

## MASTER SUBSCRIPTION & PROFESSIONAL SERVICES AGREEMENT

THIS MASTER SERVICE & PROFESSIONAL SERVICES AGREEMENT (THIS “**AGREEMENT**”) GOVERNS THE USE BY ANY PERSON OR ENTITY (“**CUSTOMER**”) OF THE SERVICES (AS DEFINED BELOW) PROVIDED BY EMARSYS UK LIMITED, INCORPORATED IN ENGLAND AND WALES WITH COMPANY NUMBER 06892602 (“**EMARSYS**”). BY EXECUTING A COMMERCIAL AGREEMENT (AS DEFINED BELOW) THAT REFERENCES THIS AGREEMENT, CUSTOMER AGREES TO THE TERMS OF THIS AGREEMENT.

THIS AGREEMENT, INCLUDING ANY COMMERCIAL AGREEMENTS ENTERED INTO BY THE PARTIES HEREUNDER, IS MADE EFFECTIVE ON THE DATE THAT THE INITIAL COMMERCIAL AGREEMENT IS EXECUTED BY EMARSYS AND CUSTOMER (THE “**EFFECTIVE DATE**”). CUSTOMER AND EMARSYS MAY BE REFERRED TO HEREIN INDIVIDUALLY AS A “**PARTY**” AND COLLECTIVELY AS THE “**PARTIES**.”

CUSTOMER’S ATTENTION IS PARTICULARLY DRAWN TO SECTION 8.

IN CONSIDERATION OF THE MUTUAL COVENANTS AND AGREEMENTS CONTAINED HEREIN AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, THE PARTIES AGREE AS FOLLOWS:

### 1. Definitions.

“**Affiliate**” means any entity which directly or indirectly controls, is controlled by, or is under common control with the subject entity. “**Control**,” for purposes of this definition, means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

“**Application Services**” shall mean the products and services offered by Emarsys that Customer orders on a Commercial Agreement and Emarsys makes available online via a password-protected customer login, including associated offline components, as described by the User Guide.

“**Commercial Agreement**” means the documents for placing orders for Application Services hereunder that are entered into between Customer and Emarsys from time to time, including addenda and supplements thereto. By entering into a Commercial Agreement hereunder, an Affiliate of Customer agrees to be bound by the terms of this Agreement as if it were an original party hereto. Commercial Agreements shall be deemed incorporated herein by reference.

“**Confidential Information**” shall have the meaning set forth in [Section 7](#).

“**Customer Data**” shall mean all electronic data or information submitted by Customer to the Application Services.

“**Data Protection Laws**” shall mean the Data Protection Act 1998, the Data Protection Directive (95/46/EC), the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (SI 2000/2699), the Electronic Communications Data Protection Directive (2002/58/EC), the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003) and all applicable laws and regulations relating to the processing of personal data and privacy, including where applicable the guidance and codes of practice issued by the Information Commissioner or any other supervisory authority, and the equivalent of any of the foregoing in any relevant jurisdiction.

“**Duration**” shall be as specified in each SOW and shall mean the estimated time from the Project Start Date to complete the Professional Services described in such SOW. Duration is an estimate of the time to complete the Professional Services and assumes that Customer’s availability,

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participation and cooperation have not delayed the Project Start Date or provision of the Professional Services by Emarsys.

**“Insolvency Event”** shall mean in respect of either party:

(a) other than for the purposes of a bona fide reconstruction or amalgamation, such party passing a resolution for its winding up, or a court of competent jurisdiction making an order for it to be wound up or dissolved, or that party being otherwise dissolved; or

(b) the appointment of an administrator of, or the making of an administration order in relation to, either party, or the appointment of a receiver or administrative receiver of, or an encumbrancer taking possession of or selling, the whole or any part of the entity's undertaking, assets, rights or revenue; or

(c) that party entering into an arrangement, compromise or composition in satisfaction of its debts with its creditors or any class of them, or taking steps to obtain a moratorium, or making an application to a court of competent jurisdiction for protection from its creditors; or

(d) that party being unable to pay its debts, or being capable of being deemed unable to pay its debts, within the meaning of section 123 of the Insolvency Act 1986; or

(e) that party is subject to events or circumstances analogous to any of the foregoing in any applicable jurisdiction.

**“Malicious Code”** means viruses, worms, time bombs, Trojan horses and other harmful or malicious code, files, scripts, agents or programs.

**“Non-Emarsys Applications”** means online applications and offline software products that are provided by entities or individuals other than Emarsys and are clearly identified as such, and that interoperate with the Application Services.

**“Personal data”** shall have the meaning set out in the Data Protection Laws.

**“Professional Services”** shall mean the implementation, integration, consulting and similar services described in a Statement of Work.

**“Project Start Date”** shall mean some date mutually agreed upon by the parties following execution of a Commercial Agreement, upon which date Emarsys shall commence provision of Professional Services under a Statement of Work.

**“Services”** shall mean the Application Services and Professional Services collectively.

**“Start Date”** shall mean the date on which Emarsys shall make the Application Services available to Customer as set forth in an applicable Commercial Agreement.

**“Statement of Work”** or **“SOW”** shall mean the document describing the scope and schedule of Professional Services to be performed by Emarsys for Customer. Each SOW shall be attached to a Commercial Agreement and shall be governed by the terms of this Agreement.

**“Subscription Term”** shall mean the subscription period set forth on an applicable Commercial Agreement.

**“Term”** shall have the meaning set forth in [Section 11.1](#).

**“User Guide”** means online help, training, how-to documents and explanatory materials that assist Customers in using the Application Services (as such materials may be updated from time to time), accessible via log-in to the Application Services or otherwise as made available by Emarsys.

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## 2. Application Services.

2.1. Provision of Application Services. Emarsys shall make the Application Services available to Customer pursuant to this Agreement and the applicable Commercial Agreement(s) during each Subscription Term. Customer agrees that Customer's purchases hereunder are neither contingent on the delivery of any future functionality or features nor dependent on any oral or written public comments made by Emarsys regarding future functionality or features.

2.2. Subscriptions. Unless otherwise specified in the applicable Commercial Agreement:

- (i) Application Services are purchased as subscriptions and may be accessed only in accordance with the applicable Commercial Agreement(s);
- (ii) additional quantities may be added during the applicable Subscription Term on terms agreeable to both parties; and
- (iii) the added quantities shall terminate on the same date as the pre-existing subscriptions.

2.3. Addenda for Additional Services. If Customer desires to purchase certain one-to-one digital marketing solutions as part of the Application Services, Customer acknowledges that certain aspects of such additional Application Services will be provided by third parties and that Customer would be required to execute an addendum to this Agreement.

## 3. Use of the Application Services.

3.1. Emarsys Responsibilities. Emarsys shall:

- (i) provide basic support for the Application Services to Customer at no additional charge, and/or upgraded support if purchased; and
- (ii) use commercially reasonable efforts to make the Application Services available 24 hours a day, 7 days a week, except for:
  - (a) planned downtime (of which Emarsys shall give at least 8 hours' notice online via the Application Services or via email), or
  - (b) any unavailability caused by circumstances beyond Emarsys' reasonable control, including without limitation, acts of God, acts of government, floods, fires, earthquakes, civil unrest, acts of terror, strikes or other labor problems (other than those involving Emarsys employees), failures, downtime or delays by an Internet service provider, hosting provider, or third-party social platform, or denial of service attacks.

3.2. Customer Responsibilities.

- (a) Customer shall:
  - (i) be responsible for its compliance with this Agreement;
  - (ii) be responsible for the accuracy, quality and legality of Customer Data and of the means by which Customer acquires the Customer Data;
  - (iii) use commercially reasonable efforts to prevent unauthorized access to or use of the Application Services, and notify Emarsys promptly of any such unauthorized access or use; and

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- (iv) use the Application Services only in accordance with the User Guide and applicable laws and government regulations.
- (b) Customer shall not:
- (i) make the Application Services available to anyone other than its employees and contractors who are authorized by Customer to use the Application Services;
  - (ii) sell, resell, rent, or lease the Application Services;
  - (iii) use the Application Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party rights;
  - (iv) use the Application Services to store or transmit Malicious Code;
  - (v) interfere with or disrupt the integrity or performance of the Application Services or third-party data contained therein; or (vi) attempt to gain unauthorized access to the Application Services or their related systems or networks.
- (c) Additionally, Customer shall not:
- (i) use the Application Services for the purpose of serving as a factor in establishing an individual's eligibility for credit, employment or insurance;
  - (ii) submit to the Application Services or use the Application Services to collect, store or process any sensitive individually identifiable information, including, without limitation:
    - (a) social security numbers, passport numbers, driver's license numbers, taxpayer numbers, or other government-issued identification numbers, or
    - (b) any Sensitive Personal Information (as defined in the Data Protection Act 1998 and regulations thereunder, as amended) including, without limitation, information relating to an individual's racial or ethnic origin, physical or mental health or political opinions, or similar information under other comparable laws or regulations.
    - (c) Emarsys shall be entitled (but not obliged) to verify at its own cost that Customer is in compliance with its responsibilities pursuant to this Section 3.2. In the event Customer breaches any provision of this Section 3.2, Emarsys may, in addition to any other rights which Emarsys may have under this Agreement or at law, temporarily suspend Customer's access to the Application Services.

## **4. Professional Services.**

4.1. Who May Order. Customer or an Affiliate may obtain Professional Services from Emarsys. Each Customer entity purchasing Professional Services shall perform its respective obligations in accordance with the terms and conditions of this Agreement and the relevant SOW.

4.2. Personnel; Use of Subcontractors. Subject to the provisions below and unless otherwise specified in the applicable SOW, Emarsys shall supply all materials, equipment, and qualified personnel necessary to perform the Professional Services. Emarsys may use subcontractors to perform the Professional Services. Any subcontractor used by Emarsys shall have executed a written agreement with Emarsys that obligates such subcontractor to protect Customer Data to the same extent as is required of Emarsys hereunder. Emarsys shall be

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responsible for all acts and omissions of any such subcontractor to the same extent as if Emarsys had performed the Professional Services.

4.3. Relationship to the Application Services. The Professional Services may be in support of Customer's subscription to use the Application Services pursuant to a Commercial Agreement. No SOW grants Customer any rights to use the Application Services. Except as specifically set forth in an SOW, Customer's purchase of Professional Services is not contingent upon the delivery of any future functionality or features in the Application Services, nor is it dependent upon any oral or written public comments made by Emarsys with respect to future functionality or features.

## **5. Fees and Payment.**

5.1. Service Fees. Customer shall pay all fees specified in all Commercial Agreements executed hereunder. Except as otherwise specified in a Commercial Agreement, fees are based on the Services purchased and not actual usage; payment obligations are non-cancelable; fees paid are non-refundable; and the Services purchased cannot be decreased during the relevant Subscription Term.

### **5.2. Professional Services Fees.**

(a) Fixed Price. If a Commercial Agreement provides for payment of Professional Services fees on a "Fixed Price" basis, Emarsys will invoice Customer for work performed as set forth in such Commercial Agreement. If Emarsys is delayed in completing the Professional Services beyond the estimated Duration of the SOW and such delay is due to Customer's unavailability, failure to cooperate, failure to provide information required by Emarsys to provide the Professional Services, and/or provision of materially inaccurate or misleading information, Emarsys shall notify Customer that its performance of the Professional Services may be delayed. In such cases Emarsys' obligations may be reconsidered, the time to provide Professional Services may be extended, and Emarsys may renegotiate the fixed fee.

(b) Time & Materials. If a Commercial Agreement provides for payment of Professional Services fees on a time and materials (or "T&M") basis, the Professional Services shall be provided at Emarsys' T&M rates in effect as of the Project Start Date. On a T&M engagement, if an estimated total amount is stated in the applicable Commercial Agreement, that amount is solely a good faith estimate for Customer's budgeting and Emarsys' resource scheduling purposes and not a guarantee that the Professional Services will be completed for that amount; the actual amount may be higher or lower. If the estimated amount is expended, Emarsys will continue to provide Professional Services on a T&M basis under the same rates and terms. (c) Expenses. Customer shall reimburse Emarsys for reasonable travel and out-of-pocket expenses incurred in conjunction with the Professional Services.

5.3. Invoicing and Payment. Emarsys shall invoice Customer for all Services listed in the Commercial Agreement for the initial Subscription Term and any renewal Subscription Term(s) as set forth in Section 11.2. Emarsys will invoice Customer in advance and otherwise in accordance with the relevant Commercial Agreement. Unless otherwise stated in the Commercial Agreement, invoiced charges are due net 30 days from the invoice date. Customer is responsible for providing complete and accurate billing and contact information to Emarsys and notifying Emarsys of any changes to such information.

5.4. Overdue Charges. If any amounts invoiced are not received by Emarsys by the due date, then, without limiting Emarsys' rights or remedies,

(i) such charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by the Late Payment of Commercial Debts (Interest) Act 1998, whichever is lower, and/or

(ii) Emarsys may condition future subscription renewals and Commercial Agreements on payment terms shorter than those specified in Section 5.3.

5.5. Suspension of Application Services and Acceleration. If any amount owing by Customer under this or any other agreement for the Services is 30 days or more overdue, Emarsys may, without limiting Emarsys' other rights and remedies, accelerate Customer's unpaid fee obligations under such agreements so that all such obligations become immediately due and payable, and suspend provision of the Services to Customer until such amounts are paid in full. Emarsys will give Customer at least 7 days' prior notice that Customer's account is overdue, in accordance with Section 12.1, before suspending services to Customer.

5.6. Payment Disputes. Emarsys shall not exercise Emarsys' rights under Section 5.4 or 5.5 if Customer is disputing the applicable charges reasonably and in good faith and is cooperating diligently to resolve the dispute; provided, however, Customer shall not be entitled to offset its own claims against any claim of Emarsys under this agreement (or to claim any right of retention) unless Customer's counter-claim is

(i) undisputed by Emarsys, or

(ii) confirmed by a binding court decision that cannot be appealed.

5.7. Taxes. Unless otherwise stated, Emarsys' fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction including, without limitation, value added tax chargeable under the Value Added Tax Act 1994 and any similar replacement tax and any similar additional tax (collectively, "Taxes"). Customer is responsible for paying all Taxes associated with Customer's purchases hereunder. If Emarsys has the legal obligation to pay or collect Taxes for which Customer is responsible, the appropriate amount shall be invoiced to and paid by Customer, unless Customer provides Emarsys with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, Emarsys is solely responsible for taxes assessable against Emarsys based on Emarsys' income, property and employees.

## **6. Proprietary Rights.**

6.1. Reservation of Rights. Subject to the limited rights expressly granted hereunder, Emarsys reserves all rights, title and interest in and to the Application Services, including all related intellectual property rights. No rights are granted to Customer hereunder other than as expressly set forth herein.

6.2. Restrictions. Customer shall not

(i) modify, copy, or create derivative works based on the Application Services;

(ii) frame or mirror any content forming part of the Application Services, other than on Customer's own intranets or otherwise for its own internal business purposes;

(iii) reverse engineer the Application Services; or

(iv) access the Application Services in order to

(a) build a competitive product or service, or

(b) copy any ideas, features, functions or graphics of the Application Services.

6.3. Customer Data. As between Customer and Emarsys, Customer shall own all Customer Data, including all reports, statistics, and other data to the extent generated solely from Customer Data, and all intellectual property rights therein; provided, however, that during the term

of this Agreement, Customer grants to Emarsys a worldwide, non-exclusive, royalty-free license to aggregate Customer Data with other data, including the customer data of other Emarsys customers so long as such aggregation omits any data that would enable the identification of Customer, Customer's clients, or any individual, company or organization ("**Aggregated Data**"). Customer further grants Emarsys a worldwide, perpetual, royalty-free license to use, modify, distribute and create derivative works based on such Aggregated Data, including all reports, statistics or analyses created or derived therefrom. Additionally, Customer grants to Emarsys the right to access Customer Data to provide feedback to Customer concerning Customer's use of the Application Services.

6.4. Data controller. Customer remains the sole data controller of the Customer Data pursuant to the Data Protection Laws (meaning that Customer alone determines the purposes and means of collecting, processing and using the data), and shall be responsible for the lawful collection, processing and use of the data as well as for preserving the rights of the data subjects. Where required, Customer shall inform the data subjects about the collection, processing and use of the data, and/or obtain their consent. Where Customer Data must be corrected, deleted or blocked, Customer itself shall carry out these measures by using the corresponding functions of the provided software. Where this is not possible, Emarsys shall correct, delete or block such data according to instructions provided by Customer at Customer's risk and expense.

6.5. Improvements. Emarsys shall own all rights, title and interest, including all intellectual property rights, in and to any improvements to the Application Services or any new programs, upgrades, modifications or enhancements developed by Emarsys in connection with rendering the Application Services to Customer, even when refinements and improvements result from Customer's request or suggestion. To the extent, if any, that ownership in such refinements and improvements does not automatically vest in Emarsys by virtue of this Agreement or otherwise, Customer hereby transfers and assigns (and, if applicable, shall cause its Affiliates to transfer and assign) to Emarsys all rights, title, and interest which Customer or its Affiliates may have in or to such refinements and improvements.

6.6. Professional Services Deliverables. Emarsys hereby grants Customer a worldwide, perpetual, non-exclusive, non-transferable, royalty-free license to use for its internal business purposes anything developed by Emarsys for Customer under a Statement of Work ("**Deliverables**"). Emarsys shall retain all ownership rights to the Deliverables.

6.7. Publicity; Trademarks. Neither party may issue press releases or any other public announcement of any kind relating to this Agreement without the other party's prior written consent. Notwithstanding the foregoing, during the Term, either party may include the name and logo of the other party in lists (including on its website) of customers or vendors in accordance with the other party's standard logo and/or trademark usage guidelines. In addition, Emarsys may use the trademarks and trade names of Customer solely in connection with its authorized provision of the Services. Except as set forth herein, neither party may use the trademarks and trade names of the other party without the prior written consent of the other party.

## **7. Confidentiality.**

7.1. Definition of Confidential Information. As used herein, "**Confidential Information**" means all information disclosed by a party ("**Disclosing Party**") to the other party ("**Receiving Party**"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure. Customer Confidential Information shall include Customer Data; Emarsys Confidential Information shall include the Application Services; and Confidential Information of each party shall include the terms and conditions of this Agreement and all Commercial Agreements, as well as business and marketing plans, technology and technical information, product plans and designs, and business processes disclosed by such party. However, Confidential Information shall not include any information that:

- (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party;

(ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party;

(iii) is received from a third party without breach of any obligation owed to the Disclosing Party; or

(iv) was independently developed by the Receiving Party.

7.2. Protection of Confidential Information. The Receiving Party shall

(i) use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but in no event less than reasonable care),

(ii) not use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, and

(iii) except as otherwise authorized by the Disclosing Party in writing, to limit access to Confidential Information of the Disclosing Party to those of its and its Affiliates' employees, contractors and agents who need such access for purposes consistent with this Agreement and who have signed agreements with the Receiving Party containing protections no less stringent than those herein. Neither party shall disclose the terms of this Agreement or any Commercial Agreement to any third party other than its Affiliates and their legal counsel and accountants without the other party's prior written consent.

7.3. Compelled Disclosure. The Receiving Party may disclose Confidential Information of the Disclosing Party if it is compelled by law to do so, provided the Receiving Party gives the Disclosing Party prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure. If the Receiving Party is compelled by law to disclose the Disclosing Party's Confidential Information as part of a civil proceeding to which the Disclosing Party is a party, and the Disclosing Party is not contesting the disclosure, the Disclosing Party will reimburse the Receiving Party for its reasonable cost of compiling and providing secure access to such Confidential Information.

7.4. Remedies. If the Receiving Party discloses or uses (or threatens to disclose or use) any Confidential Information of the Disclosing Party in breach of confidentiality protections hereunder, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.

## **8. Warranties; Disclaimers.**

8.1. Representations. Each party represents that it has validly entered into this Agreement and has the legal power to do so; that the signatory of the Commercial Agreement that references this Agreement has the authority to bind the applicable organization; and this Agreement constitutes the legal, valid, and binding obligation of each party, enforceable in accordance with its terms.

8.2. Emarsys Warranties.

(a) Application Services. Emarsys warrants that:

(i) the Application Services shall perform materially in accordance with the User Guide;

(ii) the functionality of the Application Services will not be materially decreased during a Subscription Term; and

(iii) Emarsys will not transmit Malicious Code to Customer, provided Emarsys is not in breach of this subpart

(iv) if Customer uploads a file containing Malicious Code into the Application Services and later downloads that file containing Malicious Code. For any breach of a warranty above, Customer's exclusive remedy shall be as provided in Sections 11.4 and 11.5 below.

(b) **Professional Services.** Emarsys warrants that the Professional Services will be performed in a professional and workmanlike manner in accordance with generally accepted industry standards. Customer must report any deficiencies in the Professional Services to Emarsys in writing within 90 days of performance of such Professional Services in order to receive warranty remedies. For any breach of the warranty in this Section 8.2(b), Customer's exclusive remedy, and Emarsys' entire liability, shall be the re-performance of the Professional Services. If Emarsys is unable to re-perform the Professional Services as warranted within 30 days of receipt of notice of breach, Customer shall be entitled to recover the fees paid to Emarsys for the deficient Professional Services.

8.3. **Customer Warranties.** Customer represents and warrants that:

(a) the Customer Data shall not infringe on any copyright, patent, trade secret or other proprietary right held by any third party; and

(b) Customer shall not use the Application Services in a manner that violates any international, federal, state, or local law or regulation relating to individual privacy or the distribution of email and other one-to-one digital messages including, without limitation, the Data Protection Laws.

8.4. **Disclaimer.** EXCEPT AS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND EACH PARTY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTIES OF SATISFACTORY QUALITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, INCLUDING THOSE IMPLIED BY SECTIONS 3 TO 5 OF THE SUPPLY OF GOODS AND SERVICES ACT 1982 TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. APPLICATION SERVICES PROVIDED UNDER A FREE TRIAL AT NO CHARGE ARE PROVIDED "AS IS", EXCLUSIVE OF ANY WARRANTY OR AVAILABILITY COMMITMENT WHATSOEVER. EACH PARTY DISCLAIMS ALL LIABILITY AND INDEMNIFICATION OBLIGATIONS FOR ANY HARM OR DAMAGES CAUSED BY ANY THIRD-PARTY HOSTING PROVIDERS.

8.5. **Beta Services.** From time to time Emarsys may invite Customer to try, at no charge, Emarsys products or services that are not generally available to Emarsys customers ("**Beta Services**"). Customer may accept or decline any such trial in Customer's sole discretion. Any Beta Services will be clearly designated as beta, pilot, limited release, developer preview, nonproduction, or by a description of similar import. Beta Services are provided for evaluation purposes and not for production use, are not supported, may contain bugs or errors, and may be subject to additional terms. BETA SERVICES ARE PROVIDED "AS IS" WITH NO EXPRESS OR IMPLIED WARRANTY. Emarsys may discontinue Beta Services at any time in Emarsys' sole discretion and may never make them generally available.

## **9. Indemnification.**

9.1. **Indemnification by Emarsys.** Emarsys shall defend Customer against any claim, demand, suit, or proceeding made or brought against Customer by a third party alleging that the use of the Application Services as permitted hereunder infringes or misappropriates the intellectual property rights of a third party

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(a) “**Claim Against Customer**”), and shall indemnify Customer for any damages, legal fees and costs finally awarded against Customer as a result of, and for amounts paid by Customer under a court approved settlement of, a Claim Against Customer; provided that Customer:

(a) promptly gives Emarsys written notice of the Claim Against Customer;

(b) gives Emarsys sole control of the defense and settlement of the Claim Against Customer (provided that Emarsys may not settle any Claim Against Customer unless the settlement unconditionally releases Customer of all liability); and

(c) provides to Emarsys all reasonable assistance, at Emarsys’ expense. If Emarsys receives information regarding an infringement, misappropriation or other claim, Emarsys may in Emarsys’ discretion, and at no cost to Customer

(i) modify the Application Services, so that they no longer infringe, misappropriate, or give rise to any other claim, without breaching Emarsys’ warranties under Section 8.2 above,

(ii) obtain a license for Customer’s continued use of the subject Application Services in accordance with this Agreement,

(iii) terminate Customer’s subscriptions for such Application Services upon 30 days’ written notice and refund to Customer any prepaid fees covering the remainder of the term of the terminated subscriptions, or

(iv) require Customer to immediately, upon receipt of notice from Emarsys, discontinue all use of any Customer Data that may be related to an actual or potential infringement, misappropriation or other claim, to the extent not prohibited by law, or delete or permit Emarsys to delete from the Application Services, any Customer Data, in each case within five days of receipt of notice from Emarsys. Customer shall, if so requested by Emarsys, certify such deletion and discontinuance of use in writing. Emarsys shall be authorized to provide a copy of such certification to the third party claimant. Emarsys shall have no obligation to indemnify Customer to the extent any Claim Against Customer arises from a Non-Emarsys Application, Customer’s breach of the terms of this Agreement, or actions of a third party hosting provider.

9.2. Indemnification by Customer. Customer shall defend Emarsys against any claim, demand, suit or proceeding made or brought against Emarsys by a third party alleging that Customer Data, or Customer’s use of the Application Services or a Non-Emarsys Application in breach of this Agreement, infringes or misappropriates the intellectual property rights of a third party or violates applicable law (a “**Claim Against Emarsys**”), and shall indemnify Emarsys for any damages, legal fees and costs finally awarded against Emarsys as a result of, or for any amounts paid by Emarsys under a court-approved settlement of, a Claim Against Emarsys; provided that Emarsys:

(a) promptly gives Customer written notice of the Claim Against Emarsys;

(b) gives Customer sole control of the defense and settlement of the Claim Against Emarsys (provided that Customer may not settle any Claim Against Emarsys unless the settlement unconditionally releases Emarsys of all liability); and

(c) provide to Customer all reasonable assistance, at Customer’s expense. In the event Emarsys receives information regarding an actual or potential Claim Against Emarsys, Emarsys may, in Emarsys’ discretion, require Customer to immediately, upon receipt of notice from Emarsys, discontinue all use of any Customer Data that may be related to an

actual or potential Claim Against Emarsys and, to the extent not prohibited by law, delete or permit Emarsys to delete from the Application Services, any Customer Data, in each case within five days of receipt of notice from Emarsys. Customer shall, if so requested by Emarsys, certify such deletion and discontinuance of use in writing. Emarsys shall be authorized to provide a copy of such certification to the third party claimant.

9.3. Exclusive Remedy. This Section 9 states the indemnifying party's sole liability to, and the indemnified party's exclusive remedy against, the other party for any type of claim described in this Section.

## **10. Limitation of Liability.**

10.1. Limitation of Liability. NEITHER PARTY'S LIABILITY WITH RESPECT TO ANY SINGLE INCIDENT ARISING OUT OF OR RELATED TO THIS AGREEMENT SHALL EXCEED THE AMOUNT PAID BY CUSTOMER HEREUNDER IN THE 12 MONTHS PRECEDING THE INCIDENT, PROVIDED THAT IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED THE TOTAL AMOUNT PAID BY CUSTOMER HEREUNDER. THE ABOVE LIMITATIONS WILL APPLY WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY. THE FOREGOING SHALL NOT LIMIT CUSTOMER'S PAYMENT OBLIGATIONS UNDER SECTION 5.

10.2. Exclusion of Consequential and Related Damages. SUBJECT ALWAYS TO SECTION 10.3, IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS OR REVENUES OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COVER OR PUNITIVE DAMAGES HOWEVER CAUSED, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING DISCLAIMER SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

10.3 Nothing in this Agreement shall limit or exclude either party's liability for:

- (a) death or personal injury caused by negligence;
- (b) fraud; or
- (c) any other liability which cannot by law be limited or excluded.

10.4 The parties agree that the limitations set out in this Section 10 and the restrictions in this Agreement are reasonable because

- (a) Emarsys cannot control how and for what purpose Customer uses the Application Services; and
- (b) the Application Services have not been developed specifically for Customer.

## **11. Term and Termination**

11.1. Term of Agreement. This Agreement commences on the Effective Date and continues until all subscriptions granted in accordance with this Agreement have expired or been terminated (the "**Term**").

11.2. Term of Subscriptions. Subscriptions to the Application Services commence on the Start Date specified in the applicable Commercial Agreement and continue for the Subscription Term specified therein. Except as otherwise specified in the applicable Commercial Agreement, all subscriptions shall automatically renew for additional periods equal to the expiring Subscription Term or one year (whichever is shorter), unless either party gives the other notice of non-renewal at least 30 days before the end of the relevant Subscription Term. The per-unit

pricing during any such renewal term shall be the same as that during the prior term unless Emarsys have given Customer written notice of a pricing increase at least 60 days before the end of such prior term, in which case the pricing increase shall be effective upon renewal and thereafter. Any such pricing increase shall not exceed 7% of the pricing for the relevant Application Services in the immediately prior subscription term, unless the pricing in such prior term was designated in the relevant Commercial Agreement as promotional or one-time.

11.3 Term of Statement of Work. Professional Services shall commence on the Project Start Date and shall continue until such Professional Services are completed.

11.4. Termination for Cause. A party may terminate this Agreement for cause:

(i) upon 30 days' written notice to the other party of a material breach if such breach remains uncured at the expiration of such period, or

(ii) if the other party suffers an Insolvency Event.

11.5. Refund or Payment upon Termination. Upon any termination for cause by Customer, Emarsys shall refund Customer any prepaid fees covering the remainder of the Term after the effective date of termination. Upon any termination for cause by Emarsys, Customer shall pay any unpaid fees covering the remainder of the term of all Commercial Agreements after the effective date of termination. In no event shall any termination relieve Customer of the obligation to pay any fees payable to Emarsys for the period prior to the effective date of termination.

11.6. Return of Customer Data. For a period of 30 days after termination of this Agreement, Customer, using its existing login credentials, shall be able to access the Customer Data stored in the Application Services, and to export such data in CSV format using the standard export functions provided by the Application Services. Only Customer itself shall be permitted to export the Customer Data. Any transfers or exports of Customer Data that cannot be performed by the Application Services' standard functions will have to be performed by Emarsys at an additional cost to be determined by Emarsys in its reasonable discretion. At the conclusion of the 30-day period, Emarsys shall delete the Customer Data from the Application Services and shall destroy any corresponding documents under its control, except to the extent that Emarsys is bound by law to continue storing such Customer Data.

11.7. Surviving Provisions. Section 5 (Fees and Payment), Section 6 (Proprietary Rights), Section 7 (Confidentiality), Section 8 (Warranties; Disclaimers), Section 9 (Indemnification), Section 10 (Limitation of Liability), Section 11.5 (Refund or Payment upon Termination), Section 11.6 (Return of Customer Data), Section 11.7 (Surviving Provisions), and Section 12 (Miscellaneous) shall survive any termination or expiration of this Agreement.

## **12. Miscellaneous.**

12.1. Notice. Except as otherwise specified in this Agreement, all notices, permissions and approvals hereunder shall be in writing and shall be deemed to have been given upon:

(i) personal delivery;

(ii) the second business day after mailing;

(iii) the second business day after sending by confirmed facsimile; or

(iv) except for notices of termination or an indemnifiable claim ("**Legal Notices**"), the first business day after sending by email. Billing-related notices to Customer shall be addressed to the relevant billing contact designated by Customer, and Legal Notices to Customer shall be addressed to Customer and be clearly identified as Legal Notices. All

other notices to Customer shall be addressed to the relevant administrator designated by Customer.

12.2. Relationship of the Parties. The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties.

12.3. Agreement to Governing Law and Jurisdiction. Each party irrevocably submits to the exclusive jurisdiction of the courts of England and Wales and waives any objection which it may have now or in the future to the courts of England and Wales being nominated for the purpose of this Section on the ground of venue or otherwise and agrees not to claim that any such court is not a convenient or appropriate forum. Each party submits to the non-exclusive jurisdiction of the courts of England and Wales for the purposes of:

(a) enforcing any judgment or award made by the courts of England and Wales; or

(b) seeking emergency injunctive relief in any territory where the other party has disclosed or threatens or is likely to disclose any Confidential Information in breach of this Agreement, in order to prevent, restrain or curtail such disclosure, or to prevent, restrain or curtail the infringement or unauthorised use of any of its intellectual property rights

12.4. Further Assurance. Each party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, promptly execute and deliver such documents and perform such acts as may reasonably be required for the purpose of giving full effect to this agreement.

12.5. Export Compliance. The Application Services, other technology Emarsys makes available, and derivatives thereof may be subject to export laws and regulations of the United States, the European Union (“EU”) and other jurisdictions (“**Export Control Laws**”). Each party represents that it is not named on any applicable government denied-party list. Customer shall not permit Users to access or use the Application Services in a country embargoed by the US, the EU or other applicable country (currently Cuba, Iran, North Korea, Sudan, or Syria) or in violation of any Export Control Laws.

12.6. Anti-Corruption.

12.6.1 The parties shall:

(a) comply with all applicable laws, statutes, regulations relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 (**Relevant Requirements**);

(b) not engage in any activity, practice or conduct that would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;

(c) have and shall maintain in place throughout the term of this agreement its own policies and to ensure compliance with the Relevant Requirements and will enforce them where appropriate; and

(d) promptly report to Emarsys any request or demand for any undue financial or other advantage of any kind received by Customer in connection with the performance of this agreement.

12.6.2 The undertakings specified in Section 12.6.1 constitute minimum and not maximum standards for each party. Where the provisions of law or the requirements of such undertakings address the same matters, the party shall apply the provision or fulfil the undertaking that affords the greater protection.

12.6.3 Breach of this Section 12.6 shall be deemed a material breach under Section 11.4.

12.7. No Third-Party Beneficiaries. A person who is not a party to this agreement shall not have any rights under or in connection with it by virtue of the Contracts (Rights of Third Parties) Act 1999.

12.8. Waiver. No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right.

12.9. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

12.10 Legal Fees. Customer shall pay on demand all of Emarsys' reasonable legal fees and other costs incurred by Emarsys to collect any fees or charges due to Emarsys under this Agreement following Customer's breach of Section 7.2.

12.11. Subcontractors. Emarsys may use subcontractors to perform the Services if

(i) Customer agrees thereto in advance, or

(ii) Emarsys executes a written agreement with such subcontractor that obligates such subcontractor to protect Customer and Customer Data to the same extent as is required of Emarsys hereunder. Upon request, Emarsys shall disclose such subcontractors to Customer. Emarsys shall be responsible for all acts and omissions of any such subcontractor to the same extent as if Emarsys had performed the Services.

12.12. Location of data processing. If Customer's data is to be processed in a country which is not a member state of the EU or of the European Economic Area (EEA), Emarsys shall ensure an adequate level of data protection for such data processing by concluding suitable EU standard contractual clauses or by other statutorily permitted means. Customer herewith grants to Emarsys a power of attorney to conclude suitable EU standard contractual clauses with data processors established in a third country on Customer's behalf.

12.13. Assignment. Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this Agreement in its entirety (including all Commercial Agreements), without consent of the other party, to its Affiliate or in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets not involving a direct competitor of the other party. A party's sole remedy for any purported assignment by the other party in breach of this paragraph shall be, at the non-assigning party's election, termination of this Agreement upon written notice to the assigning party. In the event of such a termination, Emarsys shall refund to Customer any prepaid fees covering the remainder of the term of all subscriptions after the effective date of termination. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

12.14. Interpretation. A reference to a statute, statutory provision or any subordinated legislation made under a statute is a reference to such statute, provision or subordinated legislation as amended or re-enacted from time to time, whether before or after the date of this agreement and in the case of a reference to a statute is also to all subordinate legislation made under that statute whether before or after the date of this agreement provided that, as between the parties, no such amendment or re-enactment shall apply for the purposes of this agreement to the extent that it would impose any new or extended obligation, liability or restriction on, or otherwise adversely affect the rights of, any party.

12.15. Entire Agreement. This Agreement is the entire agreement between Customer

and Emarsys regarding Customer's use of the Application Services and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and either signed or accepted electronically by the party against whom the modification, amendment, or waiver is to be asserted. The parties agree that any term or condition stated in Customer's purchase order or in any other of Customer's other documentation (excluding Commercial Agreements) is void. In the event of any conflict or inconsistency between the provisions in the body of this Agreement and any Commercial Agreement, the terms of such Commercial Agreement shall prevail.

