USE OF THE MARKETPLACE**

**4.1. Shop and Purchase from Suppliers.** Buyers may use the Marketplace to search, assess and purchase products and services provided by Suppliers, and to manage and monitor purchasing activities under its Access Codes.

**4.2. Marketplace Service, System and Supplier Changes.** Participant acknowledges and agrees that the features, functionality, performance, access, the Suppliers enrolled, products, services and prices offered in the Marketplace may change from time to time, and that Company does not warrant the continuation of any of the foregoing. Where feasible, Company shall exercise reasonable commercial efforts to alert Participants to substantial changes (per example, changes to Suppliers, products or services offered, and/or prices), but Company reserves the right to effectuate changes immediately and without prior notice. Company may, from time to time, introduce or test new

enhancements or functionalities in the Marketplace and/or offer such enhancements or functionalities to some or all Participants, in its sole discretion.

**4.3. Buyer – Supplier Communications and Electronic Communications.** In the event that Buyer or Supplier seek to communicate regarding a matter that cannot be transmitted through the Marketplace, Company will, as reasonably feasible and during regular support hours, exercise reasonable commercial efforts to facilitate communication for off-marketplace communication. By using the Marketplace and/or the Services provided on or through the Marketplace, You consent to receiving electronic communications from Us. These electronic communications may include notices about applicable fees and charges, transactional information and other information concerning or related to the Marketplace and/or Services provided on or through the Marketplace. These electronic communications are part of Your relationship with Us. You agree that any notices, agreements, disclosures or other communications that We send You electronically will satisfy any legal communication requirements, including that such communications be in writing.

#### **4.4. Illegal and Suspect Activity**

**4.4.1. Compliance with Laws; Fraud.** The Marketplace and Services may be used only for lawful purposes and in a lawful manner. Participant agrees to comply with all applicable laws, statutes, and regulations. Participant may not use invalid or unauthorized credit cards or modes of payment. Participant may not impersonate any participant or use another participant's password(s). Such fraudulent conduct is a violation of federal and state laws. Fraudulent conduct may be reported to law enforcement, and Company will cooperate to ensure that violators are prosecuted to the fullest extent of the law.

**4.4.2. Investigation.** Company has the right, but not the obligation, to monitor any activity and content associated with this Marketplace and investigate as we deem appropriate. Company also may investigate any reported violation of its policies, including its [Marketplace AUP](#), or complaints and take any action that it deems appropriate. Such action may include, but is not limited to, issuing warnings, suspension or termination of service, limiting or denying access, and/or removal of any materials on the Marketplace, including listings and submissions of content. Company reserves the right and has absolute discretion to remove, screen, or edit any content that violates these provisions or is otherwise objectionable.

**4.4.3. Disclosure of Information.** Company also reserves the right to report any activity that it suspects violates any law or regulation to appropriate law enforcement officials, regulators, or other third parties. In order to cooperate with governmental requests, to protect Company or the Marketplace, or to ensure the integrity and operation of the Marketplace or the Services, Company may access and disclose any information it considers necessary or appropriate, including but not limited to Access Codes, contact information, IP addresses and traffic information, usage history, posted content, and Participant Data.

### **5. PARTICIPATION FEES**

**5.1. Fees, Charges and Taxes .** In consideration for the Services provided by Company, Participant shall pay to Company the Fees, Charges and Taxes as provided hereunder and in the Participation Agreement Form.

**5.1.1. Fees.** Participant agrees to pay all applicable fees ("Fees") related to Your use of the Services as more fully described in the Marketplace Participation Agreement Form. Company reserves the right to change the Fees at any time, with a 30-days prior notice before becoming effective.

**5.1.2. Charges.** Company may levy additional charges for additional services, including Setup, support, and training ("Charges"), which shall be provided under the Marketplace Participation Agreement Form or in separate statements of work. Participant shall pay all Charges for additional contracted services (or for other costs and expenses that may be imposed under this Agreement) on the due date set forth in the applicable Company Invoice. Company may waive or discount Fees and Charges as set forth in the Participation Agreement Form executed by the parties.

**5.1.3. Taxes.** All fees and charges are exclusive of federal, state, municipal or other government excise, sales, use, or other taxes, now in force or enacted in the future. Participant shall, in addition to the other amounts payable under this Agreement, pay all sales, use, value added or other taxes, federal, state or otherwise, however designated, which are levied or imposed by reason of any of the transactions or services contemplated by this Agreement.

**5.1.4. Invoices and Disputes.** Company shall issue invoices on a quarterly basis; provided that Company in its discretion may invoice more frequently. Company may, at its option, choose to invoice through the Marketplace, by email, or by Electronic Data Interchange (EDI) to Participant's provided contact for invoicing. If Participant has a good faith dispute with respect to invoiced amounts, Participant shall notify Company of the dispute within thirty (30) days of the invoice date at the contact identified on the invoices (or otherwise communicated to Participant as the point of contact regarding invoice and billing matters). Participant may withhold payment of the disputed charge(s), provided that: (i) Participant pays all undisputed amounts when due; (ii) Participant identifies the specific charge(s) in dispute and provides a reasonably detailed written explanation of the basis for the dispute within thirty (30) days of the invoice date; and (iii) Participant reasonably cooperates with Company in investigating and resolving the dispute.

**5.1.5. Payments by Third Parties.** Participant acknowledges and agrees that in addition to Fees and Charges as described above, Company may receive payments and other consideration from third parties (including Marketplace Providers) which may be based on Participant purchases, including without limitation fees from Suppliers, GPOs contracting for Participant, manufacturers, payment and financing service providers and related services providers.

**5.1.6. Corrections and Adjustments.** Company will, upon discovery of any error in the calculation or invoicing of any Fees, Charges or Taxes, investigate the error and process any applicable corrections. The error may be resolved by a credit or debit to the next subsequent invoice to Participant or, if greater than USD \$1,000.00, by a separate invoice or refund.

**5.2. Payment Terms.** Payments are due upon invoice date and payable within thirty (30) calendar days of invoice transmittal date. In the event payments of undisputed invoiced amounts are not received within thirty (30) days after invoice transmittal, Company reserves the right, in addition to and not in lieu of any other rights and remedies provided in the Agreement or otherwise provided by law, to suspend the provision of Services to the Participant, including access to the Marketplace, until the overdue Fees or Charges are paid in full. In addition, Company may charge interest at the rate of 1.5% per month or any part thereof, or at the highest rate allowed by law, whichever is less, from the due date until paid. Participant agrees to pay all costs and expenses, including reasonable attorneys' fees, in connection with Company's collection of payments due hereunder.

**6. PROPRIETARY RIGHTS.** As between Company and Participant, Company, its Affiliates and Marketplace Providers retain all right, title and interest, including without limitation all Intellectual Property Rights therein, to the Services, Aggregated Data, the Marketplace and its documentation, Company trademarks and service marks, and all other related technologies and information that are used by Company in providing the Services. Participant's access and use of the Marketplace, the Services and any related materials shall be governed by the terms of this Agreement and any documents incorporated by reference. There are no licenses granted by implication in this Agreement and Company reserves and retains any rights not expressly granted to Participant. In the event Participant (or its Authorized End Users) provides Company with any suggestions, enhancement requests, recommendations or other feedback relating to the Services or the Marketplace ("Feedback"), Participant hereby grants Company (and its licensors) a royalty-free, worldwide, transferable, sublicenseable, irrevocable, perpetual license to use or incorporate such Feedback into any Company products or services, provided it does not include any of Participant's Confidential Information.

## **7. TERM AND TERMINATION**

**7.1. Term.** Unless terminated earlier as provided herein, the term of this Agreement shall commence when this Agreement is executed by the Parties (whether by execution of the Participation Agreement Form or by online enrollment or by use of the Marketplace), and shall continue for a period of two (2) years ("Initial Term"). Thereafter, this Agreement shall automatically renew for additional two (2) year periods ("Renewal Term") unless either party gives the other notice of its intent not to renew this Agreement; provided, however, that: (a) such notice be given no fewer than thirty (30) calendar days prior to the last day of the then-current term; and, (b) any such termination shall be effective as of the date that would have been the first day of the next Renewal Term. If the parties continue to do business with each other after such termination or after the expiration of the above Term without full documentation, the relevant terms hereof will continue to govern the relationship unless otherwise expressly agreed in writing.

### **7.2. Termination**

**7.2.1. Termination for Cause.** This Agreement may be terminated by a party for cause immediately by written notice

upon the occurrence of any of the following events: (i) If the other ceases to do business, or otherwise terminates its business operations; or (ii) If the other shall fail to promptly secure or renew any license, registration, permit, authorization or approval for the conduct of its business in the manner contemplated by this Agreement or if any such license, registration, permit, authorization or approval is revoked or suspended and not reinstated within sixty (60) days and the foregoing has a material adverse effect on either party's ability to perform its obligations hereunder on the other party; or (iii) If the other materially breaches any material provision of this Agreement and fails to cure such breach within ten (10) days of written notice describing the breach; or (iv) If the other Party becomes insolvent or seeks protection under any bankruptcy, receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against the other (and not dismissed within 60 days).

**7.2.2. Suspension of Services.** Notwithstanding anything to the contrary in this Agreement, Company may suspend Participant's (and any Authorized User's) access to any portion or all of the Services or the Marketplace if (i) Company or its Affiliates or Marketplace Providers determine or suspect that (1) there is a threat or attack on the Marketplace or any Participant or Participant's system; (2) Participant's (or any Authorized User's) use of the Marketplace disrupts or poses a security or operational risk to the Marketplace or any other Participant or Marketplace Provider of Company; (3) Participant (or any Authorized User) is using the Marketplace for fraudulent or illegal activities or to subvert the Marketplace, in contravention with our [Marketplace AUP](#), or (4) Company's provision of the Services to Participant (or any Authorized User) is prohibited by applicable law; or (ii) if applicable, any Marketplace Provider of Company has suspended or terminated Company's access to or use of any third party services or products required to enable Participant's access to the Marketplace (each such suspension, in accordance with this Section 7.2.3, a "Service Suspension"). Company will make commercially reasonable efforts, circumstances permitting, to provide notice of any Service Suspension to Participant (including notices sent to Participant's registered email address) and to provide updates regarding resumption of access to the Marketplace following any Service Suspension. Company will use commercially reasonable efforts to resume providing access to the Services as soon as reasonably possible after the event giving rise to the Service Suspension is cured. Company will have no liability for any damage, liabilities, losses (including any loss of data or profits) or any other consequences that Participant (or any Authorized User) may incur as a result of any Service Suspension. Restoration of Services to Participant shall be made at the discretion of Company.

**7.2.3. No liability for Termination.** Each party understands that the rights of termination hereunder are absolute. Neither party shall incur any liability whatsoever for any damage, loss or expenses of any kind suffered or incurred by the other (or for any compensation to the other) arising from or incident to any termination or expiration of this Agreement by such party which complies with the terms of the Agreement whether or not such party is aware of any such damage, loss or expenses.

**7.2.4. Effects of Termination.** In the event of any termination or expiration, all of the rights of Participant (and its Authorized Users) to use the Services and to access the Marketplace will immediately terminate and the Participant (and its Authorized Users) shall immediately discontinue all access and/or use of the Marketplace. Participant agrees to return (or destroy upon request) the Confidential Information of Company. All Fees incurred or due prior to termination shall become automatically due.

**7.2.5. Remedies.** Termination is not the sole remedy under this Agreement and, whether or not termination is effected, all other remedies will remain available.

**7.2.6. Survival.** Even after this Agreement is terminated or expires, all provisions that logically ought to survive termination of this agreement shall survive, including without limitation Definitions, non-refundable Fees due, Ownership, perpetual licenses, Risk Allocation, Termination and General provisions.

## **8. RISK ALLOCATION**

**8.1. Indemnity.** Participant agrees to indemnify, defend and hold harmless Company, its Affiliates and Marketplace Providers from any claim or demand, investigation, dispute, damages, liabilities, and including reasonable attorneys' fees incurred in responding to, investigating or defending or settling any of the foregoing, made by any third party (including any Participant Authorized User) arising out of or related to any claim, demand or action arising from or related to the Participant's use of the Marketplace or any Services or purchase or sale made through the Marketplace or breach of its obligations under this Agreement or applicable law or regulation. Indemnification obligations and payments shall be due and paid on demand without setoff not withstanding any other dispute or counterclaim

between the parties, shall be limited only to the extent such damages are substantially and directly caused by Company's willful breach of its obligations. Company may immediately set-off any and all of its costs and/or expenses that are incurred in connection with the foregoing against any amounts owing to Participant.

**8.2. Release.** IN THE EVENT OF A DISPUTE OR CLAIM REGARDING ANY ORDER OR PURCHASE MADE (OR ALLEGED OR INTENDED TO HAVE BEEN MADE) THROUGH THE MARKETPLACE, OR BETWEEN SUPPLIER AND A BUYER OR OTHER THIRD PARTY RELATED TO ANY ORDER OR PURCHASE MADE THROUGH THE MARKETPLACE, PARTICIPANT HEREBY RELEASES COMPANY, ITS AFFILIATES AND MARKETPLACE PROVIDERS FROM ALL CLAIMS, DAMAGES OR DEMANDS OF ANY KIND, WHETHER KNOWN OR UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH SUCH DISPUTE OR CLAIM, INCLUDING THOSE ARISING FROM THE NEGLIGENCE OF COMPANY OR ITS AFFILIATES AND MARKETPLACE PROVIDERS. PARTICIPANT ACKNOWLEDGES THAT PARTICIPANT MAY DISCOVER FACTS DIFFERENT FROM OR IN ADDITION TO THOSE WHICH PARTICIPANT MAY NOW KNOW OR BELIEVE TO BE TRUE AND THAT THIS RELEASE SHALL BE AND REMAIN EFFECTIVE IN ALL RESPECTS EVEN IF PARTICIPANT DISCOVERS NEW OR ADDITIONAL FACTS AFTER PARTICIPANT EXECUTES THIS AGREEMENT. PARTICIPANT EXPRESSLY WAIVE ALL RIGHTS AND BENEFITS CONFERRED UPON PARTICIPANT BY THE PROVISIONS OF SECTION 1542 OF THE CALIFORNIA CIVIL CODE, WHICH STATES: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH PARTICIPANT DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

**8.3. Warranty Disclaimer.** PARTICIPANT AGREES THAT PARTICIPANT'S USE OF THE MARKETPLACE IS AT PARTICIPANT'S OWN RISK. THE MARKETPLACE AND ANY RELATED PRODUCTS, SERVICES, DOCUMENTATION, CONTENT, SOFTWARE, ARTWORK, DATA, AND INFORMATION ARE PROVIDED "AS IS." COMPANY EXPRESSLY DISCLAIMS ALL WARRANTIES AND/OR CONDITIONS, EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER RELATING TO OR REFERENCED BY THE MARKETPLACE, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES AND/OR CONDITIONS OF MERCHANTABILITY OR QUALITY OF DATA AND FITNESS FOR A PARTICULAR PURPOSE, SUITABILITY, TITLE, NON-INFRINGEMENT, LACK OF VIRUSES OR CORRESPONDENCE TO DESCRIPTION. COMPANY EXPRESSLY DISCLAIMS AND DOES NOT WARRANT THAT PRICING, PRODUCT INFORMATION, AND OTHER INFORMATION AVAILABLE THROUGH THE MARKETPLACE IS CURRENT, ACCURATE, OR COMPLETE, OR THE AVAILABILITY, ACCESSIBILITY, SECURITY, PERFORMANCE AND RESPONSE TIME OF THE MARKETPLACE OR ANY SUPPLIER.

**8.4. Products and Services.** COMPANY, ITS AFFILIATES, AND MARKETPLACE PROVIDERS MAKE NO REPRESENTATIONS OR WARRANTY WHATSOEVER IN CONNECTION WITH ANY OF THE PRODUCTS OR SERVICES TO BE PROVIDED BY ANY SUPPLIER VIA THE MARKETPLACE, WHETHER EXPRESS OR IMPLIED, AND INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR QUALIFICATION, LICENSURE, REPRESENTATION OR OBLIGATIONS OF ANY PARTICIPANT BUYER OR SUPPLIER, OR THAT THEY WILL MAKE OR COMPLETE ANY TRANSACTION CORRECTLY OR AT ALL. COMPANY, ITS AFFILIATES, AND MARKETPLACE PROVIDERS MAKE NO WARRANTIES OR GUARANTEES AS TO SATISFACTION WITH ANY PARTICULAR SUPPLIER.

**8.5. Limitation of Liability.** THE ENTIRE RISK ARISING OUT OF PARTICIPANT'S USE OF THE MARKETPLACE, THE USE OF ANY SERVICES OFFERED IN CONNECTION WITH THE MARKETPLACE, AND/OR THE USE OF ANY CONTENT REMAINS WITH PARTICIPANT. IN NO EVENT SHALL COMPANY, ITS AFFILIATES AND/OR MARKETPLACE PROVIDERS BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, DIRECT, INDIRECT, SPECIAL, PUNITIVE, OR OTHER DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR OTHER PECUNIARY LOSS) ARISING OUT OF THIS AGREEMENT, PARTICIPANT'S USE OF THE MARKETPLACE OR ITS SERVICES, ANY INFORMATION OBTAINED THROUGH THE MARKETPLACE, ANY DELAY OR INABILITY TO USE THE MARKETPLACE OR RELATED SERVICES, THE PROVISION OF OR FAILURE TO PROVIDE SERVICES TO PARTICIPANT IN CONNECTION WITH THE MARKETPLACE, ERROR IN PRESENTATION OR PROCESSING ANY PRODUCT, SUPPLIER OR BUYER INFORMATION OR ANY ACTUAL OR INTENDED ORDER, PARTICIPANT OR PARTICIPANT AUTHORIZED USER SETUP OR ACCESS OR INABILITY TO ACCESS THE MARKETPLACE, FAILURE OF ANY BUYER OR SUPPLIER TO UNDERTAKE ANY

OBLIGATION INCLUDING PRODUCT DELIVERY, PAYMENT OR REFUNDS/RETURNS, OR OTHERWISE ARISING OUT OF THE USE OF THE MARKETPLACE OR ANY OTHER SITE OR SERVICE OF COMPANY ITS AFFILIATES OR MARKETPLACE PROVIDERS WHETHER BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE EVEN IF COMPANY ITS AFFILIATES AND MARKETPLACE PROVIDERS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANYTHING ELSE IN THIS AGREEMENT, THE MAXIMUM CUMULATIVE LIABILITY THAT COMPANY (COLLECTIVELY WITH ITS AFFILIATES AND MARKETPLACE PROVIDERS) SHALL HAVE IS LIMITED TO THE ACTUAL VALUE OF ANY FEES ACTUALLY RECEIVED BY COMPANY IN CONNECTION WITH THE SPECIFIC PURCHASE MADE BY A BUYER THROUGH THE MARKETPLACE THAT IS THE SUBJECT OF THE CLAIM DURING THE 12 MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO ANY SUCH ACTION, CLAIM OR CAUSE OF ACTION. PARTICIPANT ACKNOWLEDGES AND AGREES THAT THE LIMITATIONS OF LIABILITY, DISCLAIMERS OF WARRANTIES AND LIMITED REMEDIES SET FORTH HEREIN REPRESENT AN INSEPARABLE ALLOCATION OF RISK (INCLUDING, WITHOUT LIMITATION, IN THE EVENT OF A TOTAL AND FUNDAMENTAL BREACH OF THIS AGREEMENT) THAT IS AN ESSENTIAL BASIS OF THE BARGAIN BETWEEN THE PARTIES.

## **9. GENERAL**

**9.1. Assignment.** Participant may not assign or transfer this Agreement, in whole or in part, without Company's prior written consent. Any attempted assignment in violation of this section shall be void. Subject to the foregoing, this Agreement and all of the provisions in this Agreement shall be binding upon and inure to the benefit of the successors in interest and permitted assigns of the parties.

**9.2. Confidentiality.** The Parties acknowledge that, in the course of performing their obligations under this Agreement, each party may acquire information, identified as confidential, about the other party, its business activities and operations, its technical information and trade secrets, of a highly confidential and proprietary nature, including without limitation, Participant Data, Supplier Data, names, and address and contact information, system and technical infrastructure information of Participants and Users, employees and representatives of Company, its Affiliates and Marketplace Providers, Participant's Setup, training and process methods, forms, business plans, Fees, technologies and Intellectual Property, plans, forecasts and strategies, cost structures, allocation and pass through procedures, computer programs, and general financing and business plans and information of Company and its Affiliates and Marketplace Providers (all such information relating to a Party being "Confidential Information" and the party to whom such Confidential Information relates being the "Proprietary Party"). Each party will use reasonable precautions to prevent the unauthorized disclosure or access to the other party's Confidential Information. Each party shall employ at least those precautions that such party employs to protect its own confidential or proprietary information. The Parties agree that each will not, during the Term hereof or thereafter and unless otherwise instructed by the Proprietary Party in writing, (i) divulge, furnish, disclose, or make accessible to any third party (other than directors, officers, employees, agents, advisors and potential investors of either party thereto) any of the other's Confidential Information except as needed to provide and use the Marketplace; or (ii) make use of any of the other's Confidential Information, other than as reasonably necessary for performance under this Agreement; provided however, that Confidential Information shall not include any information which (1) at the time of disclosure by the other party or thereafter is generally available to and known by the public other than through any action or inaction of such party, (2) was available to the other party on a non-confidential basis from a source other than the Proprietary Party, provided that such source is not bound by a confidentiality agreement, or contractual or fiduciary obligation with the Proprietary Party, or (3) has been independently acquired or developed by the other party by persons without access to such information and without use of any Confidential Information of the Proprietary Party, and without violating any obligations under this Agreement, or of any other agreement between Company and Participant. Each party, with prior written notice to the Proprietary Party, may disclose such Confidential Information to the required to be disclosed to a governmental entity or agency in connection with seeking any governmental or regulatory approval or judicial order, or pursuant to the lawful requirement or request of a governmental entity, court or agency, provided that it inform the other party and provide it reasonable assistance seeking appropriate confidential treatment or a protective order, or assisting the other party to do so; provided, that such notice and assistance need not be provided when in the good faith opinion of a party's legal counsel it would contravene a lawful order or demand of such authority or place a party at material risk of administrative, civil, or criminal liability. Notwithstanding anything to the contrary, all Aggregated Data shall be deemed Company Confidential information.

**9.3. Relationship of the Parties.** The parties hereto expressly understand and agree that the other is an independent contractor in the performance of each and every part of this Agreement, is solely responsible for all of its employees and agents and its labor costs and expenses arising in connection therewith. This Agreement does not make either party the employee, agent or legal representative of the other or of any other person.

**9.4. Notices.** Any notice, demand, request, or other communication required or permitted to be made or given to either party under this Agreement shall be deemed sufficiently made or given on the date of delivery if supported by reasonable documentation of delivery occurrence (e.g. signature, fax or email receipt/confirmation), by overnight commercial courier service with tracking capabilities with costs prepaid, , at the address of the parties providing during customer setup or to such other address as may be given from time to time under the terms of this notice provision, including for the Company the address designated on the Marketplace for sending legal notices.

**9.5. Digital Millennium Copyright Act and infringement notices.** We respect the intellectual property rights of others and encourage You to do the same. Accordingly, We have a policy of removing Participant Data and User submitted content that violate intellectual property rights of others, suspending access to this Marketplace (or any portion thereof) to any User who uses this Marketplace in violation of someone's intellectual property rights, and/or terminating in appropriate circumstances the account of any Participant (or User) who uses the this Marketplace in violation of someone's intellectual property rights.

**9.5.1.** Pursuant to Title 17 of the United States Code, Section 512, We have implemented procedures for receiving written notification of claimed copyright infringement and for processing such claims in accordance with such law. If You believe Your copyright or other intellectual property right is being infringed by a user of this Marketplace, please provide written notice to Our Agent for notice of claims of infringement: Attn: DMCA Agent, 701 East Bay Street, Suite 402 Charleston SC 29403 Email: [notices@afaxys.com](mailto:notices@afaxys.com).

**9.5.2.** To be sure the matter is handled immediately, Your written notice must:

- Contain Your physical or electronic signature;
- Identify the copyrighted work or other intellectual property alleged to have been infringed;
- Identify the allegedly infringing material in a sufficiently precise manner to allow Us to locate that material;
- Contain adequate information by which We can contact You (including postal address, telephone number, and email address);
- Contain a statement that You have a good faith belief that use of the copyrighted material or other intellectual property is not authorized by the owner, the owner's agent or the law;
- Contain a statement that the information in the written notice is accurate; and
- Contain statement, under penalty of perjury, that You are authorized to act on behalf of the copyright or other intellectual property right owner.
- Unless the notice pertains to copyright or other intellectual property infringement, the Agent will be unable to address the listed concern.

**9.5.3. Submitting a DMCA Counter-Notification.** We will notify You that We have removed or disabled access to copyright-protected material that You provided, if such removal is pursuant to a validly received DMCA take-down notice. In response, You may provide Our Agent with a written counter-notification that includes the following information:

- Your physical or electronic signature;
- Identification of the material that has been removed or to which access has been disabled, and the location at which the material appeared before it was removed or access to it was disabled;
- A statement from You under the penalty of perjury, that You have a good faith belief that the material was removed or disabled as a result of a mistake or misidentification of the material to be removed or disabled; and
- Your name, physical address and telephone number, and a statement that You consent to the jurisdiction of a court for the judicial district in which Your physical address is located, or if Your physical address is outside of the United States, for any judicial district in which We may be located, and that You will accept service of process from the person who provided notification of allegedly infringing material or an agent of such person.

**9.5.4. Termination of Repeat Infringers.** We reserve the right, in Our sole discretion, to terminate the account or access of any user of this Marketplace or Services who is the subject of repeated DMCA or other infringement notifications.

**9.6. Dispute Resolution and Arbitration; Class action waiver, Equitable Enforcement. PLEASE READ THIS PROVISION CAREFULLY. IT AFFECTS YOUR LEGAL RIGHTS.**

This Provision facilitates the prompt and efficient resolution of any dispute (e.g., claim or controversy, whether based in contract, statute, regulation, ordinance, tort – including, but not limited to, fraud, misrepresentation, fraudulent inducement, or negligence – or any other legal or equitable theory, and includes the validity, enforceability or scope of this Provision (with the exception of the enforceability of the Class Action Waiver clause below) that may arise between Participant and Company. Effectively, then, "Dispute" is given the broadest meaning enforceable by law and includes any claims against other parties relating to services or products provided or billed to Participant by its Marketplace Providers whenever Participant also assert claims against Company or its Affiliates and Marketplace Providers in the same proceeding.

This Provision provides that all disputes between Participant and Company (or including its Affiliates and Marketplace Providers) shall be resolved by binding arbitration because acceptance of this Agreement constitutes a waiver of Participant's right to litigation claims and all opportunity to be heard by a judge or jury. Participant may, however, opt-out of this Provision which means Participant would have a right or opportunity to bring claims in a court, before a judge or jury, and/or to participate in or be represented in a case filed in court by others (including, but not limited to, class actions). THE PARTIES AGREE THAT, EXCEPT AS PROVIDED BELOW, ANY AND ALL DISPUTES, AS DEFINED ABOVE, WHETHER PRESENTLY IN EXISTENCE OR BASED ON ACTS OR OMISSIONS IN THE PAST OR IN THE FUTURE, WILL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING CONFIDENTIAL ARBITRATION RATHER THAN IN COURT IN ACCORDANCE WITH THIS PROVISION.

**9.6.1. Pre-Arbitration Claim Resolution.** For all Disputes, whether pursued in court or arbitration, Participant must first give Company an opportunity to resolve the Dispute which is first done by emailing Company at [notices@afaxys.com](mailto:notices@afaxys.com) the following information: (1) Name, (2) Address, (3) A written description of Participant's Claim, and (4) A description of the specific relief Participant seek. If the Parties do not resolve the Dispute within 45 days after receiving Participant's notification, then either Party may pursue Participant's Dispute in arbitration. Participant may pursue Participant's dispute in a court only under the circumstances described below.

**9.6.2. Exclusions from Arbitration/Right to Opt Out.** Notwithstanding the above, Participant's or Company may choose to pursue a Dispute in court and not by arbitration if: (i) The dispute qualifies for initiation in small claims court; or (ii) The parties agree to resolve the dispute by litigation; or (iii) the requirement for Arbitration is prohibited by law; or (iv) at Company's election, if it is bringing the Dispute to collect amounts due for the use of the Services or to seek an injunction or other equitable remedy to enforce Participant's compliance with the terms of the Agreement; or (v) if PARTICIPANT OPTS-OUT OF THESE ARBITRATION PROCEDURES WITHIN 30 DAYS FROM THE DATE THAT PARTICIPANT FIRST EXECUTES THIS AGREEMENT (the "Opt-Out Deadline"). Participant may opt-out of this Provision by emailing Company at [notices@afaxys.com](mailto:notices@afaxys.com) the following information: (1) Participant's name; (2) Participant's address; (3) A clear statement that Participant do not wish to resolve disputes with Company through arbitration. Either way, Company will not take any decision Participant makes personally. In fact, Company promises that Participant's decision to opt-out of this Arbitration Provision will have no adverse effect on Participant's relationship with Company. But, Company does have to enforce the Opt-Out Deadline so any opt-out request received after the Opt-Out Deadline will not be valid and Participant must pursue Participant's dispute in arbitration or small claims court.

**9.6.3. Arbitration Procedures.** If this Provision applies and the dispute is not resolved as provided above (Pre-Arbitration Claim Resolution) either Participant or Company may initiate arbitration proceedings. JAMS, [www.jamsadr.com](http://www.jamsadr.com), will arbitrate all disputes, and the arbitration will be conducted before a single arbitrator. The arbitration shall be commenced as an individual arbitration, and shall in no event be commenced as a class arbitration. All issues shall be for the arbitrator to decide, including the scope of this Provision and its authority, interpretation of the rules of arbitration discovery and evidence, damages or other remedies, and enforcement of any decision. For arbitration before JAMS, the JAMS Comprehensive Arbitration Rules & Procedures and the JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases will apply. The JAMS rules are

available at [www.jamsadr.com](http://www.jamsadr.com) or by calling 1-800-352-5267. This Provision governs in the event it conflicts with the applicable arbitration rules. Under no circumstances will class action procedures or rules apply to the arbitration. Because this Marketplace and these Terms concern interstate commerce, the Federal Arbitration Act ("FAA") governs the arbitrability of all disputes. However, the arbitrator will apply applicable substantive law consistent with the FAA and the applicable statute of limitations or condition precedent to suit.

**Arbitration Award** – The arbitrator may award on an individual basis any relief that would be available pursuant to applicable law, and will not have the power to award relief to, against or for the benefit of any person who is not a party to the proceeding. The arbitrator will make any award in writing but need not provide a statement of reasons unless requested by a party. Such award will be final and binding on the parties, except for any right of appeal provided by the FAA, and may be entered in any court having jurisdiction over the parties for purposes of enforcement.

**Location of Arbitration** – All Arbitrations and Disputes to be resolved by litigation shall be initiated and conducted in the state of, or federal judicial district that includes, Charleston, South Carolina.

**Payment of Arbitration Fees and Costs** – Each Party will be responsible for all additional fees and costs that it incurs in the arbitration, which include but are not limited to, attorneys' fees or expert witnesses and one half of the costs of the arbitration to be paid as invoiced by the arbitrator. Notwithstanding the foregoing, if the arbitrator concludes that a Party is the prevailing party in the arbitration, the prevailing party will be entitled to recover reasonable attorney's fees and costs, and costs of the arbitration and enforcement of any arbitral decision as determined by the arbitrator.

**9.6.4. Class Action Waiver.** Except as otherwise provided in this Provision, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a class or representative proceeding or claims (such as a class action, consolidated action or private attorney general action) unless both Participant and Company specifically agrees to do so following initiation of the arbitration. In the event of any Dispute not subject to arbitration, Participant agrees that neither Participant, nor any of its Users shall act as a class representative, class member, or otherwise participate in a class, consolidated, or representative proceeding against the Company, its Affiliates or Marketplace Providers.

**9.6.5. Jury Waiver.** Participant understands and agrees that by accepting this Provision in these Terms, Participant and Company are each irrevocably waiving the right to a jury trial or a trial before a judge in a public court. In the absence of this Provision, Participant and Company might otherwise have had a right or opportunity to bring disputes in a court, before a judge or jury, and/or to participate or be represented in a case filed in court by others (including class actions). Except as otherwise provided below, those rights are waived. Other rights that Participant would have if Participant went to court (e.g., the rights to both appeal and certain types of discovery) may be more limited or may also be waived.

**9.6.6. Severability.** If any clause within this Provision (other than the Class Action Waiver clause above) is found to be illegal or unenforceable, that clause will be severed from this Provision whose remainder will be given full force and effect. If the Class Action Waiver clause is found to be illegal or unenforceable, this entire Provision will be unenforceable and the dispute will be decided by a court.

**9.6.7. Continuation.** This Provision shall survive the termination of this Agreement and Participant's discontinued use of the Marketplace. Notwithstanding any provision in this Agreement to the contrary, Company agrees that if Company makes any change to this Provision (other than a change to the Notice Address), Participant may reject any such change and require Company to adhere to the language in this Provision as in effect on the last day before termination of the Agreement if a dispute between the Parties arises.

**9.6.8. Equitable Enforcement.** The Parties agree that except of the payment of Fees, any breach or alleged or threatened breach of this Agreement will cause Company and/or its Affiliates and Marketplace Providers immediate and substantial harm that cannot be adequately remedied by monetary damages. Accordingly, Company its Affiliates and Marketplace Providers shall have the right to preliminary, temporary and permanent injunctions, specific performance and other equitable remedies, without requirement of proving the likelihood, nature or extent of damages or posting bonds, to prevent or abate such actual, alleged or threatened breaches.

**9.7. Waivers.** Any waiver or delay in the exercise by either party of any of its rights under this Agreement shall not be deemed to prejudice such party's right of termination or enforcement for any further, continuing or other breach by the other party. No document of any sort, including any pre-printed purchase order, confirmation, invoice or similar document, or other agreement or understanding between the parties or any affiliate or any other person, even if accepted in writing by both parties, shall be deemed an amendment or waiver of the Agreement, or in any way affect the interpretation or enforcement of its Terms and Conditions or the rights and obligations of either party or other person, unless such document is conspicuously identified as a "Amendment" or "Waiver" of the Agreement and/or these and signed in writing by authorized representatives of both parties.

**9.8. Severability.** In the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such unenforceability or invalidity shall only apply to such provision and shall not render this Agreement unenforceable or invalid as a whole; and, in such event, such provision shall be modified or interpreted so as to best accomplish the objective of such unenforceable or invalid provision within the limits of applicable law or applicable court decision and the manifest intent of the parties hereto.

**9.9. Force Majeure.** In no event shall either party be liable to the other for any failure to perform its obligations hereunder to the extent such failure is due to acts of God, terrorism, flood, fiber cuts, acts or omissions of other carriers, natural disaster, regulation or governmental acts, fire, civil disturbance, weather war, riots, embargoes, strikes or other concerted acts of workers, casualties, accidents, any failure of heat, air conditioning, telecommunications, the Internet, or power supply or other causes including suspension of service by Company providers, to the extent that such failure and the consequences thereof are reasonably beyond the control and without the fault or negligence of the party claiming excuse ("Force Majeure Condition"). If a Party suffering a Force Majeure Condition is unable to cure that event within thirty (30) days, the other Party may terminate this Agreement and neither Party shall have any further obligation to the other Party under this Agreement except those provisions that survive the termination of this Agreement.

**9.10. Public Disclosure.** Participant agrees that during the Term, Company may identify Participant as a Marketplace participant on its website and in press releases, presentations, and in all general marketing materials and Company agrees Participant may identify itself as a participant in the Marketplace in its in press releases, presentations, and all general marketing materials.

**9.11. Miscellaneous.** These terms and conditions of this Agreement shall be construed and interpreted fairly, in accordance with the plain meaning of its terms, and there shall be no presumption or inference against the Party drafting the Agreement in construing or interpreting the provisions hereof. Except as provided herein, the rights and remedies of the Parties set forth in this Agreement herein are not exclusive and are in addition to any other rights and remedies available to it at law or in equity. The headings and other captions in this Agreement are inserted for purposes of convenience only and shall not be used in interpreting, construing or enforcing any provisions of this Agreement.

**9.12. Complete Agreement and Execution.** The Agreement and other documents expressly incorporated by reference constitute the entire understanding and agreement between the parties with respect to the subject matter hereof and supersedes all proposals, oral or written, all negotiations, conversations, or discussions between or among the parties relating to the subject matter of this Agreement and all past dealing or industry custom.

**PARTICIPANT AGREES THAT ITS EXECUTION OF THE AGREEMENT (INCLUDING PARTICIPATION AGREEMENT FORM) IN WRITING, OR BY SUBSEQUENT ESIGNATURE OR ONLINE ACCEPTANCE BY ITS AUTHORIZED REPRESENTATIVE, OR BY PARTICIPANTS ACCESS AND USE OF THE MARKETPLACE SHALL CONSTITUTE A BINDING ACCEPTANCE OF THE AGREEMENT.**

**END OF TERMS AND CONDITIONS**