



AttackIQ, Inc.
5703 San Diego, CA 92121
Oberlin Drive, Suite 306
USA

Click Through Cloud Software License Agreement

This License Agreement (the “**Agreement**”) is entered into between (“Licensee”) and AttackIQ, Inc. (“Licensor”). The parties hereto agree that the Software specified below shall be supplied by the Licensor and used by Licensee in strict compliance with all provisions of this Agreement. This Agreement sets forth the terms and conditions applicable to Licensor’s provision to Licensee of access to and use of the hosted version of Licensor’s software through its cloud service provider (the “**Hosted Service**”) and certain related services. You hereby represent and warrant that you are duly authorized by all necessary and appropriate corporate action to enter into this Agreement on behalf of Licensee. By clicking “I agree”, you acknowledge that you have read and accept the terms and conditions of this Agreement on behalf of Licensor in its entirety. This Agreement is effective as of the date that the Licensee clicks “I agree” when installing the Software (the “Effective Date”).

Hosted Service Description: FireDrill Security Control Validation Software

RECITALS

A. Licensor has developed the Hosted Service, including modifications, enhancements, improvements, updates, additions, object code compiled therefrom, documentation and related material.

B. Licensee intends to purchase annual subscriptions to the Hosted Service. Licensee may purchase such license directly from Licensor or, if applicable, one of Licensor’s authorized distributor or reseller partners (each, a “Distributor”).

NOW, THEREFORE, in consideration of the mutual covenants and premises herein contained, the parties hereto agree as follows:

1. Grant of Limited Commercial License.

- a. Subject to the terms and conditions of this Agreement, including Licensor’s receipt of all applicable fees, Licensor grants to Licensee during the applicable Subscription Term (as defined below) a non-exclusive, non-transferable, revocable license (the “License”) for Licensee’s employees or Authorized Contractors (as defined below) to access and use Hosted Service.

The term “License Metric” means the license unit of measurement or model applicable to the Hosted Service under which Licensee measures, prices, and sells the right to use the Hosted Service.

An authorized contractor (“Authorized Contractor”) shall mean a third party performing services for Licensee who has been pre-approved by Licensor.

Licensee agrees to require any and all Authorized Contractors to use the Hosted Service: (i) subject to the terms and conditions of this Agreement including all confidentiality obligations included in this Agreement; and (ii) solely and directly for the benefit of Licensee. Licensee shall remain solely responsible for each Authorized Contractor’s compliance with this Agreement.

Use of the Hosted Service is for the limited purpose of evaluating and validating the effectiveness of Licensee's security infrastructure, and for no other purpose.

For the purposes of this Agreement, the term

("Scenario") means: code and Artifacts packaged to test a specified Resource or set of Resources.

"Artifact" means any software-related documentation, executable file, or Resource produced by the software development process.

"Resource" can be one or more of the following: file, process, computer, or network.

- b. Licensee obtains this License for a period defined in in the Purchase Order or other ordering mechanism between Licensee and Reseller or Distributor to purchase the Hosted Service Licenses.

- 2. **Payment.** The license fee for use of the Hosted Service is defined in the Purchase Order or other ordering mechanism between Licensee and Reseller or Distributor to purchase the Hosted Service Licenses.

Failure to timely make any payment required shall result in termination of this Agreement in accordance with Section 12 (Termination) below.

- 3. **License Term.** The License Term for licensing the Hosted Service under this Agreement is documented by the Purchase Order Licensee has issued, or if applicable, other ordering mechanism between Licensee and Reseller or Distributor.

- 4. **Reporting.** Licensee shall make all test data, all data pertaining to the number of FireDrill Agents actually run by Licensee, and all error reports available to Licensor either upon termination or expiration of the Agreement, or at any time reasonably requested by Licensor. Licensor will use commercially reasonable efforts to consult with Licensee regarding the performance of the Hosted Service and will evaluate any test data and error reports provided by Licensee. Licensor, at its sole option, may undertake to modify and improve the Hosted Service as deemed appropriate by Licensor and may provide the same to Licensee at no cost.

Licensee agrees to promptly implement any such modifications or changes that Licensor may make to the Hosted Service during the Subscription Term as they are provided by Licensor. Licensee understands that these modifications and changes may be incompatible with previous modifications and could include substantial changes to the system and its operating procedures. Except as otherwise specified in this Agreement or at the written direction of Licensor, Licensee shall not alter or modify any Hosted Service during the Subscription Term without Licensor's prior written approval.

- 5. **Limited Use.** Licensee agrees to treat the Hosted Service as Licensor's Confidential Information, as defined below in this Agreement. Licensee will not use the Hosted Service for any purpose other than internal business use. Licensee will not without the express written authorization of Licensor:

- a. demonstrate, sell, resell, license, re-license, sublicense, distribute, market, distribute or grant other rights in the Hosted Service to any third party;
- b. run a greater number of FireDrill Agents or Scenarios per month than permitted under this Agreement;

- c. publish or otherwise disclose information relating to performance of the Hosted Service or produced using the Hosted Service to any third party (except as otherwise permitted herein);
- d. modify, disassemble, decompile, decrypt, reverse engineer reverse assemble or otherwise translate or attempt to derive the source code of the underlying software of the Hosted Service or any portion of it in any manner;
- e. provide access to the Hosted Service to anyone other than those employees of Licensee who need to know and who are legally bound by obligations of confidentiality to Licensee; or
- f. use any knowledge gained in the use of the Hosted Service to create, or otherwise cause to be created, any software or service having a similar purpose to the Hosted Service.
- g. gain or attempt to gain unauthorized access to any portion of the Hosted Service or its related systems,
- h. use unauthorized modified versions of the Service, including for the purpose of building a similar or competitive product or service or for the purpose of obtaining unauthorized access to the Hosted Service;
- i. install or use any portion of the Hosted Service on any of its computer systems, servers or networks (other than the client portion of the Hosted Service that is installed on Licensee's server);
- j. use the Hosted Service in a manner that is contrary to applicable law or in violation of any third party rights of privacy or intellectual property rights, including using the Hosted Service to send spam or otherwise duplicative or unsolicited messages in violation of applicable law;
- k. send or store obscene, pornographic, threatening, libelous, or other unlawful or indecent material;
- l. publish, post, upload or otherwise transmit any electronic data or information Licensee supplies under this Agreement, including all data or information Licensee uses, processes, or stores on the Hosted Service, as well any reports or other materials Licensee creates using the Hosted Service (collectively, "Licensee Data") that contains any viruses, worms, Trojan horses, time bombs, corrupted files or other malicious or harmful computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any systems, data, personal information or property of another;
- m. interfere with or disrupt the integrity or the operation of the Hosted Service or the data contained therein;
- n. create Internet links to or from any portion of the Hosted Service, "frame," "mirror" or "scrape" any content of the Hosted Service, or copy any features, functions, screens, interfaces or graphics of any portion of the Hosted Service, to give the impression that Licensee is offering the Hosted Service as a service located on its own systems; or
- o. use or knowingly permit the use of any security testing tools in order to probe, scan or attempt to penetrate or ascertain the security of the Hosted Service.

6. **Access.** Licensor will make the Hosted Service available to Licensee upon receipt of the applicable fees under this Agreement.
7. **No Use of Personal Information.** Notwithstanding any provision to the contrary in this Agreement, Licensee acknowledges and agrees that use of the Hosted Service to transmit, process or store Personal Information is unnecessary for Licensee's use of the Hosted Service. For purposes of this Agreement, "Personal Information" means (a) any information personal or unique to a specific individual; (b) all sensitive personal or financial information relating to a specific individual; and (c) any information that relates to or can be used to identify or contact a specific individual, such as first and last name, email address, telephone number, social security number, or financial account information. Accordingly, Licensee further acknowledges and agrees that, with respect to its operation of a Hosted Service under this Agreement, Licensor has no obligation to comply with any laws or regulations applicable or related to the privacy or security of Personal Information. Licensee shall be solely responsible for any use of Personal Information in connection with its use of the Hosted Service or its Users and Licensor shall have no risk or liability for such use by Licensee. In addition, Licensee specifically acknowledges and agrees that: (i) Licensor is not acting on Licensee's behalf as a Business Associate or subcontractor (as such terms are used, defined, or described in the Health Insurance Portability and Accountability Act of 1996, as amended and supplemented ("HIPAA")); (ii) the Hosted Service is not HIPAA-compliant; and (iii) Licensee may not use the Hosted Service in any manner that would require Licensor or the Hosted Service to be HIPAA-compliant.
8. **Technical Assistance.** Licensor will provide Licensee such technical assistance as reasonably necessary to properly operate the Hosted Service.
9. **Error Notice.** Licensee shall notify Licensor of any failure, error or other malfunction of any part of the Hosted Service within twenty-four (24) hours of such occurrence. Licensor is not responsible for any problems, failures, errors, or other malfunctions of any part of the Hosted Service that Licensor determines not to be directly attributable to the Hosted Service, including problems that are due in whole or in part to Licensee's hardware, firmware, other software, third-party applications, operating systems, data, accidental damage or matters generally beyond the control of Licensor, such as:
 - a. Use or operation of the Hosted Service except in accordance with the applicable and current documentation and license rights.
 - b. Errors, omissions, damages or wrongful acts, by an operator, end-user or third party personnel.
 - c. Operation on or in association with hardware or software not specified in the applicable documentation.
 - d. External causes such as electrostatic or environmental conditions, and accidents including fire, water, and lightning.
 - e. Problems with the Hosted Service caused by a security breach at the operating environment within which Licensee uses the Hosted Service.
10. **Ownership.**
 - a. This Agreement does not convey, grant or transfer any title or ownership of any other rights in or to the Hosted Service to Licensee other than the licenses granted under this Agreement. Licensor reserves all rights in and to the Hosted Service and any updates, upgrades, modifications or derivative works of the Hosted Service, as well as all copyrights, trade secrets, patents, or trademarks, inherent

in or used in connection with the Hosted Service, except for the rights expressly granted in this Agreement.

- b. As between the parties, Licensee shall own exclusively all right, title and interest in and to all Licensee Data. Licensee, however, grants to Licensor a non-exclusive, perpetual, royalty-free license (a) to use the Licensee Data to provide the Hosted Service to Licensee; and (b) to provide application technical support or otherwise at Licensee's request. Licensor shall not reveal the source of any Licensee Data, unless required to do so by law. For the avoidance of doubt, Licensor will not access or modify any Licensee Data without Licensee's consent in writing.

11. Suggestions. Licensor shall have a royalty-free worldwide, perpetual license to use, exploit and incorporate into the Hosted Service free of any confidentiality restrictions any suggestions, ideas, enhancement requests, feedback, recommendations or other information Licensee or its users may provide with respect to the Hosted Service. Licensor shall own all rights, title and interest in and to any version of the Hosted Service that incorporates such suggestions, ideas, enhancement requests, feedback or other information from Licensee or its users.

12. Confidential Information.

- a. Definition. "Confidential Information" means any information disclosed by either party to the other party, either directly or indirectly, in writing, orally or by inspection of tangible objects that a party has designated as "Confidential," "Proprietary" or some similar designation, or information the confidential or proprietary nature of which is reasonably apparent under the circumstances. Confidential Information includes any trade secret, information, process, technique, training manual, workbook, algorithm, computer program (source and object code), design, drawing, formula, business plan or test data relating to any research project, work in process, future development, engineering, manufacturing, marketing, servicing, financing, strategic partnership or personnel matter relating to the disclosing party, its present or future products, services, sales, suppliers, clients, customers, employees, investors or business, whether in oral, written, graphic or electronic form. If a party discloses Confidential Information verbally, it must identify such information as confidential at the time of disclosure.
- b. Exceptions. Each party's obligations with respect to the Confidential Information of the other party shall not apply to information that: (a) is becomes, through no act or failure to act on the part of the receiving party, generally known or available; (b) is rightfully known by the receiving party at the time of receiving such information as evidenced by its records; (c) is furnished to the receiving party by a third party following the Effective Date, as a matter of right and without restriction on disclosure; (d) is independently developed by the receiving party without any breach of this Agreement; or (e) is the subject of a written permission to disclose provided by the disclosing party.
- c. Obligations. Each party shall maintain all Confidential Information in trust and confidence and shall not disclose to any third party without the prior written consent of the other party or use any Confidential Information for any unauthorized purpose. Each party may use such Confidential Information only to the extent required to accomplish the purposes of this Agreement as set forth herein. Confidential Information shall not be used for any purpose or in any manner that would constitute a violation of any laws or regulations, including the export control laws of the United States. Each party shall use at least the same degree of care it uses to prevent the

disclosure of its own confidential information of like importance, which care shall be no less than reasonable care. Each party may disclose the other party's Confidential Information only to its directors, officers, employees, and advisors (each, a "Representative") who have a need to know and each of whom is bound by a written agreement in that includes confidentiality obligations consistent with those set forth in this Agreement. Each party shall be responsible for the compliance of each Representative with the terms and conditions of this Agreement. Each party shall promptly notify the other party of any actual or suspected misuse or unauthorized disclosure of the other party's Confidential Information.

- d. **Compelled Disclosure.** If the receiving party receives a subpoena or other administrative or judicial process requesting Confidential Information of the other party, the receiving party shall notify the disclosing party of such receipt to allow the disclosing party a reasonable opportunity to obtain a protective order. The receiving party may then comply with such subpoena or process to the extent required by law.
- e. **Return of Materials.** Each party shall return or destroy all Confidential Information of the other party and certify in writing within thirty (30) days as to its return or destruction, upon the earlier of a written request at any time by the other party or the termination of this Agreement or of all licenses granted under this Agreement.
- f. **Previous Confidentiality Agreement.** The parties hereby agree that this Section 4 is the entire agreement and understanding of the parties with respect to Confidential Information. If the parties have previously signed a non-disclosure agreement or other form of confidentiality agreement ("NDA"), the parties hereby agree that: (a) the NDA shall remain in effect, but shall apply to and govern only any exchanges of Confidential Information that occurred before the Effective Date of this Agreement; and (b) this Section 4 shall govern all exchanges of Confidential Information between the parties beginning as of the Effective Date of this Agreement.

13. Export Provisions

- a. For domestic United States deployments, the following provision applies: "This software is controlled for export by the United States government under the Export Administration Regulations. Purchaser is responsible to comply with these regulations if the software is to be exported from the United States. ECCN 5D002.c.1 is applicable."
- b. For deployments outside of the United States, the following provision applies: "This software is controlled by the U.S. government and authorized for export only to the country of ultimate destination for use by the ultimate consignee or end-user(s) herein identified. The software may not be resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized ultimate consignee or end-user(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations, ECCN 5D002.c.1. This software is exported pursuant to EAR License Exception ENC, 27 CFR § 740.17(b)(1)."

- 14. Termination.** Either party may terminate this Agreement immediately if the other party does not cure any material breach of this Agreement within thirty (30) days after receiving notice of such breach.

Upon termination of this Agreement, Licensee shall: (1) immediately cease all use of the Hosted Service, and (2) certify in writing as to such action. In addition, all payment

obligations of Licensee under this Agreement will become due immediately. Licensee agrees to not oppose any claims for injunctive relief made by Licensor in any court of law or other adjudicative body resulting from Licensee's failure to timely terminate use of the Hosted Service as described in this Section.

Notwithstanding the above, the Parties may come to a subsequent agreement terminating this Agreement before the Subscription Term specified in in the Purchase Order or other ordering mechanism between Licensee and Reseller or Distributor to purchase the Hosted Service Licenses has completed. In this event, the License is immediately revoked. Licensee is under no obligation to make any future Payments, but no part of any Payment already made will be refunded to Licensee (i.e., there will be no pro-rated refunds).

15. Disclaimer. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, LICENSOR PROVIDES THE HOSTED SERVICE ON AN "AS IS" BASIS WITHOUT ANY WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF DESIGN, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, SYSTEM INTEGRATION, QUIET ENJOYMENT AND NONINFRINGEMENT, OR WARRANTIES ARISING FROM A COURSE OF TRADE. LICENSOR DOES NOT WARRANT THAT THE HOSTED SERVICE WILL OPERATE ERROR-FREE. THE ENTIRE RISK ARISING OUT OF THE USE OR PERFORMANCE OF HOSTED SERVICE REMAINS WITH LICENSEE.

16. Limitations of Liability. EXCEPT FOR EITHER PARTY'S (A) BREACH OF CONFIDENTIALITY OBLIGATIONS, (B) INDEMNIFICATION OBLIGATIONS, OR (C) VIOLATION OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR: (1) ANY AMOUNT GREATER THAN THE TOTAL AMOUNTS ACTUALLY PAID BY LICENSEE FOR THE HOSTED SERVICE UNDER THE APPLICABLE PURCHASE ORDER; OR (2) ANY LOST REVENUE OR INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY, SPECIAL OR CONSEQUENTIAL DAMAGES, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING EXCLUSIONS AND LIMITATIONS WILL APPLY TO ALL CLAIMS AND ACTIONS OF ANY KIND, WHETHER BASED ON CONTRACT, TORT (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE), OR ANY OTHER GROUNDS.

17. Intellectual Property Indemnification. Licensor will defend and indemnify Licensee from all third-party claims, suits or proceedings (each, an "Action") that the Hosted Service infringes or misappropriates the intellectual property rights of such third party. Licensee may elect to participate in any such action with an attorney of its own choice and at its own expense.

- a. If the Hosted Service is, or in Licensor's opinion might be, held to infringe or misappropriate a third party's intellectual property rights or other proprietary rights, Licensor will: (i) repair or modify the infringing Hosted Service so it is non-infringing, (ii) replace such Hosted Service with a non-infringing version substantially similar in functionality, or (iii) procure the right for Licensee to continue the use of such Hosted Service. If (i), (ii) or (iii) are not commercially feasible, Licensee shall terminate its use of the Hosted Service and Licensor shall issue a prorated refund of any unused fees paid by Licensee to Licensor for such Hosted Service under the applicable purchase order.
- b. The indemnity obligations described in this Section 17 will not apply to the extent the misappropriation or infringement arises as a result of (1) modifications to the Hosted Service made by any party other than Licensor or Licensor's authorized

representative; (2) use of the Hosted Service in combination with other software or systems Licensor did not provide, where the misappropriation or infringement would not have occurred but for such combination; (3) use of a superseded or altered release of the Hosted Service, if the misappropriation or infringement would have been avoided by the use of a current, unaltered release of the Hosted Service; (4) use of the Hosted Service other than in accordance with the applicable documentation and this Agreement; or (5) any materials or information Licensee provided to Licensor. Licensee shall be solely responsible for, and shall defend Licensor against, any third party claims described in this paragraph.

- c. The indemnification obligations this Section 17 state Licensor's entire liability and Licensee's sole and exclusive remedy for alleged and actual intellectual property infringement.

18. Licensee's Indemnification. In addition to the claims described in Section 14.b above, Licensee will defend, indemnify and hold harmless Licensor from and against all third party Actions brought against Licensor or its Affiliates arising or related to: (a) the actual or alleged use of the Hosted Service by Licensee for anything other than its intended use or other use in violation of Section 4 (Limited Use); (b) assertions that the Licensee Data, or Licensee's use of the Hosted Service in violation of this Agreement, infringes or otherwise violates such third party's intellectual property, privacy or other rights; or (c) arising from or related to Licensee's use of Personal Information in violation of this Agreement. Such indemnification will include all damages and costs awarded, including attorneys' fees, and any cost of settling any suit or proceeding if the settlement is approved by Licensee or Licensee fails to meet its obligations to defend the suit or proceeding when requested by Licensor. Licensor may elect to participate in any such action with an attorney of its own choice and at its own expense. The indemnification obligations this Section 18 state Licensee's entire liability and Licensor's sole and exclusive remedy for alleged and actual claims by third parties described in this Section 18.

19. Indemnification Procedure. Upon becoming aware of an Action subject to indemnification under either Section 17 or 18, the party entitled to indemnification (the "Indemnified Party") will promptly provide written notice of such Action to the other party (the "Indemnifying Party") and give the Indemnifying Party all information and assistance reasonably required to defend or settle any such Action. The Indemnifying Party's indemnification obligation shall be offset to the extent its ability to defend or settle a claim is jeopardized by the Indemnified Party's failure to comply with the preceding sentence. The Indemnifying Party shall have sole control of any such Action or settlement negotiations. The Indemnifying Party will pay any amounts awarded to, or agreed upon in settlement with, the third party claimants in any such Action; except, that the Indemnified Party must approve in writing any settlement agreement that (a) does not include a full release of the Indemnified Party with respect to all third party claimants, (d) imposes any obligations on the Indemnified Party, or (c) adversely affects the Indemnified Party's rights or obligations under this Agreement.

20. Audit. During the term of this Agreement and for an additional one (1) year afterward, Licensee will maintain complete records regarding its use of the Hosted Service under this Agreement. Upon request, at mutually agreeable times, but not to exceed thirty (30) days from the date of the request and no more frequently than once annually, Licensee agrees to make available for audit all relevant records, solely to the extent they apply to this Agreement, and allow access to the operating facilities of Licensee using the Hosted Service as are reasonably necessary to confirm: (a) conformance with the terms of this Agreement; (b) proper payment of any license fees due under this Agreement; or (c) that any person or entity to whom Licensee has provided access to the Hosted Service has had

such access only in accordance with this Agreement. Licensor will conduct such audit through a certified public accountant of its choice, subject to a confidentiality agreement consistent with the terms of this Agreement. Licensor shall pay all costs related to the audit unless the audit reveals discrepancies amounting to five percent (5%) or more of the amounts Licensee owed during the audit period; in such case, Licensee will also pay for the reasonable costs associated with the audit.

- 21. Notice.** Any notice required by this Agreement shall be given by prepaid, first class, certified mail, return receipt requested, addressed to the below individuals, or such other addressees as may be provided from time to time under the terms of this notice provision.

For Licensor:

AttackIQ, Inc.
Attn: VP Finance
5703 Oberlin Drive, Suite 306
San Diego, CA 92121

For Licensee:

Licensee's Primary Mailing Address

- 22. Assignment.** Neither party may assign this Agreement, or its rights or duties hereunder, to any third party without prior written consent of the non-assigning party, which shall not be unreasonably withheld or delayed; except that such consent is not required if (a) either party assigns the Agreement to an affiliate of or a successor to such party, including an assignment to an unrelated entity in connection with a merger or acquisition with, or a sale of all or substantially all of its assets to, such other separate entity, as long as the assigning party provides written notice to the other party within a reasonable time following the completion of such assignment; or (b) Licensor assigns its right to receive payment. The Agreement will be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns.
- 23. Choice of Law.** The laws of the State of California and the United States of America shall govern all matters arising under or related to this Agreement, without reference to conflict of laws principles. All claims under this Agreement shall be brought and maintained in the state and federal courts located in San Diego, California, USA, and the parties hereby expressly consent (and waive any right to otherwise object) to the exclusive venue and jurisdiction of such courts.
- 24. Force Majeure.** Neither party shall be liable to the other for delays or failures in performance resulting from causes beyond the reasonable control of that party, including, but not limited to, acts of God, labor disputes or disturbances, material shortages or rationing, riots, acts of war, governmental regulations, communication or utility failures, or casualties each a "Force Majeure Event"). The delayed party must (a) give the other party prompt notice of the occurrence of a Force Majeure Event, and (b) use reasonable commercial efforts promptly to correct and otherwise reasonably mitigate such failure or delay in performance. The time of delivery or performance and time of payment shall be extended for a period of time equal to the time lost because of such Force Majeure Event. A Force Majeure Event may delay Licensee's obligation to pay amounts due under this Agreement, but shall not relieve Licensee of such obligation. The delayed party shall also promptly notify the other party when the Force Majeure Event has abated.
- 25. Headings; Construction.** Paragraph headings are included for convenience only and are not to be used to construe or to interpret this Agreement. If an ambiguity or question of intent arises with respect to any provision of this Agreement, the Agreement will be construed as if drafted jointly by the parties and no presumption or burden of proof will arise favoring

or disfavoring either party by virtue of authorship of any of the provisions of this Agreement. The words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation” or the phrase “but not limited to”. The word “will” shall be construed to have the same meaning and effect as the word “shall,” and vice versa.

- 26. Independent Contractors.** The parties to this Agreement are independent contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise or agency between Licensor and Licensee. Neither party’s officers, employees, agents or contractors will be deemed officers, employees, agents or contractors of the other party for any purpose. Neither party will have the power to bind the other or incur obligations on the other’s behalf. Each party will be solely responsible for payment of all compensation owed to its employees, as well as employment related taxes.
- 27. Laws and Regulations.** The parties shall comply with all applicable federal, state, and local laws, regulations, and ordinances in connection with its activities pursuant to this Agreement, including the export control regulations of the United States, in performing its obligations or exercising its rights under this Agreement.
- 28. Publicity and Advertising.** Neither party may use the name, logos, trademarks, service marks, or other proprietary identifying symbols of the other party in any press release, public statement, advertising, signage, marketing materials, brochures, or other materials in any medium, including any Internet-related materials, without the other party’s prior written consent. Any such permitted use shall comply with the guidelines or instructions provided by the other party. A party may revoke consent at any time for any reason upon written notice to the other party.
- 29. Severability.** Should any provision of the Agreement be held by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remaining provisions of this Agreement shall not be affected or impaired. The court or the parties may modify the invalid or unenforceable part, term or provision to the extent required to allow its enforcement in a manner most closely representing the intentions of the parties in entering into this Agreement.
- 30. Survival.** Those provisions which by their nature survive the termination of this Agreement shall survive and the obligations thereof continue for a period of five (5) years following termination, including: (a) Licensee’s obligation to pay all dollar amounts accrued or accruable under this Agreement prior to or following the date of such expiration or early termination; (b) any cause of action or claim of Licensee or Licensor, accrued or to accrue, because of any breach or default by the other party; and (c) the provisions of Sections 2 (Payment), 4 (Limited Use), and 8 through 31.
- 31. Waiver.** The waiver or failure of either party to exercise in any respect any rights provided for in this Agreement will not be deemed a waiver of any as to any other breach, whether similar or dissimilar in nature, or prevent the exercise of any other right under this Agreement.
- 32. Dispute Resolution.** Except in instances where a party is seeking equitable relief, any dispute arising out of or relating to this Agreement, whether based on contract, tort, or any other legal or equitable theory, will be resolved as follows: Upon notice by either party of a dispute, senior management for each party will meet and seek a resolution. If the parties do not resolve the dispute within 45 days from the initial notice, then the dispute must be submitted to mediation in San Diego County, California before a mediator mutually agreed upon by the parties. If the parties cannot mutually agree upon a mediator, then a mediator shall be selected by a Judge of the Superior Court of San Diego County of competent jurisdiction. If mediation fails to resolve the dispute, then either party may then begin litigation proceedings. Either party at any time may seek an injunction or other equitable remedies against the other party for misappropriation of trade secrets or breach

of confidentiality obligations without complying with the dispute resolution process in this Section.

- 33. Entire Agreement.** This Agreement embodies the entire understanding of the parties on the subject matter of this Agreement. It replaces and supersedes any previous agreements or understandings, written or oral, in effect between the parties relating to such subject matter. The parties may amend or supplement this Agreement only by an instrument signed by duly authorized representatives of both parties.