



SAAS TERMS OF SERVICE

TERRYBERRY COMPANY, LLC AND/OR ITS AFFILIATES SET FORTH IN AN APPLICABLE ORDER (“**TERRYBERRY**”) IS WILLING TO GRANT ACCESS TO THE SAAS PRODUCTS TO YOU AS THE COMPANY OR THE LEGAL ENTITY THAT WILL BE UTILIZING THE SAAS PRODUCTS (REFERENCED BELOW AS “**CUSTOMER**”) ON THE CONDITION THAT YOU ACCEPT ALL OF THE TERMS OF THIS AGREEMENT (AS DEFINED BELOW). BY ENTERING INTO THIS AGREEMENT ON BEHALF OF THE CUSTOMER, YOU REPRESENT THAT YOU HAVE THE LEGAL AUTHORITY TO BIND THE CUSTOMER TO THIS AGREEMENT. CUSTOMER AND TERRYBERRY MAY EACH ALSO BE REFERRED TO AS A “**PARTY**” AND TOGETHER, THE “**PARTIES**”.

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE USING THE SAAS PRODUCTS. THESE TERMS OF SERVICE (“**AGREEMENT**”) CONSTITUTES A LEGAL AND ENFORCEABLE CONTRACT BETWEEN CUSTOMER AND TERRYBERRY. BY INDICATING CONSENT ELECTRONICALLY, OR ACCESSING OR OTHERWISE USING THE SAAS PRODUCTS, CUSTOMER AGREES TO THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF CUSTOMER DOES NOT AGREE TO THIS AGREEMENT, DO NOT INDICATE CONSENT ELECTRONICALLY AND MAKE NO FURTHER USE OF THE SAAS PRODUCTS. THIS AGREEMENT SETS FORTH THE TERMS AND CONDITIONS UNDER WHICH TERRYBERRY WILL PROVIDE AND MAINTAIN THE SUBSCRIPTION SERVICES (AS DEFINED BELOW); THE BEWELL SERVICES PRODUCTS (THE “**BEWELL SERVICES**”); AND THE BEHEARD SERVICES PRODUCTS (THE “**BEHEARD SERVICES**”), AND ANY OTHER SOFTWARE AS A SERVICE SERVICES OFFERED BY TERRYBERRY IN ITS SOLE DISCRETION (COLLECTIVELY, THE “**SAAS PRODUCTS**”) TO CUSTOMER, EACH PARTY’S RESPONSIBILITIES HEREUNDER, AND THE FEES RELATED THERETO.

1. ACCESS AND USE

- 1.1. **Subscription Service.** Subject to the terms and conditions herein, Terryberry grants to Customer the right during the term of the Agreement to access and use (i) the web-based the BeRecognized software-as-a-service platform(s) expressly set forth in the Order (“**Subscription Service**”) for use; (ii) the BeWell Services software-as-a-service platform(s); and/or the BeHeard Services software-as-a-service platform(s) expressly set forth in the Order for Customer’s own internal business purposes. Customer may exercise its right set forth in this [Section 1.1](#) via its Authorized Users. Where applicable, the number of Authorized Users authorized to use the Subscription Service will be set forth in the Order. If the number of Authorized Users exceeds the limit set forth in the Order, additional fees will apply.
- 1.2. **Subscription Service Updates.** Customer acknowledges that Terryberry reserves the right at any time, or from time to time, with or without notice, to update, change or remove the content, functionality, or user interface of the SaaS Product at Terryberry’s sole discretion.

2. PAYMENT

- 2.1. **Fees.** Customer shall pay all invoices as set forth in any applicable Order without deduction or set-off (except for any amount disputed promptly and in writing by Customer in good faith), and payment will be sent to the address specified by Terryberry. If the Order does not set forth payment terms, Customer shall pay Terryberry all invoices within thirty (30) days of the invoice date. Without prejudice to Customer’s rights set out elsewhere in the Agreement, all fees are non-refundable and payable in advance. Terryberry may invoice for purchases of Subscription Services upon delivery. Any amounts arising in relation to this Agreement not paid when due will be subject to a late charge of one and one-half percent (1 ½ %) per month on the unpaid balance or the maximum rate allowed by law, whichever is less.
- 2.2. **Expenses.** Customer shall reimburse Terryberry for the actual, necessary, and reasonable costs incurred by Terryberry in rendering the Services, which may include, but is not limited to, travel, lodging, and food (“**Terryberry Expenses**”). All travel required to achieve completion of any Services shall be subject to Terryberry’s then-current policies.
- 2.3. **Taxes.** Customer is liable for any sales tax, use tax, service tax, value added tax, transfer tax, excise tax, tariff, duty or any other similar tax imposed by any governmental authority arising from the fees or charges invoiced to Customer under this Agreement. Such taxes may be invoiced by Terryberry to Customer for all taxing jurisdictions where Terryberry is permitted or required by Applicable Law to collect such taxes unless Customer provides a valid resale certificate or other documentation required under Applicable Law to evidence tax exemption. Prices shown for Goods and Gift Cards do not include taxes or charges for shipping and handling or processing.
- 2.4. **Float Accounts.** If specified in the applicable Order or the ancillary terms specified in Section 7 based on product type, upon execution of the Agreement, the Customer shall deposit with Terryberry a minimum of \$10,000 to initially fund any purchases by Customer’s employees of Goods and/or Gift Cards either as part of a Subscription Service or as part of a Single Event Subscription, which shall be held by Terryberry (the “**Float Account**”). The amount of the Float Account requirement will be monitored regularly by Terryberry and Terryberry will notify the Customer if the Float Account deposit requirement needs to be increased if volumes dictate. If the Customer has less than \$10,000 in their Float Account at any given time, Customer hereby authorizes Terryberry up to \$5,000 without further authorization to replenish the Float Account. Terryberry reserves the right to stop processing Customer’s orders when there are not enough funds available in the Float Account to pay for any awards chosen by Customer’s employees.

3. PROFESSIONAL SERVICES

- 3.1. **Professional Services.** Subject to the terms and conditions herein, during the term of the SaaS Terms, Terryberry agrees to perform the implementation and other professional services expressly set forth in the Order (“**Professional Services**”) in accordance with Terryberry’s then-current professional services terms. The Subscription Service and Professional Services are, collectively, the “**Terryberry Services**.”

4. CUSTOMER OBLIGATIONS

- 4.1. **User Accounts.** Each Authorized User that accesses the SaaS Product must be issued a separate user account (with a unique ID and password) by Terryberry and/or Customer (“**User Accounts**”). Customer shall ensure that passwords associated with the User Accounts remain confidential and secure and to not allow multiple Authorized Users to utilize the same User Account. Customer shall not provide, or provide access to, a User Account to any third party without prior written consent of Terryberry. If any User is designated by Customer as no longer authorized by Customer to have such access to the SaaS Product, then Customer shall immediately notify Terryberry.
- 4.2. **Authorized Users.** Customer is responsible for its Authorized Users’ compliance with the Agreement and for access to Customer Data (defined below) or the SaaS Products by other persons as a result of Customer’s failure to use reasonable precautions to secure its own systems or credentials for access to the SaaS Products. Customer will: (i) use its best efforts to prevent unauthorized access to or use of the SaaS Products and notify Terryberry immediately of any such unauthorized access or use; (ii) cooperate with any reasonable investigation by Terryberry of any outage, security problem or suspected breach of the Agreement ; and (iii) comply with all Terryberry instructions relating to Customer’s access to or use of the SaaS Products, including instructions specifying specific windows of time for certain types of Customer Data uploading. Customer shall be responsible for: (a) all acts that occur in connection with its Authorized Users’ SaaS Products accounts; (b) assuring that its employees receive adequate disclosures of the terms and conditions governing such its employees’ use of Terryberry Services; and (c) all transmissions initiated by Authorized Users during use of Terryberry Services. Customer will cause all Authorized Users to comply at all times with the terms and conditions set forth herein and any standard terms and conditions applicable to the use of the SaaS Products that may be made available to Authorized Users from time to time. Customer is responsible and liable for any breach by any

Authorized User of any obligation, representation or warranty of Customer in the Agreement or any standard terms and conditions applicable to the use of the SaaS Products. Terryberry reserves the right to refuse registration of, or to cancel, login IDs that it reasonably believes to violate the terms and conditions set forth in the Agreement, in which case Terryberry will promptly inform Customer in writing of such refusal or cancellation.

- 4.3. **Acceptable Use Policy.** Customer shall, and shall cause its Authorized Users and Affiliates to, abide by the terms of Terryberry's Acceptable Use Policy, set forth at <http://www.terryberry.com/acceptable-use-policy>.

5. CUSTOMER DATA.

- 5.1. **Customer Data Content.** As between Terryberry and Customer, Customer is solely responsible for: (i) the content, quality and accuracy of Customer Data as made available by Customer and by Authorized Users; (ii) providing notice to Authorized Users with regards to how Customer Data will be collected and used for the purpose of the SaaS Products; (iii) ensuring Customer has a valid legal basis for processing Customer Data and for sharing Customer Data with Terryberry (to the extent applicable); and (iv) ensuring that the Customer Data as made available by Customer complies with applicable laws and regulations including Applicable Laws.
- 5.2. **Data Protection Laws.** The Parties shall comply with their respective data protection obligations under Applicable Laws. In particular, if Customer is established in the European Economic Area ("EEA"), in the United Kingdom ("UK") or in California, or will, in connection with the SaaS Products, provide Terryberry with personal data relating to an individual located within the EEA, the UK or California, the Parties shall comply with the Data Processing Addendum found at <https://www.terryberry.com/data-processing-addendum.pdf> ("DPA") which in such case is hereby incorporated into this Agreement.
- 5.3. **Security of Customer Data.** Terryberry shall: (i) ensure that is has in place appropriate administrative, physical and technical measures designed to protect the security and confidentiality of Customer Data against any accidental or illicit destruction, alteration or unauthorized access or disclosure to third parties; (ii) have measures in place designed to protect the security and confidentiality of Customer Data; and (iii) access and use the Customer Data solely to perform its obligations in accordance with the terms of the Agreement, and as otherwise expressly permitted in the Agreement. Terryberry shall not materially diminish its security controls with respect to Customer Data during a particular SaaS Products term.

6. SINGLE EVENT SUBSCRIPTIONS

- 6.1. **Single Event Subscriptions.** If Customer purchases a single event subscription, the SaaS Products will be available for no more than one hundred and twenty (120) days, with the first thirty (30) days allotted to setup and registration and the remaining ninety (90) days allotted to the event (the "Single Event Subscription"). The Single Event Subscription will automatically expire following one hundred and twenty (120) days from the Effective Date of the applicable Order.
- 6.2. **Automatic Payment Program.** Enrollment in Terryberry's automatic payment program is required if the Customer is using Single Event Subscription as specified in the Order. Customers enrolled in automatic payment program shall provide a payment method for Terryberry to maintain on file (either a credit card or banking information for ACH draws or Direct Debit), and authorization for Terryberry to collect fees when due automatically.

7. ANCILLARY TERMS.

- 7.1. **Third Party Goods.** In the event that Terryberry provides tangible goods that are not manufactured by Terryberry ("Third Party Goods") and to Customer or Customer's Authorized Users as set forth in an applicable Order, the Non-Manufactured Goods Terms (set forth at <http://www.terryberry.com/nonmanufactured-goods-terms/>) shall apply.
- 7.2. **Manufactured Goods.** In the event that Terryberry provides tangible goods that are manufactured by Terryberry ("Manufactured Goods") and to Customer or Customer's Authorized Users as set forth in an applicable Order, the Manufacturing Supply Agreement (set forth at <http://www.terryberry.com/manufacturing-supply-agreement/>) shall apply.
- 7.3. **Gift Cards.** In the event that Terryberry provides tangible or electronic gift cards ("Gift Cards") to Customer or Customer's Authorized Users as set forth in an applicable Order, Gift Cards Terms (set forth at <http://www.terryberry.com/gift-card-terms/>) shall apply.
- 7.4. **Reward Events.** In the event that Customer purchases a BeRecognized Reward Events subscription, the Reward Events Terms (set forth at <http://www.terryberry.com/reward-events-terms/>) shall apply.

8. WARRANTIES

- 8.1. **Limited SaaS Products Warranty.** During the applicable Subscription Term, Terryberry warrants that: (a) the SaaS Products will perform in substantial conformity with the Documentation; and (b) Terryberry will use industry standard measures designed to detect viruses, worms, Trojan horses or other unintended malicious or destructive code in the SaaS Products. The foregoing warranties are void if the failure of the SaaS Products has resulted from negligence, error, or misuse of the SaaS Products (including use not in accordance with the Documentation) by Customer, the User or by anyone other than Terryberry. Customer shall be required to report any breach of warranty to Terryberry within a period of thirty (30) days of the date on which the incident giving rise to the claim occurred. Terryberry's sole and exclusive liability, and Customer's sole and exclusive remedy, for breach of these warranties will be for Terryberry, at its expense, to use reasonable commercial efforts to correct such nonconformity within thirty (30) days of the date that notice of the breach was provided; and, if Terryberry fails to correct the breach within such cure period, Customer may terminate the affected Order and, in such event, Terryberry shall provide Customer with a pro-rata refund of any unused pre-paid fees paid for the period following termination as calculated on a monthly basis for the affected SaaS Products.
- 8.2. **Representations and Warranties by Customer.**
- 8.2.1. Customer represents and warrants to Terryberry that Customer owns and will at all times own, or otherwise has and will at all times have, all necessary rights, licenses, permissions and consents in and relating to the data provided or made available by or on behalf of Customer so that, as used, disclosed, hosted, stored and processed by Terryberry in accordance with the terms of this Agreement, they do not and will not infringe, misappropriate, or otherwise violate any right of any third party or violate any Applicable Law. Customer further represents and warrants to Terryberry that the receipt and use by Terryberry of the Customer Marks and any other material provided by the Customer to Terryberry in the performance of this Agreement, its agents, subcontractors or consultants shall not infringe the rights, including any Intellectual Property Rights, of any third party.
- 8.2.2. Without derogating from Terryberry's obligations under the Agreement, Customer warrants that it shall take and maintain appropriate steps within its control to protect the confidentiality, integrity, and security of its Confidential Information and Customer Data, including: (i) operating the SaaS Products in accordance with the Documentation and applicable law and; and (ii) dedicating reasonably adequate personnel and resources to implement and maintain the security controls set forth in the Documentation. Customer will be responsible for the acts and omissions of its Authorized Users.
- 8.3. **Mutual Warranties.** Each Party hereby represents and warrants to the other Party as follows: (i) such Party is an entity duly formed, organized and existing in good standing in such Party's state of formation; (ii) such Party has full power and all requisite legal and entity authority to enter into this Agreement; and (iii) such Party's execution, delivery, and performance of this Agreement shall not constitute (a) a violation of any judgment, order, or decree; (b) a material default under any material contract by which such Party or any of its material assets are bound; or (c) an event that would, with notice or lapse of time, or both, constitute such a default.
- 8.4. **Third Party Materials.** Customer acknowledges and agrees that Terryberry may provide, disclose, resell, make available or facilitate the access to materials, content, works of authorship, data, software, software tools, products, goods, services and Documentation that are not proprietary to Terryberry or that are licensed, leased, acquired or otherwise obtained by Terryberry or any of its Affiliates from a third party (collectively, "Third-Party Materials"). Customer, as applicable, will be responsible for complying with the terms of any licenses and terms and conditions related to Customer's access, use or

disclosure of Third-Party Materials. Notwithstanding anything to the contrary in this Agreement or elsewhere, Third-Party Materials are provided “as-is” and “as available,” and Terryberry hereby disclaims all representations and warranties in connection with Third-Party Materials, including, without limitation, warranties of merchantability, fitness for a particular purpose, noninfringement, title and compliance with law. Customer hereby forever releases Terryberry from any and all claims and liabilities relating to or arising from Third-Party Materials.

- 8.5. Compliance with Law.** Each Party shall comply with all Applicable Laws and regulations in connection with the performance of its obligations and the exercise of its rights under the Agreement.
- 8.6. Disclaimer** Any and all warranties, expressed, incorporated or implied, are limited to the extent and period mentioned in the Agreement. To the maximum extent allowed by applicable law, Terryberry disclaims (and disclaims on behalf of its licensors and/or contributors to any Third-Party Materials) all other warranties, conditions and other terms, whether express or implied or incorporated into the Agreement by statute, common law or otherwise, including the implied conditions and warranties of merchantability and fitness for a particular purpose. Terryberry will have no liability for delays, failures or losses attributable or related in any way to the use or implementation of third-party software or services not provided by Terryberry. Without limiting the foregoing, any implied warranty of merchantability, implied warranty against infringement, and implied warranty of fitness for a particular purpose are hereby expressly excluded and disclaimed by Terryberry to the maximum extent allowed by Applicable Law

9. TERM, TERMINATION, AND SUSPENSION

- 9.1. Term and Renewal.** This Agreement shall be in effect from the Effective Date and shall continue until the end of the term set forth in the Order (the “**Initial Term**”), until terminated in accordance with the provisions set forth herein. If no term is set forth in the Order, the Initial Term shall be twelve (12) months. At the end of the Initial Term and each Renewal Term (as defined herein), this Agreement will automatically renew for a successive twelve (12) month period (each a “**Renewal Term**”, together with the Initial Term, the “**Term**”) unless either party gives 90 days written notice of its intent not to renew.
- 9.2. Termination by Either Party.** Either Party may immediately terminate this Agreement by giving written notice to the other Party, if the other Party (i) materially breaches any obligations under this Agreement and fails to cure such breach within thirty (30) days after the non-breaching Party demands such cure; (ii) becomes insolvent or assigns all, or substantially all, of its assets or business for the benefit of creditors; (iii) commences bankruptcy or dissolution proceedings, has a receiver appointed for a substantial part of its assets, or ceases to operate in the ordinary course of business; or (iv) suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business (v) resolves to wind up business, dissolve, or liquidate. In addition, a Party may terminate this Agreement, in whole or in part, or cease provision of maintenance and support services and Professional Services or Customer’s access to the applicable Services if required to comply with Applicable Law or regulation, and such termination will not constitute a breach of this Agreement by the terminating Party. A Party may terminate this Agreement, in whole or in part, or cease provision of Services or terminate Customer’s access to the applicable Services if required to comply with Applicable Law or regulation, and such termination will not constitute a breach of this Agreement by the terminating Party.
- 9.3. Termination by Terryberry.** Terryberry may immediately terminate this Agreement by giving written notice to Customer if Customer assigns its rights or obligations in violation of the terms of this Agreement or if Customer fails to pay any amount due under this Agreement on the due date for payment and remains in default not less than 14 days after being notified in writing to make such payment.
- 9.4. Effect of Termination.** Upon termination or expiration of this Agreement: (i) Customer shall immediately cease using Services and shall have no further right to access or use the applicable Services; (ii) Terryberry’s obligation to provide Services shall terminate immediately; (iii) each Party shall destroy all copies of the Confidential Information of the other Party on tangible media in such Party’s possession or control or return such copies to the other Party; (iv) upon request, each Party shall certify in writing to the other Party that it has returned or destroyed such Confidential Information; (v) any accrued rights and obligations will survive; and (vi) Customer shall immediately pay all fees and charges incurred as of the date of termination or expiration.
- 9.5. Suspension.** Terryberry may, on written notice, suspend access to the SaaS Product without liability if: (i) Terryberry reasonably believes that the SaaS Product is being used in violation of the Agreement; (ii) Customer does not cooperate with reasonable investigation by Terryberry of any suspected violation of the Agreement; (iii) the SaaS Product or Customer Data are accessed or manipulated by a third party without consent of either Party; (iv) Terryberry is required by Law to suspend access to the SaaS Product; (v) if any invoiced amounts remain unpaid by Customer for more than ten (10) calendar days past the due date; or (vi) there is another event for which Terryberry reasonably believes that the suspension of access to the SaaS Product is necessary to protect the cloud environment in which Customer’s instance of the SaaS Product is deployed. Terryberry reserves the right to suspend any applicable Professional Services or Customer’s access to the applicable Subscription Services upon 30 days’ written notice to Customer if: (a) an invoice is more than sixty (60) days past due; or (b) if there is an uncured material breach of the Agreement. In addition to the rights set forth in the Agreement, Terryberry may suspend Customer’s access and use of the SaaS Products if there is an unusual and material spike or increase in Customer’s use of the SaaS Products and Terryberry reasonably suspects or knows that such traffic or use is fraudulent or materially and negatively impacting the operating capability of the SaaS Products. Terryberry will promptly reinstate Customer’s access to and use of the SaaS Products once the issue has been resolved, provided that if Terryberry already terminated the Agreement for uncured material breach in accordance with the Agreement, Terryberry shall not be obligated to reinstate Customer’s access to and use of the SaaS Products.

10. CONFIDENTIALITY

- 10.1. Confidential Information.** The Parties acknowledge that each Party (the “**Disclosing Party**”) may disclose Confidential Information to the other Party (“**Receiving Party**”). Each Party further acknowledges that the Confidential Information of the other Party, and all other intellectual property rights of the other Party, are and shall remain the exclusive property of the other Party, whether or not protected under Applicable Laws, including intellectual or property laws.
- 10.2. Exclusions.** Notwithstanding anything to the contrary in this Section 4, Confidential Information shall not include information which: (i) was already known to Receiving Party at the time of disclosure by Disclosing Party, and Receiving Party was under no obligation of confidentiality with respect to such information; (ii) is becomes known (independently of disclosure by the Disclosing Party) to Receiving Party by a third party who had the right to make such disclosure without any confidentiality restrictions; (iii) is, or through no fault of Receiving Party has become, generally available to the public; or (iv) is independently developed by the Receiving Party without use of, access to, or reliance upon the Disclosing Party’s Confidential Information, and the Receiving Party can provide evidence to that effect.
- 10.3. Obligations.** The Receiving Party will not disclose the Disclosing Party’s Confidential Information to any third party, except as permitted in Section 4.4. The Receiving Party will protect and keep confidential the Disclosing Party’s Confidential Information using the same degree of care that the Receiving Party uses to protect its own nonpublic or proprietary business, technical or financial information of similar importance, but in no event less than a reasonable degree of care. The Receiving Party will not use the Disclosing Party’s Confidential Information for any purpose other than to perform its obligations or exercise its rights under this Agreement. The disclosure of Confidential Information pursuant to this Agreement is not intended in any way to transfer or grant any right, title or interest in or to such Confidential Information to the Receiving Party unless otherwise expressly indicated in this Agreement or by the Disclosing Party in writing.
- 10.4. Permitted Disclosure.** The Receiving Party may disclose the Confidential Information of the Disclosing Party only to those of its officers, directors, employees, agents, representatives and contractors (“**Representatives**”) who have a legitimate need to know such Confidential Information consistent with the purposes of this Agreement and who have agreed, either as a condition of employment, representation or in a written agreement, to be bound by terms and conditions substantially as protective as the confidentiality terms and conditions applicable to the Receiving Party under this Section 4. The Receiving Party shall be responsible and liable for any breach by its Representatives of the obligations of the Receiving Party set forth in this Section 4. The Receiving Party shall be allowed to disclose Confidential Information of the Disclosing Party to the extent that such disclosure is: (i) approved in writing by the Disclosing Party; (ii) necessary for the Receiving Party to enforce its rights under this Agreement in connection with a legal proceeding; or (iii) required by Applicable Law or by the order of a court or similar judicial or administrative body, provided that, to the extent it is legally permitted to

do so, the Receiving Party notifies the Disclosing Party of such required disclosure promptly and in writing and cooperates with the Disclosing Party at the Disclosing Party's reasonable request and expense in any lawful action to contest or limit the scope of such required disclosure. This [Section 4](#) supersedes any and all prior or contemporaneous understandings and agreements, whether written or oral, between the Parties with respect to Confidential Information and is a complete and exclusive statement thereof.

11. INTELLECTUAL PROPERTY

- 11.1. **Terryberry Intellectual Property.** Except for the rights granted to Customer in this Agreement, all rights, title, and interest in and to the Services and Terryberry Intellectual Property are hereby reserved by Terryberry, its Affiliates, or its licensors. To the extent that Customer gains any Intellectual Property rights in the Services or Terryberry Intellectual Property by any means or mechanism, Customer hereby irrevocably assigns to Terryberry all of its right, title and interest in and to such Services, Intellectual Property, and Intellectual Property rights. To the extent Customer's rights are inalienable under Applicable Law, Customer hereby irrevocably waives such rights and, if such waiver is deemed invalid, grants to Terryberry the exclusive, irrevocable, perpetual, worldwide, royalty free right to use, market, modify and grant licenses to such items without identifying Customer or seeking Customer's consent. Customer agrees not to take any action that interferes with intellectual proprietary rights of Terryberry. Nothing in this Agreement shall transfer ownership of any Intellectual Property rights from Terryberry to the Customer.
- 11.2. **Customer Intellectual Property.** Except as provided for herein, all rights, title, and interest in and to Customer Intellectual Property are hereby reserved by Customer, its Affiliates or licensors. Nothing in this Agreement shall transfer ownership of any Intellectual Property rights from Customer to Terryberry. Customer owns all right, title and interest in all Customer Data. Nothing in this Agreement shall be construed to grant Terryberry any rights in Customer Data beyond those expressly provided herein. Customer grants Terryberry and its Affiliates the limited, non-exclusive, worldwide license to view and use the Customer Data solely for the purpose of providing the Services.
- 11.3. **Feedback and Usage Data.** If Customer or any of its employees or contractors sends or transmits any communications or materials to Terryberry by mail, email, telephone, or otherwise, suggesting or recommending changes to Services, including new features or functionality relating thereto, or any comments, questions, suggestions, or the like (collectively, "**Feedback**"), Terryberry is free to use such Feedback irrespective of any other obligation or limitation between the Parties governing such Feedback. Customer hereby assigns to Terryberry on Customer's behalf, and on behalf of its employees, contractors and/or agents, all right, title, and interest in, and Terryberry is free to use, without any attribution or compensation to any party, any ideas, know-how, concepts, techniques, or other intellectual property rights contained in the Feedback, for any purpose whatsoever, although Terryberry is not required to use any Feedback. Terryberry shall be permitted to collect and use Usage Data for its reasonable business purposes and for Customer's benefit. In the event Terryberry wishes to disclose the Usage Data or any part thereof to third parties (either during the Subscription Term or thereafter), such data shall be anonymized and/or presented in the aggregate so that it will not identify Customer or its Authorized Users. The foregoing shall not limit in any way Terryberry's confidentiality obligations in [Section 4](#) of the SaaS Terms.
- 11.4. **Trademark.** Customer will furnish Terryberry with all Customer Marks it desires to include in construction of the site. Customer grants to Terryberry a non-exclusive, non-transferable right and license to use the Customer Marks in association with the recognition program and all purposes contemplated under this Agreement.

12. INDEMNIFICATION

- 12.1. **Terryberry Indemnification.** Terryberry will indemnify and defend Customer, its Affiliates, and its and their respective directors, officers, employees, agents, successors and permitted assigns from and against all third-party claims, suits and proceedings resulting from the violation, misappropriation, or infringement of such third party's patent, copyright, trademark or trade secret caused by Customer's use of the Services in accordance with this Agreement and applicable Documentation (as defined herein), and all directly related losses, liabilities, damages, costs and expenses (including reasonable attorneys' fees).
- 12.2. **Customer Indemnification.** Customer will indemnify and defend Terryberry, its Affiliates, and its and their respective directors, officers, employees, agents, successors and permitted assigns from and against any third-party claims, suits and proceedings (including those brought by a government entity) resulting from: (i) an actual or alleged infringement or violation by the Customer Data of such third-party's patent, copyright, trademark, trade secret; (ii) Terryberry's use of the Customer Data, in accordance with the terms of this Agreement and (where applicable) with the terms of a DPA, violates Applicable Law, (iii) the content or structure of Customer Data; (iv) Customer's gross negligence, fraud or willful misconduct, (v) Customer's violation of the licensing terms for any Services further set forth in any Exhibit, and all directly related losses, liabilities, damages, costs and expenses (including reasonable attorneys' fees); or (vi) actual or alleged infringement of a third party's Intellectual Property rights, arising out of, or in connection with, the receipt or use in the performance of the Agreement of the Customer Marks.
- 12.3. **Procedure.** Each Party's defense and indemnification obligations herein will become effective upon, and are subject to: (a) the Party entitled to indemnification under this Agreement ("**Indemnified Party**") giving prompt notification to the Party that is obligated to provide indemnification ("**Indemnifying Party**") of any claims in writing; and (b) the Indemnified Party providing the Indemnifying Party with full and complete control, authority and information for the defense of the claim, provided that the Indemnifying Party will have no authority to enter into any settlement or admission of the Indemnified Party's wrongdoing on behalf of the Indemnified Party without the Indemnified Party's prior written consent (not to be unreasonably withheld). The Indemnifying Party will promptly, and in no event less than ten (10) days before the date on which a response to such claim is due, assume and diligently pursue the defense and settlement of such claim, engaging attorneys with appropriate expertise to handle and defend the same, at the Indemnifying Party's sole cost and expense. At the Indemnifying Party's request and sole expense, the Indemnified Party shall reasonably cooperate with the Indemnifying Party in defending or settling any claim. If the Indemnifying Party fails to timely assume, or ceases to diligently pursue, such defense, the Indemnified Party may defend or settle the claim in such manner as it may deem appropriate at the cost of the Indemnifying Party.
- 12.4. **Remedies.** If Customer's use of the Services is prevented by injunction or court order because of any claim subject to indemnification under [Section 7.1](#), or, in Terryberry's opinion, if the Services are likely to become the subject of any such claim, then Terryberry, at its sole discretion and at no additional expense to Customer, shall either: (i) procure the right for Customer to continue using the Services in accordance with the terms of this Agreement; or (ii) replace or modify the Services so that such Services become non-infringing. If Terryberry determines that neither (i) nor (ii) is available in a timely manner on commercially reasonable terms, then Terryberry may terminate Customer's right to use the infringing Service, in which event Customer shall receive a pro-rata refund of all unused, pre-paid fees for the Services for the period following termination as calculated on a monthly basis for the affected Services. This [Section 7.4](#) states the sole liability of Terryberry and the exclusive remedy of Customer with respect to any indemnification claims arising out of or related to this Agreement.
- 12.5. **Exclusions.** The above Terryberry obligations to defend and indemnify will not apply in the event that a claim arises from or relates to: (i) a modification of the Services made by, or at the request or direction of, Customer; (ii) the combination of the Services with an item, technology, software, data or intellectual property not supplied by or approved in writing by Terryberry; (iii) the use of the Services in a manner not intended or allowed by this Agreement; (iv) any portion of the Services based upon specifications provided by or on behalf of Customer; (v) Third-Party Materials; or (vi) data provided or made available by or on behalf of Customer.

13. LIMITATION OF LIABILITY

- 13.1. **Liability Cap.** Except for liability caused by Terryberry's intellectual property infringement indemnification obligations in [Section 7.1](#), Customer's indemnity in [Section 7.2](#), and Customer's payment obligations herein, in no event will either Party's maximum aggregate liability arising out of or related to this Agreement, regardless of the cause of action and whether in contract, tort (including negligence), warranty, indemnity or any other legal theory, exceed the total amount paid or payable to Terryberry under this Agreement during the twelve (12) month period preceding the date of initial claim. The exclusions and limitations set forth in this [Section 8.1](#) shall apply even if an exclusive remedy of Customer under this Agreement has failed of its essential purpose.

- 13.2. Consequential Damages.** Neither Party or its Affiliates will have any liability to the other Party, its Affiliates, or any third party for any loss of profits or revenues, loss of goodwill, or for any indirect, special, incidental, consequential or punitive damages arising out of, or in connection with the supply, use, or performance of, or inability to use, the Services or arising out of or in connection with this Agreement, however caused, whether in contract, tort (including negligence), indemnity, breach or failure of express or implied warranty, breach of contract, misrepresentation, negligence, strict liability in tort or otherwise, or any other legal theory, and whether or not the Party has been advised of the possibility of such damages.
- 13.3. Construction.** This Agreement is not intended to and will not be construed as excluding or limiting any liability which cannot be limited or excluded by Applicable Law, including liability for (a) death or bodily injury caused by a Party's negligence; or (b) gross negligence, willful misconduct, or fraud.

14. GENERAL PROVISIONS

- 14.1. Force Majeure.** Any delay in or failure of performance by either Party under this Agreement, other than a failure to pay amounts when due, shall not be considered a breach of this Agreement, and shall be excused to the extent caused by any occurrence beyond the reasonable control of such Party. Such acts shall include, but not be limited to, fortuitous events and acts of God; wars, riots, terrorism and insurrections; laws, decrees, ordinances and governmental regulations; change in Applicable Laws; strikes and lockouts; transportation stoppages or slowdowns; hurricanes, earthquakes, floods, fires and explosions; pandemics and epidemics; and shelter-in-place or similar orders. Notwithstanding the foregoing, if such act or condition beyond the reasonable control of such Party continues for a period of one hundred and eighty (180) days or more, the unaffected Party may, on notice to the Party affected, terminate this Agreement, and neither Party shall have any further obligation to the other save for those provisions hereunder which, by their terms, survive the termination or expiration of this Agreement.
- 14.2. Compliance with Export Controls.** Customer will not export, re-export, divert, transfer, or disclose, directly or indirectly, or allow the use of, any Service or Terryberry Documentation, or any direct product thereof in violation of applicable United States export control requirements. Without limiting the generality of the immediately preceding sentence, Customer will not (i) re-export the Service or Terryberry Documentation to, or allow the use of the Service or Terryberry Documentation by, an unauthorized or prohibited destination; (ii) transfer the Service or Terryberry Documentation to, or allow the use of the Service or Terryberry Documentation by, any Prohibited Person; or (iii) transfer, use or permit or authorize the use of the Service or Terryberry Documentation in any unauthorized end-use (i.e. activities related to the proliferation of weapons of mass destruction).
- 14.3. Commercial Computer Software.** If Customer is an agency or contractor of the United States Government, Customer acknowledges and agrees that: (i) the Services (including any software forming a part thereof) were developed entirely at private expense; (ii) the Services (including any software forming a part thereof) in all respects constitute proprietary data belonging solely to Terryberry; (iii) the Services (including any software forming a part thereof) are not in the public domain; and (iv) the software forming a part of the Services is "Commercial Computer Software" as defined in sub-paragraph (a)(1) of DFAR section 252.227-7014 or FAR Part 12.212. Customer shall provide no rights in the Software (including any software forming a part thereof) to any U.S. Government agency or any other party except as expressly provided in this Agreement.
- 14.4. Notice.** Any and all notices, requests, demands and other communications required or otherwise contemplated to be made under this Agreement shall be in writing and in English to 2033 Oak Industrial Drive NE, Grand Rapids, Michigan 49505, United States, Attn: General Counsel, provided by one or more of the following means and deemed to have been duly given (i) if delivered personally, when received; (ii) if delivered by certified or registered mail (postage prepaid and return receipt requested), when received; (iii) if transmitted by facsimile (to those for whom a facsimile number is set forth below), on the date of receipt of the transmission confirmed by receipt of a transmittal confirmation; or (iv) if delivered by courier service, on the third business day following the date of deposit with such courier service. Either Party may change its address by giving notice as provided herein of the new address to the other Party. Notices to Terryberry shall be sent to the address specified for the applicable Terryberry entity below. Notices to Customer shall be sent to the address provided on the Order.
- 14.5. Governing Law; Jurisdiction.**
- 14.5.1. Customers Located in Canada, the United States, or the Americas.** If Customer's billing address set forth on the Order is located in Canada, North America, Central America, or South America, each Party agrees to the governing law of the State of Michigan, United States, without regard to choice or conflict of law rules, and to the exclusive jurisdiction of the state and federal courts located in Kent County, Michigan, United States with respect to any dispute, claim, action, suit, or proceeding (including non-contractual disputes or claims) arising out of or in connection with this Agreement, or its subject matter formation.
- 14.5.2. Customers Located in the United Kingdom, EEA, or APAC.** If Customer's billing address set forth on the Order is located in United Kingdom, European Economic Area, or the Asia-Pacific Region, each Party agrees to the governing law of England and Wales without regard to choice or conflict of law rules, and to the exclusive jurisdiction of the state and federal courts located in England and Wales with respect to any dispute, claim, action, suit, or proceeding (including non-contractual disputes or claims) arising out of or in connection with this Agreement, or its subject matter formation.
- 14.5.3. Application of Legislation.** Except to the extent expressly required by Applicable Law, neither the United Nations Convention on Contracts for the International Sale of Goods 1980, nor any international and domestic legislation implementing such Convention, applies to this Agreement. The Parties' rights and obligations under this Agreement are solely and exclusively as set forth in this Agreement and the Uniform Computer Information Transactions Act ("UCITA"), whether enacted in whole or in part by any state or applicable jurisdiction, regardless of how codified, does not apply to this Agreement and is hereby disclaimed. The Parties will amend this Agreement as may be necessary to comply with any mandatory disclaimer language required by UCITA in any applicable jurisdiction.
- 14.6. Waiver of Jury Trial.** To the extent not prohibited by Applicable Law, each of the Parties hereby irrevocably waives any and all right to trial by jury in any legal proceeding arising out of or related to this Agreement.
- 14.7. Equitable Relief.** The Parties agree that a breach of [Section 4](#) may result in irreparable and continuing damage for which there will be no adequate remedy at law, and each Party will be entitled to seek temporary or permanent injunction or other equitable relief restraining such breach or threatened breach from any court of competent jurisdiction without the need for posting bond and/or a decree for specific performance, and such other relief as may be proper. Notwithstanding anything to the contrary in this Agreement, either Party may seek injunctive relief against the other Party from any other judicial or administrative authority pending the resolution of such controversy or claim.
- 14.8. Assignment.** Neither Party may assign any of its rights or obligations under this Agreement without the other Party's prior written consent, which will not be unreasonably withheld. Notwithstanding the foregoing, either Party may assign any and all of its rights and obligations under this Agreement to a successor in interest in the event of a merger or acquisition or to an Affiliate, upon written notice to the other Party. Any purported assignment, pledge, delegation or transfer in violation of this [Section 10.13](#) is null and void. All provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by and against, the respective successors and permitted assigns of Terryberry and Customer.
- 14.9. Waivers; Amendments.** All waivers must be in writing. Any waiver or failure to enforce any provision of this Agreement on one occasion shall not be deemed a waiver of any other provision or of such provision on any other occasion. Subject to [Section 10.14.2](#), this Agreement may be amended only by a written document signed by duly authorized representatives of each Party. Notwithstanding anything to the contrary herein or elsewhere, Terryberry may amend this Agreement from time to time by posting an amended version at its website, available at www.terryberry.com/legal/terms-and-conditions/. Such amendment will be deemed accepted and become effective 30 days after such notice (the "Proposed Amendment Date") unless Customer first gives Terryberry written notice of rejection of the amendment. In case of such rejection, this Agreement will continue under its original provisions, and the amendment will become effective at the start of Customer's next renewal term following the Proposed Amendment Date (unless this Agreement is earlier terminated in accordance with its provisions). Customer's continued use of the Service following the effective date of an amendment will confirm Customer's consent thereto.

- 14.10. **Severability.** If a court of competent jurisdiction holds any provision, or part of any provision, of this Agreement to be illegal or invalid, the provision, or the affected part of such provision, shall be null and void and deemed automatically severed from this Agreement. Any such holding shall not affect the legality or validity of the remaining provisions or remaining parts or unaffected provisions of this Agreement.
- 14.11. **Relationship of The Parties.** The relationship between the Parties is that of independent contractors only, and nothing in this Agreement shall be interpreted or construed to create a partnership, joint venture, employer-employee, or agency relationship, or any other relationship between the Parties, other than that of independent contractors. Neither Party shall have the power to obligate the other Party in any manner whatsoever unless expressly provided in this Agreement.
- 14.12. **Counterparts.** The Order may be executed in counterparts, each of which shall be considered an original, but all of which together shall constitute one and the same instrument. The exchange of a fully executed Agreement or Order (in counterparts or otherwise) by fax, .pdf, .pic, .tif, .jpg, other legible image file or by widely accepted electronic signature services (ex. DocuSign) shall be sufficient to bind the Parties to the terms and conditions of this Agreement.
- 14.13. **Entire Agreement.** This Agreement constitutes the entire Agreement between the Parties regarding this matter, and they supersede all prior discussions or Agreements related to the same. Should Customer utilize a purchase order (or other form which includes additional terms and conditions), any additional terms and conditions in such document shall not bind Terryberry, unless such additional terms and conditions have been expressly acknowledged in writing by Terryberry in an amendment as overriding this Agreement. Fulfillment of Customer's order by Terryberry does not constitute acceptance of any of Customer's terms and conditions and does not serve to modify or amend this Agreement.

15. DEFINITIONS AND INTERPRETATION.

- 15.1. **Definitions.** Capitalized terms shall have the meaning set forth below. Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Agreement. Defined terms stated in the singular may be used in the plural, and vice versa.
- 15.1.1. **"Affiliate"** means, with respect to a Party, any entity or individual that directly or indirectly controls, is controlled by, or is under common control with such Party. For purposes of the Affiliate definition, an entity or individual "controls" an entity if it has the power to direct the management and policies of the entity, through ownership of more than 50% of the voting securities of an entity, representation on its board of directors or other governing body, or by contract.
- 15.1.2. **"Applicable Law(s)"** means all laws, statutes, codes, rules, regulations, and other pronouncement having the effect of law of the United States, any foreign country or any domestic or foreign state, county, city or other political subdivision, including those promulgated, interpreted or enforced by any governmental or regulatory authority, and any order of a court or governmental agency of competent jurisdiction in effect as of the Effective Date and as they may be amended, changed or modified from time to time.
- 15.1.3. **"Authorized User"** means any individual to whom Customer grants access authorization in compliance with a license to use the Services that is an employee, agent, contractor or representative of Customer or Customer's Affiliates.
- 15.1.4. **"Confidential Information"** means the nonpublic or proprietary business, technical or financial information disclosed to the Receiving Party by or on behalf of the Disclosing Party pursuant to this Agreement and includes all information marked by the Disclosing Party as confidential or proprietary and any other information, whether written or oral, that the Receiving Party should reasonably understand is confidential or proprietary to the Disclosing Party.
- 15.1.5. **"Customer Data"** means all electronic data, files and records which are provided or made available by Customer or any User and received, processed or stored by Terryberry, its contractors or the Subscription Service as part of the Terryberry Services provided to Customer.
- 15.1.6. **"Customer Marks"** means all registered or common law Customer trademarks, trade names, Services marks, slogans, and logos and such other Customer trademarks or logos as Customer identifies from time to time to Terryberry for branding or other use in connection with the Services.
- 15.1.7. **"Intellectual Property"** means a Party's proprietary material, technology, or processes, including, but not limited to: services, software tools, proprietary framework and methodology, hardware designs, algorithms, works of authorship, inventions, deliverables, work product, trade secrets and developments objects and Documentation (both printed and electronic), network designs, know-how, trade secrets and any related intellectual property rights throughout the world (whether owned or licensed by a third party), and any derivatives, improvements, enhancements or extensions of such Intellectual Property conceived, reduced to practice, or developed. For avoidance of doubt, Intellectual Property of Terryberry shall also include Intellectual Property created, developed, conceived, acquired, authored or reduced to practice by or on behalf of a Terryberry, whether alone or jointly with others.
- 15.1.8. **"Order"** means Terryberry's quote accepted by Customer via Customer's purchase order or other ordering document received by Terryberry to order Terryberry's Services (including, but not limited to, a fully executed Order), which references the Services, pricing, payment terms, quantities, and other applicable terms set forth in an applicable Terryberry quote or ordering document.
- 15.1.9. **"Professional Services"** means implementation services, design services, consulting services and/or other professional services provided to Customer by Terryberry under a Order or SOW.
- 15.1.10. **"Prohibited Persons"** means anyone on the U.S. Commerce Department's Denied Persons, Entity, or Unverified Lists or the U.S. Treasury Department's list of Specially Designated Nationals and Consolidated Sanctions list.
- 15.1.11. **"SOW" or "Statement of Work"** means a written order executed by the Parties which identifies the Professional Services ordered by Customer, including the description, and associated fees.
- 15.1.12. **"Subscription Term"** means the period of time during which Customer is subscribed to the Subscription Services, as specified in an Order and which shall begin upon delivery of the Subscription Services.
- 15.1.13. **"Usage Data"** means data generated in connection with Customer's access, use and configuration of the Subscription Services and data derived from it (e.g., types of applications or accounts utilized or interacting with the Subscription Services).