

# HEAVY CONSULTING STANDARD TERMS AND CONDITIONS

These Heavy Consulting Standard Terms and Conditions (“**Heavy Consulting Terms and Conditions**”) apply to all services provided by Chris De Vita. O/A Heavy Consulting, doing business as Heavy Consulting, a corporation organized under the laws of the Province of Ontario, with its principal place of business at 3007-600 Fleet Street, Toronto, ON, M5V 1B7 (“**Heavy Consulting Incorporated**” or “**Heavy Consulting**”) to Customer (defined below). Heavy Consulting and Customer hereinafter may be referred to individually as a “**Party**” and collectively as the “**Parties**”.

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## 01. The Heavy Consulting Agreement

(a) Unless otherwise agreed in an Engagement Agreement, Heavy Consulting reserves the right to make changes to these Heavy Consulting Terms and Conditions. Heavy Consulting will notify Customer of changes by: (a) posting a notice on the Heavy Consulting website for a period of 30 days before such changes will become effective (“**Effective Change Date**”); and/or (b) sending Customer an email notification of such changes at least 30 days prior to the Effective Change

Date. As of the Effective Change Date, the most current and up to date version of these Heavy Consulting Terms of Use will be accessible on the website and the continued use of the Services will signify continued acceptance to the revised Heavy Consulting Terms and Conditions.

(b) In the event of a conflict between these Heavy Consulting Terms and Conditions and an applicable Engagement Agreement, the terms and conditions of the Engagement Agreement shall govern with respect to the conflict.

## 02. Definitions

The following definitions shall apply to this Agreement:

(a) “**Affiliate**” has the meaning ascribed to such term under the Canada Business Corporations Act.

(b) “**Agreement**” means an applicable Engagement Agreement and these Heavy Consulting Terms and Conditions, including any documents incorporated by references or attached thereto.

(c) “**Confidential Information**” means any and all information related to past, present or future business plans, activities, products, policies, services, suppliers, partners, prospective or current customers and any other business or technical information, data or know-how disclosed either directly or indirectly by a Party (the “**Disclosing Party**”) to the other Party (the “**Receiving Party**”), its affiliates or its representatives to the Receiving Party or its representatives, including without limitation all financial information (including user fees), source documentation, analysis, technical, operational, sales or marketing information, intellectual property, strategies and trade secrets, whether written, graphic, oral, pictorial, physical, computer-read, electronic or any other form or medium whatsoever and received by the Receiving Party and labelled as confidential or that ought to be reasonably considered to be confidential from its nature or the circumstances surrounding its disclosure.

(d) “**Customer**” means the customer of the Services that agrees to this Agreement through an Engagement Agreement, and its Affiliates.

(e) “**Customer IP**” means all Customer (or agent of Customer) originating intellectual property specifically identified as such to Heavy Consulting in writing, which for clarity does not include Products and Heavy Consulting Property.

(f) “**Customer Personnel**” means any personnel of Customer that receives the Services or Products.

(g) “**Dispute**” shall mean a disagreement concerning or relating to this Agreement or the Services that the Parties have been unable to resolve by the normal and routine channels ordinarily used for such matters with customer service representatives or other designated personnel of each Party handling inquiries and complaints through informal contact.

(h) “**Effective Date**” means the effective date set out on an applicable Engagement Agreement or the date Customer agrees to an Engagement Agreement through an online process.

(i) “**Engagement Agreement**” means any online engagement agreement, engagement document, term sheet or cover letter entered into by the parties with reference to these Heavy Consulting Terms and Conditions.

(j) “**Fees**” means the fees set out in an applicable Engagement Agreement, or chargeable in accordance with this Agreement, for Services and Products.

(k) “**Hardware**” means any third-party hardware procured by Customer from Heavy Consulting in accordance with this Agreement.

(l) “**Initial Term**” means the initial term for an applicable Engagement Agreement set out in the applicable Engagement Agreement.

(m) “**Heavy Consulting Property**” means rights (including all intellectual property rights) in and to the Services, all documentation, materials, technology, techniques with general application that are conceived by Heavy Consulting (whether or not conceived first with respect to the Services), general designs, operational concepts and know how, operational formulas and tools owned by Heavy Consulting and provided by Heavy Consulting to Customer or used to provide the Services, including without limitation the hardware and software provided or made available by Heavy Consulting in connection with the Services, and any trademarks or service marks of Heavy Consulting (other than Customer IP and Products and associated materials and documentation), except for Products and Customer IP.

(n) “**Personal Information**” has the meaning ascribed to such term under the Personal Information Protection and Electronic Documents Act.

(o) “**Products**” means third party Hardware, maintenance services, software and/or firmware purchased pursuant to this Agreement.

(p) “**Work Products**” means all deliverables and other materials, text, drawings, specifications, reports, notes, documentation, software, and any other work product developed by Heavy Consulting in the performance of the Services which are provided to Customer under an Engagement Agreement.

### 03. Provision of Services.

(a) Description of Services. Subject to and in accordance with the terms of this Agreement, Heavy Consulting hereby agrees to provide to Customer with the services (“Services”) subscribed to in the corresponding Engagement Agreement, which may include service descriptions and additional terms and conditions. Any change in the Services (including any addition or modification thereto) must be agreed upon in writing by Heavy Consulting and Customer. All Engagement Agreements applying to the Services are hereby incorporated into this Agreement by this reference.

(b) Implementation of the Services. Heavy Consulting agrees to implement the Services in accordance with this Agreement, including the applicable implementation terms in the Engagement Agreement. Customer agrees to, and, if applicable, agrees to cause its third-party providers to, provide Heavy Consulting with all reasonably requested assistance to enable Heavy Consulting to implement the Services in accordance with the applicable Engagement Agreement.

(c) Use of Heavy Consulting Personnel: Heavy Consulting shall have exclusive authority for making decisions concerning the use of its personnel to provide the Services, including the right to re-assign personnel, provided that the Services continue to be rendered in accordance with the terms and conditions of this Agreement.

(d) Professional Services: Upon Customer request, Heavy Consulting may provide additional professional services at Heavy Consulting's then current time and materials rates ("Professional Services").

(e) Applicable Law: Each Party shall comply with all laws applicable to such Party with respect to the provision and receipt of the Products and Services, as applicable. Customer is fully responsible and liable for Customer Personnel.

#### 04. Subcontractors and Data Storage

(a) Customer agrees that, in providing the Services, Heavy Consulting may use contractors or 3rd party providers. Heavy Consulting acknowledges and agrees that it is the prime contractor responsible for the performance of the Services in accordance with this Agreement and will remain responsible for the performance of all or any part of its obligations performed by any Heavy Consulting subcontractor to the same extent as if such obligations were performed by Heavy Consulting. Any breach of this Agreement by any Heavy Consulting subcontractor will be deemed to be a breach of this Agreement by the Customer. Heavy Consulting shall not be relieved of any of its obligations as a result of any such delegation.

(b) Where the Services involve the storage of Customer data, and unless otherwise agreed in an Engagement Document, the applicable servers will be located in North America. Customer data may be accessed by Heavy Consulting or its subcontractors outside of North America.

(c) Customer is solely responsible for disaster recovery, business continuity and all backing up of Customer data, either on their own or through the use of a third-party provider, unless the same explicitly forms part of the Services provided by Heavy Consulting. Where Heavy Consulting is managing or storing Customer data, it agrees to provide reasonable cooperation with applicable third-party providers of Customers, provided that there are appropriate confidentiality agreements in place between the applicable third-party provider and Heavy Consulting.

#### 05. Services to Customer Affiliates.

(a) If requested by Customer, Heavy Consulting will provide the Products and Services to any Customer Affiliate in Canada and elsewhere as agreed in an applicable Engagement Agreement as if such Services were provided directly to Customer. Heavy Consulting's provision of the

Services to a Customer Affiliate will not render it a third-party beneficiary under this Agreement. Unless a Customer Affiliate executes a separate agreement with Heavy Consulting:

- (i) Customer will be responsible for the compliance by the Customer Affiliates with the terms and conditions of this Agreement, including the payment terms; and
  - (ii) only Customer will be entitled to enforce the rights or remedies available to Customer or a Customer Affiliate under this Agreement and Customer Affiliates will not be entitled to do so directly.
- (b) The provision of Services to Customer Affiliates will not have the effect of increasing the aggregate limitation of liability of Heavy Consulting.

#### 06. Provision of Products.

- (a) As part of the Services, Heavy Consulting may provide Products in accordance with the additional terms and conditions set out in an Engagement Agreement.
- (b) Customer assumes the risks of loss and damage to any Product that has been delivered to its premises. The Product is billable to the Customer upon delivery, provided that the Product was ordered by Customer, and the Product is not visibly damaged. Title to Product shall transfer to Customer upon payment in full of all Fees and Taxes (as defined below).
- (c) By installing (or having Heavy Consulting install) or using Products, Customer agrees that software included with the Product is licensed strictly in accordance with the terms provided by the OEM. Once title and risk of loss has passed to Customer, Heavy Consulting is not responsible for any defect in the Product.
- (d) Sections 13 and 16 do not apply to Products. Any warranty, indemnity and liability for Product will be provided by the OEM and will accompany the Product. Any warranty, indemnity and liability provided with Product will be between Customer and the OEM. Heavy Consulting will have no liability to Customer in connection with such warranty, indemnity and liability obligations.
- (e) Unless otherwise set out in an Engagement Agreement, Customer is responsible for payment of all charges for transportation, duty, customs clearance, insurance, brokerage, as well as any other applicable charges and costs from the point of shipment of the Product.
- (f) Hardware Products may be sold, rented or leased to Customer in accordance with an Engagement Document.

#### 07. Customer Obligations

- (a) The Customer shall:

(i) comply, and cause its Customer Personnel to comply, with this Agreement and all laws applicable to Customer in its receipt of the Services, including all applicable privacy laws and laws pertaining to the use of third-party intellectual property;

(ii) unless provided by Heavy Consulting as part of the Services, be responsible for the supply (including obtaining necessary licenses and authorizations), installation and maintenance of any software, material, equipment at each site that is necessary to receive the Services. Customer shall ensure that Customer provided equipment and software is (A) installed, maintained, secured, used and stored in a manner and an environment that conform to the manufacturer's specifications and license requirements, and any reasonable specifications provided by Heavy Consulting; and (B) compatible with the Products requested by Customer.

(iii) obtain and maintain all third party licenses, authorizations, permissions and consents necessary to permit Heavy Consulting and/or the Heavy Consulting subcontractors prompt and safe access to Customer's premises, Products and Customer provided equipment and software, so they can perform Heavy Consulting's obligations and enforce Heavy Consulting's rights under this Agreement, provided that Heavy Consulting and all Heavy Consulting's agents comply with all reasonable site access requirements at each Customer premises;

(iv) be responsible for use of the Services and Products, including through access points, by any party other than Heavy Consulting, including Customer Personnel (collectively, "End Users"), and take all necessary measures to ensure that the End Users use the Services and Products in accordance with the terms and conditions of this Agreement;

(v) comply and cause its End Users to comply with any third-party software license terms and conditions for software used by the Customer and/or its End Users in connection with the use of the Services and Products;

(vi) consent and ensure its End Users consent to receive software downloads from Heavy Consulting, its Affiliates and partners to the Customer's End User devices, Customer or Heavy Consulting provided equipment and software to the extent such downloads form part of the Services; and

(vii) and shall ensure End Users, not use, abuse, tamper with, alter or otherwise rearrange the Services or Products, or permit or assist others to do so, for any purpose or in any manner.

(b) Heavy Consulting is not liable for any failure to provide the Services or Products in accordance with this Agreement resulting from Customer's failure to comply with any of the obligations this Agreement and the dependencies listed below and in any Engagement Agreement. Customer shall;

(i) comply with reasonable technical requirements and best practices necessary to allow Heavy Consulting's performance of the Services;

(ii) shall perform, or allow Heavy Consulting to perform, necessary software updates;

(iii) cooperate and respond to Heavy Consulting within a reasonable time to facilitate Heavy Consulting's performance of the Services; and

(iv) coordinate with, and ensure the necessary availability of, the appropriate Customer Personnel required to allow Heavy Consulting to perform the Services.

(c) Customer is fully responsible and liable for the security of its premises and systems, unless otherwise set out in an Engagement Agreement.

(d) Customer agrees to indemnify and hold Heavy Consulting harmless from any third-party claims resulting from a breach by Customer of Section 7(a).

#### 08. Billing and Payment.

##### (a) Fees.

(i) Fees for Services and Products shall be set out in an applicable Engagement Agreement. Unless otherwise expressly provided in an Engagement Agreement, fees for Services set forth on a particular Engagement Agreement will begin accruing on the Effective Date set forth on such Engagement Agreement.

(ii) Where Heavy Consulting is providing Professional Services, Customer will pay Heavy Consulting for Services rendered in accordance with Heavy Consulting's then current time and material rates, monthly in arrears.

(iii) For all reasonable out of pocket expenses, including travel and living expenses, incurred by Heavy Consulting in the performance of Services. These expenses shall be pre-approved by Customer and supported by receipts.

(iv) Customer will pay, without deduction or offset, the Fees set forth on such Engagement Agreement or accrued for Professional Services requested by Customer and provided by Heavy Consulting.

(v) Notwithstanding the foregoing, and unless otherwise set out in an applicable Engagement Agreement, Heavy Consulting reserves the right to adjust the fees payable by Customer on an annual basis, provided that: (a) Heavy Consulting provides 60 days advanced written notice prior to the effective date of the fee adjustment; and (b) Customer has the right to terminate the applicable Engagement Document or impacted Services effective on the effective date of the pricing adjustment, provided that it has provided 30 days' notice.

(vi) Customer shall pay or reimburse Heavy Consulting for any and all applicable federal, state, provincial and local sales, use, value-added, excise, duty and other taxes of any nature (except taxes based on Heavy Consulting's net income) assessed or imposed by applicable law upon the Products, Services or the Fees charged therefor ("Taxes").

(b) **Terms of Payment.** Heavy Consulting bills in advance for Services to be provided in the upcoming month, except for charges that are dependent on usage of the Services, which are billed monthly in arrears. Customer's payment of an invoice shall be due, and Customer agrees to pay such invoices, within 30 days after the date that such invoice is issued by Heavy Consulting. If Customer, in good faith and acting reasonably, disputes all or any portion of an invoice, Customer will, on or before the due date of such invoice

(i) pay all undisputed amounts and

(ii) provide Heavy Consulting with written notice of the details of the billing dispute, together with all supporting documentation. The Parties agree to work diligently and in good faith to resolve all billing disputes. Any disputed amount found to be properly owed to Heavy Consulting shall be paid within 30 days following resolution of the dispute.

(c) **Late Payment Charges; Certain Remedies.** Customer will pay a late payment charge equal to the lesser of 1.5% per month (or 18% per annum) or the maximum amount permitted by law on invoiced amounts not paid when due (other than amounts subject to a good faith dispute). If Customer fails to pay any invoiced amount when due (other than a properly disputed amount), Heavy Consulting reserves the right to suspend Services until all unpaid amounts are paid by Customer. In the event that the account remains delinquent for 90 days from the date of invoice, Heavy Consulting reserves the right to terminate this Agreement for cause. Suspension of the Services in accordance with this Agreement (other than in the case of force majeure or for any reason not due to Customer's breach) shall not relieve Customer of its obligation to pay the fees in full, as if no suspension had occurred.

#### 09. Service Level Agreements.

Heavy Consulting's sole obligation with respect to the availability or performance of a particular Product or Service, and the applicable remedies for failure thereof, shall be as set out in associated Engagement Agreement or as provided by the applicable OEM. Such remedies are the Customer's sole and exclusive remedy against Heavy Consulting (and Heavy Consulting's sole liability) for performance or outage issues.

#### 10. Confidential Information.

All Confidential Information disclosed by the Disclosing Party to the Receiving Party in connection with this Agreement shall be treated as confidential and (i) Receiving Party shall hold such Confidential Information in strict confidence using the same standard of care as it uses to protect its own Confidential Information but not less than reasonable care, (ii) Receiving Party shall not use or disclose such Confidential Information for any purpose except

(A) as necessary to fulfill its obligations or exercise its rights under this Agreement, provided that Receiving Party shall limit access to such Confidential Information to such of its employees, agents and subcontractors who need such access for such purposes and Receiving Party shall require such persons to abide by the provisions of this Section, or (B) as required by law, court order or request by any government or regulatory authority, provided, unless prohibited by law,



the Disclosing Party is given a reasonable opportunity to obtain, at its expense, a protective order. Confidential Information shall not include information which (a) is now, or hereafter becomes, publicly known or available through lawful means, (b) is rightfully in Receiving Party's possession prior to disclosure by the Disclosing Party, as evidenced by Receiving Party's records, (c) is disclosed to the receiving Party without confidentiality restriction by a third party who rightfully possesses and rightfully discloses the information, (d) is independently developed by the Receiving Party without reference to the Disclosing Party's Confidential Information, or (e) is the subject of a written permission to disclose provided by the Disclosing Party.

#### 11. Term.

(a) This Agreement will be effective on the Effective Date stated on the first Engagement Agreement executed by the Parties and will continue in effect as long as there is an Engagement Agreement in effect under this Agreement.

(b) An applicable Engagement Agreement will be effective on the Effective Date set out in the document and continue for the "Initial Term" set out therein.

(c) Unless otherwise agreed by the Parties, each Engagement Agreement shall automatically renew for successive one year renewal terms, unless either Party provides written notice of non-renewal to the other Party at least ninety days prior to the end of the then current term of such Engagement Agreement (the Initial Term and any renewals thereof being referred to as the "Term").

#### 12. Termination.

(a) Termination for Convenience: Where such right is included in an applicable Engagement Agreement, Customer shall have the right to terminate an applicable Engagement Agreement for convenience upon the notice period set out in the applicable Engagement Agreement.

(b) Termination for Breach: Either Party may terminate an Engagement Agreement or this entire Agreement upon written notice to the other Party in the event:

(i) the other Party has breached any material obligation under this Agreement, including any Engagement Agreement, and such breach is not cured within thirty days after the breaching Party receives written notice of such breach from the non-breaching Party; and

(ii) the other Party becomes the subject of a voluntary or involuntary bankruptcy, insolvency, reorganization, liquidation or dissolution proceeding in bankruptcy or under any other insolvency law, makes an assignment for the benefit of creditors, or admits in writing its inability to pay debts when due.

(c) Effect of Expiration or Termination. Upon the expiration or termination of an Engagement Agreement or this entire Agreement:

(i) unless otherwise agreed in an applicable Engagement Agreement, Heavy Consulting shall store all Customer data for the period of 30 days following the effective date of expiry or termination, during which time Heavy Consulting shall make such data storage service available to Customer at Heavy Consulting's then current rates (but at rates no greater than the rates provided to Heavy Consulting's other customers for similar services) and, thereafter, Heavy Consulting shall delete all such data in a permanent, irrecoverable fashion. Following such deletion, Heavy Consulting shall have no further duties or obligations to provide the expired or terminated Services, including access to such Customer data;

(ii) Where the applicable Engagement Agreement or this Agreement is terminated by Heavy Consulting for cause, Customer shall remain obligated to pay all Fees, expenses and Taxes for the terminated Services that would have been payable hereunder and under the terminated Engagement Agreement(s) for the remainder of the applicable Term as if such termination had not occurred;

(iii) Where the applicable Engagement Agreement or this Agreement is terminated by Customer for convenience, Customer shall pay all applicable Fees, expenses and Taxes owing by Customer up to the effective date of Termination (i.e. the date following the applicable notice period).

(iv) Customer remains obligated with respect to any contracts pertaining to the Products and can only terminate such Products in accordance with those terms.

### 13. Intellectual Property.

#### (a) Heavy Consulting Intellectual Property.

(i) As between Customer and Heavy Consulting, Customer acknowledges that Heavy Consulting shall retain all right, title and interest, including all intellectual property rights, in and to Heavy Consulting Property and any changes or improvements made thereto.

(ii) Customer shall have no right, title, claims or interest in or to the Heavy Consulting Property, and Customer may not use the Heavy Consulting Property or related documentation except as expressly provided herein, nor copy, modify or translate the Heavy Consulting Property or related documentation, or decompile, disassemble or reverse engineer the Heavy Consulting Property, or grant any other person or entity the right to do so. Unless otherwise expressly stated in this Agreement, Customer is not authorized to distribute or to authorize others to distribute the Heavy Consulting Property in any manner without the prior written consent of Heavy Consulting.

(iii) For the Term of an Engagement Agreement and in subject to compliance with this Agreement, Heavy Consulting hereby grants Customer a non-exclusive, transferable, worldwide, royalty-free license to use such Heavy Consulting Property as is required to access and use the Services set forth on such Engagement Agreement, solely for such access and use as defined in an Engagement Agreement.

#### (b) Customer Intellectual Property:

(i) As between Customer and Heavy Consulting, Heavy Consulting acknowledges that Customer shall retain all right, title and interest, including all intellectual property rights, in and to Customer IP and any improvements made thereto.

(ii) Customer hereby grants to Heavy Consulting (and any applicable subcontractor) a fully paid-up, royalty free, non-transferable, sub-licensable and non-exclusive license to use Customer IP only for the purposes of providing the Services to the Customer during the Term.

(iii) Unless otherwise expressly stated in this Agreement, Heavy Consulting shall have no right, title, claims or interest in or to the Customer IP. Other than to the extent necessary or appropriate to provide the Services or as otherwise permitted under this Agreement, Heavy Consulting shall not use, copy, modify, distribute or translate Customer IP or related documentation, or decompile or disassemble or reverse engineer the Customer IP, or grant any other person or entity the right to do so. Unless otherwise expressly stated in this Agreement, Heavy Consulting is not authorized to distribute or to authorize others to distribute the Customer IP in any manner without the prior written consent of Customer.

(c) Third Party Intellectual Property:

(i) At its expense, and other than Products, Customer shall be solely responsible for obtaining any and all licenses and rights for Heavy Consulting to use or have access to Customer software (including third party software), hardware, tools and other items required to provide the Services to Customer.

(ii) Heavy Consulting shall abide by the terms of Customer's licenses to third party software which Heavy Consulting uses or to which Heavy Consulting has access to provide the Services, provided that such terms have been communicated by Customer to Heavy Consulting in writing.

(iii) Customer shall abide by all applicable third-party terms and conditions applicable to Products it receives as part of the Services.

(d) Work Product:

(i) Unless otherwise expressly set out in an applicable Engagement Agreement, Customer acknowledges that Heavy Consulting shall retain all right, title and interest, including all intellectual property rights, in and to the Work Products.

(ii) Upon final payment of the applicable Fees, unless otherwise agreed to in an Engagement Agreement, Heavy Consulting hereby grants to Customer, and Customer accepts, a fully paid-up, royalty free, non-transferable and non-exclusive license to use the Work Products only for internal business purposes and the purposes of the specific project(s) for which the Work Product were provided for the term.

(e) Restrictions: Customer may not, except as expressly permitted in writing by Heavy Consulting or the applicable third-party terms (with respect to Products):

- (i) modify the Services, Products or Work Product in any manner;
- (ii) disclose, distribute, resell, sublicense or publish the Services, Products or Work Product in any manner;
- (iii) authorize a third party to use, copy or modify the Services, Products, or Work Product in whole or in part;
- (iv) reverse engineer, decompile, disassemble, re-engineer or otherwise create or permit, allow, or assist others to create the source code of any software delivered by Heavy Consulting in object code format only; or
- (v) remove the copyright and other proprietary notices and legends placed on the Services, or Work Products provided by Heavy Consulting.

#### 14. Privacy

- (a) In the event that Customer provides Heavy Consulting with access to Personal Information, Customer shall ensure that it has complied with all applicable laws with respect to such Personal Information and that it has all necessary right, authority and consents required to provide Heavy Consulting with the right to collect, access and use such Personal Information in accordance with Customer's instructions.
- (b) Where Heavy Consulting collects Personal Information directly, including through its website, Customer acknowledges that Heavy Consulting collects, uses and discloses Personal Information in accordance with its privacy policy available at <https://Heavy.ca/privacy>. Customer consents to Heavy Consulting's collection, use and disclosure of Customer's Personal Information in accordance with this policy.

#### 15. Indemnification.

- (a) Heavy Consulting shall defend, indemnify and hold harmless Customer from and against any and all claims, demands, actions, suits or proceedings ("Claims") made or brought against Customer by a third party alleging that Customer's access to or use of Services, Heavy Consulting Property or Work Products in accordance with this Agreement infringes the intellectual property rights of a third party (an "**IP Infringement Claim**") provided that Company shall have sole control over the defense or settlement of any such claim.
- (b) If the use of any Services, Heavy Consulting Property or Work Product or portion thereof is, or in Heavy Consulting's opinion is likely to be, enjoined by reason of such an infringement, in its sole discretion, make the Services non-infringing or arrange for Customer's continued use of the Services by license or otherwise, but if neither of the foregoing options is commercially practicable, Heavy Consulting may, in Heavy Consulting's sole discretion, upon written notice to Customer, cancel the directly affected Services, refund to Customer any prepaid fees for such cancelled Services and, if applicable, adjust Customer's ongoing monthly fees for the continuing Services to account for such cancelled Services.

(c) Notwithstanding the foregoing, Heavy Consulting will have no indemnification obligation to Customer for any infringement arising from

(i) any modification of the Services by Customer or on its behalf,

(ii) Customer's combination of the Services with any intellectual property not developed or owned by Heavy Consulting if the infringement would not have occurred but for such combination, or

(iii) Customer's failure to install updates, patches or other similar items provided by Heavy Consulting or the licensor of the intellectual property that is the subject of such a claim.

(d) Heavy Consulting's obligations under this Section 15 shall be Customer's sole remedy with respect to a third-party intellectual property claim against Customer.

(e) Customer Indemnification. Customer will indemnify, defend and hold harmless Heavy Consulting, its affiliates, directors, officers, employees and agents (collectively, the "**Heavy Consulting**") from and against all third party claims against Heavy Consulting to the extent arising from

(i) for infringement of any patent, copyright or other proprietary right which infringement is attributable to Customer IP, software, hardware or technology that is Customer's responsibility in accordance with this Agreement, whether supplied by Customer or any third-party provider of Customer (but excluding any such materials provided by Heavy Consulting in connection with the Services) (collectively, "**Customer-Provided Materials**"),

(ii) any personal injury, death or physical damage to, or loss or theft of, tangible personal property caused by the gross negligence or willful misconduct of Customer or its employees, agents or subcontractors; and (iii) any breach of Section 7 of these Heavy Consulting Terms and Conditions.

(f) Indemnification Procedures. An indemnifying Party shall have no obligation for indemnification unless the other Party promptly gives written notice to the indemnifying Party after any applicable matter arises and allows the indemnifying Party to have sole control of the defense or settlement of any underlying claim; provided, however, that the indemnifying Party may not settle a claim on any basis other than financial payment without the other Party's prior written consent. Notice will be considered prompt as long as there is no material prejudice to the indemnifying party because of the timing of delivery of such notice.

## 16. Limitations of Liability.

(a) Aggregate Limit of Liability. Except for either Party's indemnification obligations and except for Customer's payment obligations, each Party's aggregate liability under this Agreement, whether in contract or tort (including negligence), as a result of breach of warranty, strict liability, indemnity or under any other theory of liability whatsoever, will be limited to direct damages in an amount not exceeding the total Fees paid to Heavy Consulting by Customer for

Services under the applicable Engagement Agreement in the six (6) months immediately prior to the month in which the most recent event giving rise to liability occurred. This cap on damages does not include Fees paid for Products.

(b) Exclusion. To the maximum extent permitted by law, under no circumstances and in no event, whether in contract or tort (including negligence), as a result of breach of warranty, strict liability, indemnity or under any other theory of liability whatsoever, will Heavy Consulting be liable to Customer under this Agreement for: (i) any indirect, consequential, incidental, exemplary, punitive or special damages; or (ii) for any damages, whether direct, indirect, consequential, incidental, exemplary, punitive or special, characterized as lost revenue, lost savings or lost profits; even if Heavy Consulting has been advised of the possibility of such damages in advance. Regardless of whether such losses are deemed to be direct or indirect damages, Heavy Consulting shall not be liable to Customer for any damages relating to a loss of data

#### 17. Warranties and Disclaimers.

(a) Reciprocal Warranties. Each Party warrants to the other Party that it has the power, authority and legal right to enter into this Agreement and to perform its respective obligations hereunder and under all incorporated provisions.

(b) Heavy Consulting Warranties. Heavy Consulting represents and warrants that: (i) the Services will be performed in a good and professional manner, in accordance with industry standards.

(c) Warranties Disclaimer. NOTWITHSTANDING ANY ORAL OR WRITTEN COMMUNICATIONS BETWEEN Heavy Consulting AND CUSTOMER ABOUT OR IN CONNECTION WITH THE SERVICES, EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT AND TO THE FULL EXTENT PERMITTED BY APPLICABLE LAW, NEITHER Heavy Consulting NOR ANY OF ITS EMPLOYEES, AFFILIATES, AGENTS, SUPPLIERS, SUBCONTRACTORS OR LICENSORS MAKE ANY WARRANTIES OR CONDITIONS OF ANY KIND, ORAL OR WRITTEN, EXPRESS OR IMPLIED, ARISING FROM COURSE OF DEALING, COURSE OF PERFORMANCE OR OTHERWISE INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OR CONDITIONS OF MERCHANTABILITY, MERCHANTABLE QUALITY, FITNESS FOR A PARTICULAR PURPOSE, CONFORMITY TO ANY REPRESENTATION OR DESCRIPTION, SECURITY, FREEDOM FROM ERROR, NONINTERRUPTION, NON-INTERFERENCE OR NON-INFRINGEMENT. EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT OR IN THE ADDENDA, THE SERVICES AND EQUIPMENT PROVIDED UNDER OR ASSOCIATED WITH THIS AGREEMENT ARE PROVIDED ON AN “AS IS” AND “AS AVAILABLE” BASIS. FOR CLARITY AND WITHOUT LIMITING ANY OTHER PROVISION IN THIS AGREEMENT, Heavy Consulting EXPRESSLY DISCLAIMS LIABILITY FOR, AND SHALL NOT BE LIABLE FOR, ANY LOSS OF OPPORTUNITY, REVENUE OR POTENTIAL REVENUE RESULTING FROM DOWNTIME OF CUSTOMER SYSTEMS.

## 18. Force Majeure.

Neither Party shall be liable for, nor shall either Party be considered in breach of this Agreement due to, any failure or delay in performing its obligations if such failure or delay is due to circumstances beyond its reasonable control, including, without limitation, any natural calamity, act of God or a public enemy, act of any military, civil or regulatory authority, change in any law or regulation, labor dispute, disruption or outage of communications, power or other utility, malfunction of or damage to machinery, equipment or software, loss or corruption of data, interruption of or delay in transportation, failure to perform by any supplier or other third party, and act or omission of the other Party. If, as a result of a force majeure condition affecting Heavy Consulting, Services are unavailable for a period of thirty continuous days, either Party may terminate the Engagement Agreement for such Services upon reasonable written notice to the other Party.

## 19. Dispute Resolution.

(a) The Parties intend that all Disputes be resolved expeditiously, amicably, and at the level within each Party's organization that is most knowledgeable about the Dispute. Written notice shall be given by the disputing Party to the other Party detailing the Dispute, and the Parties agree to use good faith efforts to resolve the Dispute. In the event the Dispute remains unresolved at this level of each Party's organization after a two-week period, the Dispute may be elevated to a higher level within each Party's organization (which may be to a Party's chief executive) for resolution within thirty days of the written notice of the Dispute (or such later date as the Parties may mutually agree).

(b) If the Parties are still unable to resolve the Dispute within the periods set forth herein, the parties agree to refer the Dispute for mediation to be conducted in accordance with the rules of the ADR Institute of Canada, in Toronto, Ontario with a mediator to be agreed to by the parties or, failing agreement, appointed in accordance with the rules of the ADR Institute of Canada.

(c) Failing resolution of the Dispute by mediation in accordance with Section 19(a) or (b), the Parties agree to refer the Dispute to arbitration for final resolution, to be conducted in Toronto, Ontario, and in accordance with the rules of the ADR institute of Canada and the provisions of the Ontario Arbitration Act in force at the time of the dispute. The arbitration will be conducted under the auspices of a single arbitrator to be agreed to by the parties or, failing agreement, appointed in accordance with the rules of the ADR Institute of Canada

(d) The arbitration award will be final, enforceable and without appeal and will bind the Parties. The costs of the arbitrator will be divided equally between the Parties or as otherwise expressly provided in the arbitrator's decision.

(e) The processes set forth in this Section shall not apply to any Dispute, controversy or claim relating to Confidential Information, nor shall they preclude the bringing of any action for equitable relief to protect a Party's intellectual property. Except where actually prevented by a Dispute, the Parties shall continue performing their respective obligations under this Agreement

while the Dispute is being resolved, unless and until this Agreement is terminated or expires in accordance with its terms.

## 20. Compliance with Laws.

Customer acknowledges that Customer and its End Users are responsible for the security of any customer credit card numbers and related customer information to which Customer or its End Users may have access as a result of conducting electronic commerce transactions on the Internet, subject to Heavy Consulting's ongoing warranty obligations hereunder.

## 21. Miscellaneous.

(a) **Governing Law.** The validity, interpretation, enforceability and performance of this Agreement shall be governed by and construed under the laws of the Province of Ontario, without regard to choice of law or conflicts of laws principles. The Parties agree that (i) all disputes and other matters relating to the interpretation and enforcement of this Agreement and any other document entered into by the Parties in connection therewith shall be brought before the courts located in Toronto, Ontario. The Parties each hereby waive trial by jury in any dispute. Customer further acknowledges and agrees that the pricing provided to Customer is based in large measure on the Parties' respective rights, obligations, and limitations thereto set forth in this Agreement. The United Nations Convention on Contracts for International Sale of Goods shall not apply.

(b) **Enforcement.** Each Party acknowledges that (i) the provisions of this Agreement regarding each Party's use and access to the Confidential Information of the other Party are reasonable and necessary to protect the other Party's business interests and (ii) any breach of such provisions may result in irreparable harm to the other Party for which money damages may not be adequate compensation. Thus, if there a breach of such provisions, the injured Party shall be entitled, in addition to all other rights and remedies that it may have at law or in equity, to seek a decree of specific performance or injunctive relief against the breaching Party.

(c) **References.** Neither Party will, without the prior written consent of the other Party, (a) use the trademark, logo or other identifying marks of the other Party in any news releases, articles, brochures, marketing materials, advertisements, or other publicity or promotions, or (b) issue any press release or other public statement regarding this Agreement; provided, however, that either Party may publicly refer to the other Party by corporate name as a vendor or customer and may publicly disclose the existence and general nature of this Agreement (but not the specific terms thereof or any detailed information concerning the performance thereof).

(d) **Amendment.** Except as otherwise expressly provided herein or in any document incorporated herein by reference, neither this Agreement nor any Engagement Agreement may be amended except upon the written consent of Customer and an authorized officer of Heavy Consulting.

(e) **Waiver.** No failure to exercise and no delay in exercising any right, remedy, or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy, or power hereunder preclude any other or further exercise thereof or the exercise of any



other right, remedy, or power provided herein or by law or in equity. The waiver by any Party of the time for performance of any act or condition hereunder shall not constitute a waiver of the act or condition itself.

(f) Assignment. This Agreement shall be binding upon and inure to the benefit of Customer and Heavy Consulting and their respective successors and permitted assigns. Customer may not assign this Agreement without the prior written consent of Heavy Consulting, which consent will not be unreasonably withheld or delayed. Any attempt by Customer to assign this Agreement without Heavy Consulting's consent shall be null and void.

(g) Section References; Severability. Unless otherwise specifically indicated herein, all references to a "Section" herein refer to the applicable Section of this Agreement. Any provision in this Agreement which is held to be illegal or unenforceable in any jurisdiction shall be severed to the extent of such illegality or unenforceability without invalidating the remaining provisions and any such illegal or unenforceable provision shall be deemed to be restated to reflect as nearly as possible the original intentions of the Parties in accordance with applicable law.

(h) Notices. All notices, requests, consents and other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been received on the earlier of (i) the date of actual receipt at the designated address, (ii) the first business day after being sent to the designated address by a reputable overnight delivery service, (iii) the third business day after being mailed to the designated address by first class mail; or (iv) the day of sending of an email (where receipt is acknowledged). Any notice may be given by e-mail to the designated e-mail address. Notices, requests, consents and other communications shall be delivered to Customer at the address set out in the applicable Engagement Agreement and to Heavy Consulting at the following address:

Attention: Legal Department

Heavy Consulting  
3007-600 Fleet Street  
Toronto, ON, M5V1B7  
Attention: Legal Department  
E-mail: [info@heavy.ca](mailto:info@heavy.ca)

(i) Entire Agreement. This Agreement, together with any addenda and associated Engagement Agreements, Heavy Consulting policies and other documents incorporated by reference herein, states the entire agreement between the Parties and supersedes all previous proposals, negotiations and other written or oral communications between the Parties with respect to the subject matter hereof.

(j) During the term of this Agreement and for a period of one (1) year thereafter, neither Party shall, without the prior written consent of the other, directly or indirectly: (i) employ or retain as an independent contractor any employee or contractor of the other Party with whom the Party had contact with respect to the Services prior to the termination of the applicable Engagement Agreement; or (ii) solicit or attempt to induce any such person to leave that Party's employment

or to terminate that person's contract with the other Party. The foregoing restriction shall not apply to the employment of, or contracting with, any person who responds to any general recruitment advertisement by a Party in the normal course of business, without specifically targeting or approaching the employee or contractor of the other Party.

(k) Survival. The rights and obligations of the Parties in this Agreement and any Addenda that would by their nature or context be intended to survive the expiration or termination of this Agreement shall so survive.

(l) No Third-Party Beneficiary. No person or entity other than the Parties and their respective successors and assigns is or shall be entitled to bring any action to enforce any provision of this Agreement against either of the Parties.

(m) Relationship of the Parties. Customer and Heavy Consulting are, and shall remain, independent contractors. Nothing in this Agreement shall be deemed or construed to create a joint venture or partnership relationship between Heavy Consulting and Customer.

(n) Les parties reconnaissent que ce contrat a été négocié et est rédigé en langue anglaise. The Parties acknowledge that this contract was negotiated and is made in the English language.