

## TERMS AND CONDITIONS (Enterprise Cloud)

Effective Date: September 1, 2022

PLEASE READ THESE TERMS AND CONDITIONS (“**TERMS**”) CAREFULLY BEFORE USING THE PLATFORM OFFERED BY NOTEABLE, INC. (“**NOTEABLE**”). BY MUTUALLY EXECUTING ONE OR MORE ORDER FORMS WITH NOTEABLE WHICH REFERENCE THESE TERMS (EACH, AN “**ORDER FORM**”), YOU (“**CUSTOMER**”) AGREE TO BE BOUND BY THESE TERMS (TOGETHER WITH ALL ORDER FORMS, SERVICE LEVEL AGREEMENT, COPYRIGHT DISPUTE POLICY, DATA PROCESSING ADDENDUM AND PRIVACY POLICY, THE “**AGREEMENT**”) TO THE EXCLUSION OF ALL OTHER TERMS. IN ADDITION, ANY ONLINE ORDER FORM WHICH YOU SUBMIT VIA NOTEABLE’S STANDARD ONLINE PROCESS AND WHICH IS ACCEPTED BY NOTEABLE SHALL BE DEEMED TO BE MUTUALLY EXECUTED. IF THE TERMS OF THIS AGREEMENT ARE CONSIDERED AN OFFER, ACCEPTANCE IS EXPRESSLY LIMITED TO SUCH TERMS.

**1. Definitions.** Certain definitions used in this Agreement are set forth below, other capitalized terms used herein shall have the respective meanings set forth elsewhere in this Agreement or in the Order Form.

**1.1. “Client-Side Software”** means any Noteable software in source or object code form that Noteable makes available to Customer for use in connection with the Platform.

**1.2. “Copyright Dispute Policy”** means Noteable’s Copyright Dispute Policy available at <https://www.noteable.io/legal/copyright-dispute-policy>.

**1.3. “Data Processing Addendum”** means Noteable’s Data Processing Addendum available at <https://www.noteable.io/legal/data-processing-addendum>.

**1.4. “Order Form”** means the cover page to this Agreement, an amendment to this Agreement or a supplemental order form, which shall be in writing and signed by both parties and shall specify Platform or [Professional Services] to be acquired by Customer.

**1.5. “Personal Information”** means any information that, individually or in combination, does or can identify a specific individual or by or from which a specific individual may be identified, contacted, or located, including without limitation all data considered “personal data”, “personally identifiable information”, or something similar under applicable laws, rules, or regulations relating to data privacy.

**1.6. “Platform”** means the platform and add-ons (if any) identified in an Order Form and any Client-Side Software.

**1.7. “Privacy Policy”** means Noteable’s Privacy Policy available at <https://www.noteable.io/legal/privacy-policy>.

**1.8. “Professional Services”** means training, migration, implementation, integration, or other professional services that are memorialized in writing in an Order Form or Statement of Work and provided to Customer in connection with its use of the Platform hereunder.

**1.9. “Service Level Agreement”** means Noteable’s Service Level Agreement available at <https://www.noteable.io/legal/service-level-agreement>.

**1.10. “Sensitive Data”** means (i) special categories of data enumerated in European Union Regulation 2016/679, Article 9(1) or any successor legislation; (ii) protected health information as defined in the Health Insurance Portability and Protection Act, as amended (“**HIPAA**”); (iii) payment cardholder information or financial account information, including bank account numbers or other personally identifiable financial information; (iv) social security numbers, driver’s license numbers, or other government identification numbers; (v) other information subject to regulation or protection under specific laws such as the Children’s Online Privacy Protection Act (“**COPPA**”) or the Gramm-Leach-Bliley Act (“**GLBA**”), in each case as amended, or related rules or regulations; or (vi) any data similar to the above protected under applicable laws, rules, or regulations.

**1.11. “Statement of Work”** means a written statement of work for Professional Services executed by both parties that incorporates this Agreement by reference.

**1.12. “Users”** means an employee, consultant, or independent contractor of Customer who has been authorized by Customer to use the Platform.

## **2. Usage & Restrictions.**

**2.1. Access and Use of the Platform.** Subject to the terms and conditions of this Agreement, including without limitation any usage limitations identified in the Order Form, Customer may, solely through its Users, access and use the Platform via the internet during the Term (as defined in the Order Form) on a non-exclusive, non-transferable, non-sublicensable basis. Such use is limited to Customer’s internal business purposes and the features and functionalities specified in the Order Form. The foregoing includes a limited license for Customer to install and use the Client-Side Software solely in

support of Customer's authorized use of the Platform. The Platform is subject to modification from time to time at Noteable's sole discretion, for any purpose deemed appropriate by Noteable. Customer will be responsible for maintaining the security of Customer's and its Users' accounts, passwords (including but not limited to administrative and User passwords) and files, and for all uses of Customer's and its Users' accounts with or without Customer's knowledge or consent. Customer will cooperate with Noteable in connection with the performance of this Agreement by making available such personnel and information as may be reasonably required, and taking such other actions as Noteable may reasonably request. Customer will also cooperate with Noteable in establishing a password or other procedures for verifying that only designated Users of Customer have access to any administrative functions of the Platform. Users may not share their account credentials with one another or any third party. Customer is responsible for all of the acts and omissions of its Users in connection with this Agreement and for all use of Users' accounts (whether or not authorized by Customer).

**2.2. Ownership.** Noteable and its licensors retain all right, title and interest in and to the Platform, all copies, modifications and derivative works thereof; all Noteable trademarks, names, logos; and all documentation for the Platform, including without limitation, all rights to patent, copyright, trade secret and other proprietary or intellectual property rights. Customer may (but is not obligated to) provide suggestions, comments or other feedback to Noteable with respect to the Platform ("**Feedback**"). Feedback, even if designated as confidential by Customer, shall not create any confidentiality obligation for Noteable notwithstanding anything else. Noteable acknowledges and agrees that all Feedback is provided "AS IS" and without warranty of any kind. Customer shall, and hereby does, grant to Noteable a nonexclusive, worldwide, perpetual, irrevocable, transferable, sublicensable, royalty-free, fully paid up license to use and exploit the Feedback for any purpose. This Agreement is not a sale and does not convey to Customer any rights of ownership in or related to the Platform, or any intellectual property rights.

**2.3. Restrictions.** Customer will not and will not allow its Users or a third party to: (i) decompile, reverse engineer, disassemble or otherwise attempt to derive, analyze or use any source code or underlying ideas or algorithms related to the Platform by any means whatsoever; (ii) use or allow the use of the Platform by or for the benefit of third parties, including without limitation by renting, leasing, lending, timesharing, or using for service bureau purposes; (iii) disseminate benchmark performance information or analysis for purposes other than internal issue resolution or as requested by Noteable; (iv) sell, reproduce, distribute, translate or market the Platform; (v) modify or create derivative works based on the Platform; (vi) use the Platform in any infringing, defamatory, harmful, fraudulent, illegal, violent, deceptive, threatening, harassing, or obscene way; (vii) compromise the performance, security or integrity of our Platform or related systems, network or data by probing, scanning, monitoring, crawling, or testing the vulnerability of the Platform or any system or network that hosts the Platform; (viii) tamper with, hack or circumvent any security or authentication measures, or attempt to gain unauthorized access to the Platform, related systems, networks or data; (ix) harvest or scrape any Content; (x) use the Platform to make or distribute malware or spyware (including remote user surveillance); (xi) use the Platform to engage in phishing, extortion, fraud, or mining of cryptocurrencies; or (xii) use the Platform other than in accordance with this Agreement and in compliance with all applicable laws, regulations and rights (including but not limited to those related to privacy intellectual property, consumer and child protection, SPAM, text messaging, obscenity or defamation). Customer is responsible for any breach, compromise or violation, by Customer employees, consultants, or independent contractors, of such obligations and Noteable's rights and title to the Platform.

**2.4. Irreparable Injury.** Customer acknowledges that there is no adequate remedy at law for a breach of this Section 2, that such breach would irreparably harm Noteable for which monetary damages would be inadequate and that Noteable is entitled to injunctive and equitable relief in addition to any other remedies.

**3. Professional Services.** Noteable will perform Professional Services as described in an Order Form or Statement of Work. Customer will provide Noteable all reasonable cooperation required for Noteable to perform the Professional Services, including without limitation timely access to any reasonably required Customer materials, information, or personnel. Subject to any limitations identified in an Order Form or Statement of Work, Customer will reimburse Noteable's reasonable travel and lodging expenses incurred in providing Professional Services. To the extent the Professional Services result in any software code or other tangible work product ("**Work Product**"), all such Work Product will remain owned solely and exclusively by Noteable and may be used by Customer solely in connection with Customer's authorized use of the Platform under this Agreement.

**4. Support & Maintenance.** Provided that Customer is in compliance with the terms and conditions of this Agreement and has paid the applicable fees, Noteable shall provide the support and maintenance services for the Platform as described in the Service Level Agreement applicable to the Support Tier identified in the Order Form.

## **5. Customer Content.**

**5.1. Content Ownership and License.** Noteable will obtain and process certain content or data provided by or on behalf of Customer ("**Content**") only to perform its obligations under this Agreement. By submitting Content through the Platform, Customer hereby grants Noteable a worldwide, non-exclusive, perpetual, royalty-free, fully paid sublicensable and transferable license to use, edit, modify, truncate, aggregate, reproduce, distribute, display and perform the Content in

connection with the Platform and Noteable's (and its successors' and assigns') businesses. To the extent that Customer agrees to make any Content available to Noteable's other customers through the functionality provided on the Platform, Customer also hereby grants each such customer a worldwide, non-exclusive, perpetual, royalty-free, fully paid, sub licensable and transferable license to access the Content through the Platform, and to use, edit, modify, reproduce, distribute, prepare derivative works of, display and perform such Content, including after the termination of Customer's account on the Platform. Customer and its licensors shall (and Customer hereby represents and warrants that they do) have and retain all right, title and interest (including, without limitation, sole ownership of) all Content distributed through the Platform and the intellectual property rights with respect to that Content without infringement or violation of any third party rights, including without limitation, any privacy rights, publicity rights, copyrights, trademarks, contract rights, or any other intellectual property or proprietary rights.

**5.2. Copyright Disputes.** Customer acknowledges and agrees to the Copyright Dispute Policy, which is hereby incorporated by reference. If Noteable receives any notice or claim that any Content, or activities hereunder with respect to any Content, may infringe or violate rights of a third party, Noteable may (but is not required to) suspend activity hereunder with respect to that Content or remove such Content in its sole discretion.

**5.3. Safeguards.** Noteable will implement and maintain commercially reasonable administrative, physical, and technical safeguards designed to protect Content from unauthorized access, use, alteration, or disclosure.

**5.4. Personal Information.** To the extent Content includes any Personal Information, Noteable's rights and obligations with respect to such Personal Information are set forth in Noteable's Privacy Policy, to the extent Content includes any Personal Information from a data subject that is subject to (i) European Union's General Data Protection Regulation ("EU GDPR"), (ii) EU GDPR as it forms part of the law of England and Wales by virtue of section 3 of the European Union (Withdrawal) Act 2018 ("UK GDPR"), (iii) the UK Data Protection Act 2018, (iv) Swiss Federal Act on Data Protection, or (v) California Consumer Privacy Act ("CCPA"), the Data Processing Addendum, each of which is hereby incorporated by reference. Notwithstanding the foregoing, Customer acknowledges and agrees that: (i) the Platform is not designed to store Sensitive Data; and (ii) Customer will not use the Platform to store Sensitive Data and will not submit, post, or otherwise transmit through the Platform any Content that includes or constitutes Sensitive Data.

**6. Third Party Services.** Customer acknowledges and agrees that the Platform operates on or with or using application programming interfaces (APIs) and/or other services operated or provided by third parties ("Third Party Services"). Noteable is not responsible for the operation of any Third Party Services nor the availability or operation of the Platform to the extent such availability and operation is dependent upon Third Party Services. Customer is solely responsible for procuring any and all rights necessary for it to access Third Party Services and for complying with any applicable terms or conditions thereof. Noteable does not make any representations or warranties with respect to Third Party Services or any third party providers. Any exchange of data or other interaction between Customer and a third party provider is solely between Customer and such third party provider and is governed by such third party's terms and conditions. Certain aspects of the Platform, such as the Client-Side Software, may contain or be distributed with open source software code or libraries ("Open Source Components"). Noteable will provide a list of Open Source Components for a particular version of any distributed portion of the Platform, such as the Client-Side Software, on Customer's request. To the extent required by the license applicable to such Open Source Components: (i) Noteable will use reasonable efforts to deliver to Customer any notices or other materials (such as source code); and (ii) the terms of such licenses will apply to such Open Source Components in lieu of these Terms. To the extent the terms of such licenses prohibit any of the restrictions in these Terms with respect to any particular Open Source Component, such restrictions will not apply to such Open Source Component. To the extent the terms of such licenses require Noteable to make an offer to provide source code or related information in connection with the Open Source Component, such offer is hereby made. For purposes of clarity, Open Source Components are Third-Party Services.

## **7. Term & Termination.**

**7.1. Term.** Unless earlier terminated in accordance with [Section 7.2](#), this Agreement shall become effective on the Effective Date of the first (1<sup>st</sup>) Order Form entered into by the parties that incorporates this Agreement by reference and will remain in effect until the date that is six (6) months after the expiration or termination of the last Order Form entered into by the parties that incorporates this Agreement by reference. Each Order Form will be effective during the Term set forth thereon.

**7.2. Termination.** This Agreement may be terminated (i) by either party upon 30 days prior written notice in the event of a material breach of a material provision of this Agreement by the other party which is not cured within such period; (ii) by either party, immediately, if the other shall seek protection under any bankruptcy, receivership, trust deed, creditors arrangement, composition or comparable insolvency proceeding, or if any such insolvency proceeding is instituted against the other (and not dismissed within 120 days). In addition, either party may terminate this Agreement for convenience on 15 days prior written notice if there are no then-current effective Order Forms in place.

**7.3. Effects of Termination.** Upon termination of this Agreement, all licenses granted hereunder shall terminate and Customer shall immediately cease use of the Platform, provided that [Sections 2.2, 2.3, 2.4, 7.3, 9, 10, 11, 12, and 13](#), and any rights to payment shall survive any expiration or termination of this Agreement. Termination is not the sole remedy under this Agreement and, whether or not termination is effected, all other remedies will remain available.

## **8. Fees & Payment Terms.**

**8.1. Fees.** Customer shall pay to Noteable all fees, in U.S. dollars, specified in any Order Form (collectively, the “Fees”).

**8.2. Expenses.** Customer is responsible for all reasonable costs and expenses (including without limitation reasonable travel and out-of-pocket expenses) incurred by Noteable in connection with its performance of this Agreement.

**8.3. Payment Terms.** Except as specified in an Order Form, all amounts are due and payable within 30 days after invoice date. Unpaid Fees are subject to a finance charge of one percent (1.0%) per month, or the maximum permitted by law, whichever is lower, plus all expenses of collection, including reasonable attorneys’ fees.

**8.4. Taxes.** Any amounts payable hereunder are exclusive of, and Customer shall be responsible for, all sales taxes, value added taxes, duties, use taxes, withholdings and other governmental assessments, excluding taxes based on the net income of Noteable, unless Customer provides to Noteable a valid tax-exempt certificate.

**9. Warranty Disclaimer.** EXCEPT AS OTHERWISE STATED HEREIN, NEITHER NOTEABLE NOR ITS SUPPLIERS MAKE ANY OTHER WARRANTIES, AND HEREBY DISCLAIM ALL OTHER WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, CORRECTNESS OR RELIABILITY RELATING TO PATIENT INFORMATION, REGARDING THE USE AND RESULTS OF THE PLATFORM, OR THAT USE WILL BE UNINTERRUPTED OR ERROR-FREE, AND ALL WARRANTIES ARISING OUT OF COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE IN TRADE.

**10. Limitations.** NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, NOTEABLE, AND ITS SUPPLIERS WILL NOT BE LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT, UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL OR EQUITABLE THEORY FOR (I) ANY AMOUNTS IN EXCESS, IN THE AGGREGATE, OF THE FEES PAID BY CUSTOMER HEREUNDER IN THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE CLAIM; (II) ANY INDIRECT, INCIDENTAL, EXEMPLARY, SPECIAL, RELIANCE OR CONSEQUENTIAL DAMAGES INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS; (III) COST OF PROCUREMENT OF SUBSTITUTE GOODS, TECHNOLOGY OR SERVICES; (IV) FOR LOSS, INACCURACY, OR CORRUPTION OF DATA OR INTERRUPTION OF USE; OR (V) FOR ANY MATTER BEYOND ITS REASONABLE CONTROL. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

## **11. Indemnification.**

**11.1. Noteable Indemnity.** Noteable will: (i) defend and settle, at its option, any claims, suits, actions, or proceedings brought by an unaffiliated third party (each a “**Third Party Claim**”) brought against Customer arising from any allegation by such third party that the Platform infringes or misappropriates a valid United States patent, copyright or trade secret right of such third party; and (ii) indemnify Customer against any losses, liabilities, or expenses incurred (including reasonable attorneys’ fees), as well as amounts finally awarded in a settlement or by a court, in connection with any such Third Party Claim. If the Platform becomes or, in Noteable’s opinion, is likely to become the subject of an injunction, Noteable may, at its option, (a) procure for Customer the right to continue using the Platform, (b) replace or modify the Platform so that it becomes non-infringing without substantially compromising its functionality, or, if (a) and (b) are not reasonably available to Noteable, then (c) terminate the Order Form under which the Platform has been made available to Customer and refund to Customer any Subscription Fees (as defined in the applicable Order Form) actually prepaid by Customer for the Platform covering the remainder of the Initial Term or then-current Renewal Term (as applicable) under the applicable Order Form. The foregoing states the entire liability of Noteable with respect to infringement of patents, copyrights, trade secrets or other intellectual property rights.

**11.2. Exclusions.** The foregoing obligations shall not apply to: (i) the Platform being combined or bundled with any products, processes or materials not provided or approved by Noteable where the alleged infringement relates to such combination; (ii) Customer continues allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement; (iii) Customer’s use of the Platform is not strictly in accordance with this Agreement; or (iv) infringement or misappropriation of any proprietary right in which Customer has an interest.

**11.3. Customer Indemnity.** Customer will: (i) defend and settle, at its option, any Third Party Claims brought against Noteable arising from (a) an alleged violation of the restrictions set forth in [Sections 2.3](#) or 5 otherwise from Customer’s use of the Platform or (b) that any Content, or either party’s authorized activities hereunder with respect to any Content,

infringes or violates the rights of a third party; and; and (ii) indemnify Noteable and its affiliates and its and their respective directors, officers, employees, contractors, agents, successors, and assigns against any losses, liabilities, or expenses incurred (including reasonable attorneys' fees), as well as amounts finally awarded in a settlement or by a court, in connection with any such Third Party Claim.

**11.4. Indemnity Procedures.** The party seeking indemnification or defense (the "Indemnified Party") will provide the party from whom indemnification or defense is sought: (i) prompt written notice of any Third Party Claim; (ii) sole control of the defense and settlement of the Third Party Claim (provided that neither party may enter into a settlement or otherwise dispose of a Third Party Claim in a manner that imposes any obligation on the other party without the other party's prior written consent, such consent not to be unreasonably withheld, conditioned, or delayed); and (iii) reasonable assistance, at the Indemnified Party's request and expense, in the defense and settlement of the Third Party Claim.

## **12. Confidential Information.**

**12.1. Definition.** Each party agrees that the business, technical and financial information, including without limitation, the Platform, source code, inventions, algorithms, know-how and ideas and the terms and conditions of this Agreement, that is designated in writing as confidential, or is disclosed in a manner that a reasonable person would understand the confidentiality of the information disclosed, shall be the confidential property of the disclosing party and its licensors ("Confidential Information"). Confidential Information does not include information that (i) is previously rightfully known to the receiving party without restriction on disclosure, (ii) is or becomes known to the general public, through no act or omission on the part of the receiving party, (iii) is disclosed to the receiving party by a third party without breach of any separate nondisclosure obligation, or (iv) is independently developed by the receiving party without use or reliance on the Confidential Information.

**12.2. Confidentiality.** Except as expressly and unambiguously allowed herein, the receiving party will hold in confidence and not use or disclose any Confidential Information and shall similarly bind its employees, consultants, and independent contractors in writing to confidentiality restrictions at least as restrictive as those contained herein.

**12.3. Return of Confidential Information.** Upon the expiration or termination of this Agreement, all of the Confidential Information (including any copies) will be returned to the disclosing party, and receiving party will make no further use of such materials.

**12.4. Required Disclosure.** If required by law, the receiving party may disclose Confidential Information of the disclosing party, but will give adequate prior notice of such disclosure to the disclosing party to permit the disclosing party to intervene and to request protective orders or other confidential treatment therefor.

**12.5. Relief.** Money damages will not be an adequate remedy if this [Section 12](#) is breached and, therefore, either party may, in addition to any other legal or equitable remedies, seek an injunction or other equitable relief against such breach or threatened breach without the necessity of posting any bond or surety.

## **13. General.**

**13.1. Relationship of Parties.** The parties hereto shall each be independent contractors in the performance of their obligations under this Agreement, and nothing contained herein shall be deemed to constitute either party as the agent or representative of the other party, or both parties as joint venturers or partners for any purpose.

**13.2. Publicity.** Noteable may identify Customer as a user of the Platform and may use Customer's name, logo, and other trademarks in Noteable's customer list, press releases, blog posts, advertisements, and website (and all use thereof and goodwill arising therefrom shall inure to Customer's sole and exclusive benefit). Otherwise, neither party may use the name, logo, or other trademarks of the other party for any purpose without the other party's prior written approval.

**13.3. Notices.** Notices under this Agreement shall be sufficient only if in writing and personally delivered, delivered by a major commercial rapid delivery courier service or mailed by certified or registered mail, return receipt requested to a party at the address first set forth herein or as amended by notice pursuant to this subsection, and if such notice is sent to Noteable, such notice shall be addressed to the attention of "Legal".

**13.4. Force Majeure.** If either party is unable to perform any of its obligations under this Agreement, other than payment obligations, due to any cause beyond the reasonable control of such party, the affected party's performance shall be extended for the period of its inability to perform due to such occurrence.

**13.5. Export Control.** Customer shall comply with the U.S. Foreign Corrupt Practices Act and all applicable export laws, restrictions and regulations of the U.S. Department of Commerce, and any other applicable U.S. and foreign agency or authority. Customer represents and warrants that it is not (i) a person or entity that is the target of sanctions administered by U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), or other relevant sanctions authority or (ii) located

in a Crimea Region of Ukraine, Cuba, Iran, North Korea and Syria. Violation of this Section 13.5 will result in immediate termination of this Agreement.

**13.6. Headings.** Headings and captions used in this Agreement are for convenience only and are not to be used in the interpretation of this Agreement.

**13.7. Assignment.** This Agreement and the rights and obligations herein may not be assigned or otherwise transferred, in whole or in part, whether by operation of law or otherwise, by Customer without Noteable's prior written consent. Noteable may freely assign this Agreement. Any assignment in violation of this provision is void and without effect. In the case of any permitted assignment or transfer of or under this Agreement, this Agreement or the relevant provisions shall be binding upon, and inure to the benefit of, the successors and permitted assigns of the parties hereto.

**13.8. Governing Law.** This Agreement shall be governed by and construed under the laws of the State of California and the United States without regard to conflicts of laws provisions thereof.

**13.9. Arbitration.** Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the JAMS Streamlined Arbitration Rules and Procedures (the "Rules") then in effect, by one commercial arbitrator with substantial experience in resolving intellectual property and commercial contract disputes. The arbitrator shall be selected from the appropriate list of JAMS arbitrators in accordance with such Rules. Judgment upon the award rendered by such arbitrator may be entered in any court of competent jurisdiction. Notwithstanding the foregoing, each party will have a right to seek injunctive or other equitable relief in any court of competent jurisdiction. The prevailing party will be that party who may be fairly said by the arbitrator(s) to have prevailed on the major disputed issues. Customer hereby consents to the arbitration in the State of California in the county of San Francisco.

**13.10. Attorneys' Fees.** In any action or proceeding to enforce rights under this Agreement, the prevailing party shall be entitled to recover its costs, expenses and attorneys' fees.

**13.11. Severability.** If any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement otherwise remains in full force and effect and enforceable.

**13.12. Entire Agreement.** This Agreement together with the exhibits hereto and any Order Forms, constitute the entire agreement between the parties relating to the subject matter hereof and supersede all proposals, letters of intent, memoranda of understanding, or discussions, whether written or oral, relating to the subject matter of this Agreement and all past dealing or industry custom.

**13.13. Waiver.** No provision of, right or privilege under this Agreement shall be deemed to have been waived by any act, delay, omission or acquiescence on the part of any party, its agents or employees, but only by an instrument in writing duly executed by both parties. No waiver by any party of any breach or default of any provision of this Agreement by the other party shall be effective as to any other breach or default, whether of the same or any other provision and whether occurring prior to, concurrent with, or subsequent to the date of such waiver.

**13.14. Modification.** No modification of this Agreement shall be effected by either party's use of any order form, purchase order, acknowledgement, shrinkwrap, boxtop, or clickwrap license, or other form containing additional or different terms. This Agreement may only be modified by an Order Form or an instrument in writing duly executed by both parties, making specific reference to this Agreement and the clause to be modified.

**13.15. Counterparts.** This Agreement may be executed in one or more counterparts, all of which shall constitute the same instrument.