

# HAWKEYE

## Terms of Service

**Last Updated: September \_\_, 2018**

Thank you for using the Hawkeye Services (as defined below), a user testing platform that allows designers, developers and marketers to conduct eye tracking tests on their webpages or applications. To be eligible to register for a Hawkeye account and use the Hawkeye Services, you must review and accept the terms of these Terms of Service (this “**Agreement**” or these “**Terms**”) this Agreement by signing up for a Hawkeye account through the mechanism provided. PLEASE REVIEW THESE TERMS CAREFULLY. BY ACCEPTING THESE TERMS OR USING THE HAWKEYE SERVICES, YOU AGREE TO THESE TERMS AND CONDITIONS WITH HAWKEYE LABS, INC. (“**HAWKEYE**”). IF YOU DO NOT AGREE TO BE BOUND BY THESE TERMS, YOU SHOULD NOT CLICK THE “I ACCEPT” BUTTON AND YOU SHOULD NOT USE THE HAWKEYE SERVICES.

In this Agreement, “you,” “your” and “Customer” will refer to you. If you are registering for a Hawkeye account or using the Hawkeye Services on behalf of an entity or other organization, you are agreeing to these Terms for that entity or organization and representing to Hawkeye that you have the authority to bind that entity or organization to these Terms (and, in which case, the terms “you”, “your” and “Customer” will refer to that entity or organization).

### IMPORTANT NOTES:

- HAWKEYE DOES NOT PROVIDE WARRANTIES OR INDEMNITIES FOR THE HAWKEYE SERVICES, AND THESE TERMS LIMIT HAWKEYE’S LIABILITY TO YOU.
- DISPUTES RELATING TO THIS AGREEMENT, YOUR ACCOUNT OR THE HAWKEYE SERVICES MUST BE RESOLVED BY BINDING ARBITRATION AND ON AN INDIVIDUAL BASIS ONLY.

### 1. Certain Definitions

1.1 The following terms, when used in this Agreement will have the following meanings:

**“Confidential Information”** means any information or data disclosed by either party that is marked or otherwise designated as confidential or proprietary or that should otherwise be reasonably understood to be confidential in light of the nature of the information and the circumstances surrounding disclosure. However, “Confidential Information” will not include any information which (a) is in the public domain through no fault of receiving party; (b) was properly known to receiving party, without restriction, prior to disclosure by the disclosing party; (c) was properly disclosed to receiving party, without restriction, by another person with the legal authority to do so; or (d) is independently developed by the receiving party without use of or reference to the disclosing party’s Confidential Information.

**“Hawkeye Services”** means the user testing services, software, functions and platform provided by Hawkeye to you (including the Hawkeye SDK, Documentation and technical support that may be made available by Hawkeye to you in connection with such services), and subsequent updates or upgrades of any of the foregoing made generally available by Hawkeye.

**“Customer Content”** means the content, webpage, software application and other material supplied or made available by you (or, if you are an agency, your clients for which you are an agency of record) through the use of or access to the Hawkeye Services.

**“Documentation”** means the printed and digital instructions, on-line help files, technical documentation and user manuals made available by Hawkeye for the Hawkeye Services.

## **2. Changes**

2.1 These Terms. Hawkeye may revise these Terms from time to time. If Hawkeye does revise these Terms, the revised Terms will supersede prior versions. Unless Hawkeye says otherwise, revisions will be effective upon the effective date indicated at the top of these Terms. Hawkeye will use reasonable efforts provide you advance notice of any material revisions. This notice will be provided via the account portal and/or via an email to the email address Hawkeye has on file. For other revisions, Hawkeye will update the effective date of these Terms at the top of the page. Hawkeye encourages you to check the effective date of these Terms whenever you visit Hawkeye’s website or account portal. Your continued access or use of the Hawkeye Services constitutes your acceptance of any revisions. If you don’t agree to the revisions, you should stop using the Hawkeye Services and Hawkeye is not obligated to provide you with the Hawkeye Services. If you have a subscription to any Hawkeye Services, any change to these Terms will be effective with respect to such Hawkeye Services upon your next renewal of your subscription.

2.2 Hawkeye Services. You acknowledge that Hawkeye may change, deprecate or republish Hawkeye SDKs for any Hawkeye Services or feature of the Hawkeye Services from time to time. Although Hawkeye endeavors to avoid changes to the Hawkeye SDKs or Hawkeye Services that are not backwards compatible, if any such changes become necessary Hawkeye will endeavor to notify you at least thirty (30) days prior to Hawkeye’s implementation of any such incompatible changes to the Hawkeye Service of which it becomes aware.

## **3. Hawkeye Services**

3.1 Provision of Services. Subject to the terms and conditions of this Agreement and the Hawkeye Acceptable Use Policy (available at <https://usehawkeye.com/aup>) (the **“AUP”**), Hawkeye will use commercially reasonable efforts to make the Hawkeye Services available to you pursuant to this Agreement, and hereby grants you a non-exclusive, non-sublicensable, non-transferable right to (a) access and use the Hawkeye Services, and (b) if applicable, incorporate the Hawkeye SDK into your mobile applications (“Your Applications”) and distribute the SDK solely as integrated in Your Applications, in each case solely to engage in user testing of the Customer Content.

3.2 Restrictions. The rights granted herein are subject to the following restrictions (the **“License Restrictions”**):

(a) You will not reverse engineer, decompile, disassemble, modify, create derivative works of or otherwise create, attempt to create or derive, or permit or assist any third party to create or derive, the source code underlying the Hawkeye Services;

(b) You will not transfer, distribute, resell, lease, license, or assign Hawkeye Services or otherwise offer the Hawkeye Services on a standalone basis, and, without limiting the foregoing, if Customer is an agency, you will only use the Hawkeye Services on behalf of your clients of which you are

an agency of record and which have authorized you to use the Hawkeye Services on behalf of such clients within the scope of your other *bona fide* agency responsibilities for such clients;

(c) You will not (nor will it permit any third party to) use Hawkeye Services in any manner that violates Hawkeye's AUP (or any other term of this Agreement);

(d) You will not circumvent any functions within the Hawkeye Services that seek a tester's consent for access to certain functions of its device or agreement to any terms of use or privacy policy;

(e) You will not remove any proprietary notices or branding from the Services or otherwise use the Hawkeye Services in violation of any applicable laws or regulations or outside the scope expressly permitted hereunder; and

(f) You will ensure that you and your users do not use temporary email addresses or share user accounts among multiple individuals, and you will permit Hawkeye to terminate the accounts of any users that violate this Agreement or the AUP.

### 3.3 Account Registration; Other Customer Responsibilities.

(a) To use the Hawkeye Services, you will be asked to create an account. As part of the account creation process, you will be asked to provide your email address and create a password. When registering an account, you must provide true, accurate, current and complete information about yourself as requested during the account creation process. You must also keep that information true, accurate, current and complete after you create your account.

(b) You will (i) be responsible for all use of the Hawkeye Services and Documentation under your account (whether or not authorized), (ii) be solely responsible for the accuracy, quality, integrity and legality of Customer Content, (iii) use commercially reasonable efforts to prevent unauthorized access to or use of the Hawkeye Services and Documentation and notify Hawkeye promptly of any such unauthorized access or use and (iv) be responsible for obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Hawkeye Services, including as set forth in the Documentation. You will be solely responsible for your failure to maintain such equipment, software and services, or to use the current version of the SDKs made available by Hawkeye or, if you choose to use any of the SDKs made separately available by Hawkeye, the current version of such SDKs, and Hawkeye will have no liability for such failure. With your permission (which may be by email or other reasonable means), Hawkeye may log into user accounts in order to debug the Hawkeye Services.

## 4. **Fees**

4.1 Fees. You agree to pay the fees set forth in Hawkeye's standard schedule of fees, as may be updated from time to time, or any other order forms for the Hawkeye Services ordered by you and accepted in writing by Hawkeye. Except as otherwise mutually agreed upon in writing, (a) fees are quoted and payable in United States dollars and (b) payment obligations are non-cancelable and non-pro-ratable for partial months, and fees paid are non-refundable.

4.2 Payment. To the extent you purchase a subscription to a Hawkeye Service, you will be required to select a payment plan and provide Hawkeye information regarding your credit card or other payment instrument. You represent and warrant to Hawkeye that such information is true and that you are authorized to use the payment instrument. You will promptly update your account information with

any changes (for example, a change in your billing address or credit card expiration date) that may occur. You agree to pay Hawkeye the amount that is specified in the payment plan in accordance with the terms of such plan and these Terms. You hereby authorize Hawkeye to bill your payment instrument in advance on a periodic basis in accordance with the terms of the applicable payment plan until termination of this Agreement, and you further agree to pay any charges so incurred. Hawkeye reserves the right to change Hawkeye's prices. If Hawkeye does change prices, Hawkeye will provide notice of the change on the Site or in email to you, at Hawkeye's option, at least 30 days before the change is to take effect. Your continued use of the Hawkeye Service after the price change becomes effective constitutes your agreement to pay the changed amount. Subject to certain credit requirements as determined by Hawkeye, Hawkeye may let you pay amounts due under these Terms in arrears. If Hawkeye lets you do that, you will make all of the payments due hereunder within thirty (30) days of the date of the invoice. Subject to the fee dispute resolution procedures below, if you are overdue on any payment and fail to pay within ten (10) business days of a written notice of your overdue payment, then Hawkeye may assess and you must pay a late fee and/or suspend your account until you pay the amount you are overdue plus the late fee. The late fee will be either 1.5% per month, or the maximum amount allowable by law, whichever is less.

4.3 Fee Disputes. You must notify Hawkeye in writing if you dispute any portion of any fees paid or payable by you under this Agreement. You must provide that written notice to Hawkeye within sixty (60) days of the applicable charge and Hawkeye will work together with you to resolve the applicable dispute promptly. If you do not provide Hawkeye with this written notice of your fee dispute within this 60 day period, you will not be entitled to dispute any fees paid or payable by you.

4.4 Suspension. If your use of the Hawkeye Services exceeds the amounts prepaid by you or if you fail to pay any amounts due by you, Hawkeye may suspend your account without prior notice to you. Hawkeye will have no liability for any damage, liabilities, losses (including any loss of data or profits) or any other consequences that you may incur with connection with any suspension of your account pursuant to this section.

4.5 Net of Taxes. All applicable use, sales and other similar taxes and government charges will be payable by you. You will not withhold any taxes from any amounts due to Hawkeye.

## **5. Proprietary Rights and Confidentiality**

5.1 Hawkeye's Ownership Rights. As between the parties, Hawkeye exclusively owns all right, title and interest in and to the Hawkeye Services. Except for the express rights granted hereunder, Hawkeye reserves all rights, title and interests in and to the Hawkeye Services and Hawkeye's Confidential Information.

5.2 Hawkeye Marks. Hawkeye hereby grants you a non-transferable, non-sublicensable, non-exclusive license during the term of this Agreement to display the trade names, trademarks, service marks, logos, domain names of Hawkeye (each, a "**Hawkeye Mark**") for the purpose of promoting or advertising that you use the Hawkeye Services. In using Hawkeye Marks, you may not: (a) display a Hawkeye Mark in any manner that implies a relationship or affiliation with, sponsorship, or endorsement by Hawkeye; (b) use Hawkeye Marks to disparage Hawkeye or its products or services; or (c) display a Hawkeye Mark on a site that violates any law or regulation. Furthermore, Hawkeye may modify any Hawkeye Marks at any time, and upon notice, you will use only the updated Hawkeye Marks, and Hawkeye may further revoke the foregoing license with respect to any use of the Hawkeye Marks if

it disapproves (in its sole discretion) any such use. Other than as permitted in this Section, you may not use any Hawkeye Marks without prior written consent. All use of the Hawkeye Marks will be subject to any trademark usage guidelines that Hawkeye may provide from time to time, and Customer will conduct its business in a professional manner that reflects favorably on the goodwill and reputation of Hawkeye.

5.3 Feedback. Customer may from time to time provide Hawkeye suggestions or comments for enhancements or improvements, new features or functionality or other feedback ("**Feedback**") with respect to the Hawkeye Services. Hawkeye will have full discretion to determine whether or not to proceed with the development of any requested enhancements, new features or functionality. Hawkeye will have the full, unencumbered right, without any obligation to compensate or reimburse Customer, to use, incorporate and otherwise fully exercise and exploit any such Feedback in connection with its products and services.

5.4 Customer Content. As between the parties, the Customer Content will be owned by you (or, if Customer is an agency, Customer's client(s)). You hereby grant to Hawkeye a non-exclusive, worldwide license to copy, distribute and use Customer Content only in connection with providing the Hawkeye Services.

5.5 Confidentiality. Each party agrees that it will use the Confidential Information of the other party solely in accordance with the provisions of this Agreement and it will not disclose, or permit to be disclosed, the same directly or indirectly, to any third party without the other party's prior written consent, except as otherwise permitted hereunder. However, either party may disclose Confidential Information (a) to its employees, officers, directors, attorneys, auditors, financial advisors and other representatives who have a need to know and are legally bound to keep such information confidential by confidentiality obligations consistent with those of this Agreement; and (b) as required by law (in which case the receiving party will provide the disclosing party with prior written notification thereof, will provide the disclosing party with the opportunity to contest such disclosure, and will use its reasonable efforts to minimize such disclosure to the extent permitted by applicable law. Neither party will disclose the terms of this Agreement to any third party, except that either party may confidentially disclose such terms to actual or potential lenders, investors or acquirers. Each party agrees to exercise due care in protecting the Confidential Information from unauthorized use and disclosure. In the event of actual or threatened breach of the provisions of this Section or the License Restrictions, the non-breaching party will be entitled to seek immediate injunctive and other equitable relief, without waiving any other rights or remedies available to it. Each party will promptly notify the other in writing if it becomes aware of any violations of the confidentiality obligations set forth in this Agreement.

5.6 Aggregated Information. Notwithstanding anything to the contrary, Hawkeye shall have the right to aggregate, collect and analyze data and other information relating to the provision, use and performance of the Hawkeye Services and shall be free (during and after the term hereof) to (a) use such data and other information to develop and improve the Hawkeye Services and other Hawkeye offerings, and (b) disclose such data and other information in an aggregated and anonymized format that does not identify you or any individual.

## **6. Warranties and Disclaimers**

6.1 Customer. You warrant that you have the necessary rights, licenses, consents, permissions, waivers and releases to provide the Customer Content and have users test the Customer Content in

connection with the Hawkeye Services as contemplated herein. Without limiting the foregoing, if Customer is an agency, it warrants that it has been granted the necessary rights from its client(s) to use the Hawkeye Services and Customer Content related to such client(s) on such client(s)' behalf.

6.2 DISCLAIMER. THE HAWKEYE SERVICES AND ANY BETA SERVICES (AS DEFINED BELOW) ARE PROVIDED "AS IS" TO THE FULLEST EXTENT PERMITTED BY LAW. HAWKEYE HEREBY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE IN RELATION TO THE HAWKEYE SERVICES AND BETA SERVICES. WITHOUT LIMITING THE FOREGOING, HAWKEYE DOES NOT WARRANT THAT THE HAWKEYE SERVICES OR BETA SERVICES WILL BE ERROR-FREE OR THAT THEY WILL MEET ANY SPECIFIED SERVICE LEVEL, OR WILL OPERATE WITHOUT INTERRUPTIONS OR DOWNTIME. TO THE EXTENT THIS DISCLAIMER CONFLICTS WITH APPLICABLE LAW, THE SCOPE AND DURATION OF ANY APPLICABLE WARRANTY WILL BE THE MINIMUM PERMITTED UNDER THAT LAW.

6.3 BETA SERVICES. FROM TIME TO TIME, YOU MAY HAVE THE OPTION TO PARTICIPATE IN A PROGRAM WITH HAWKEYE WHERE YOU GET TO USE ALPHA OR BETA SERVICES, PRODUCTS, FEATURES OR DOCUMENTATION (COLLECTIVELY, "BETA SERVICES") OFFERED BY HAWKEYE. THESE BETA SERVICES ARE NOT GENERALLY AVAILABLE AND MAY CONTAIN BUGS, ERRORS, DEFECTS OR HARMFUL COMPONENTS. YOU OR HAWKEYE MAY TERMINATE YOUR ACCESS TO THE BETA SERVICES AT ANY TIME.

## **7. Indemnification**

You will defend, indemnify and hold Hawkeye and its affiliates harmless against any actual or threatened claim, loss, liability, proceeding, governmental investigation or enforcement action arising out of or relating to your activities under these Terms or your acts or omissions in connection with the provision of any Customer Content ("**Claim**"). Hawkeye and its affiliates will cooperate as fully as reasonably required in the defense of any Claim, at your expense. Hawkeye reserves the right, at your expense, to retain separate counsel for themselves in connection with any Claim or, if you have not responded reasonably to the applicable Claim, to assume the exclusive defense and control of any Claim in which you are a named party and that is otherwise subject to indemnification under this Section. You will pay all costs, reasonable attorneys' fees and any settlement amounts or damages awarded against Hawkeye in connection with any Claim. You will also be liable to Hawkeye for any costs and attorneys' fees Hawkeye incurs to successfully establish or enforce Hawkeye's right to indemnification under this Section.

## **8. Limitation of Liability**

UNDER NO CIRCUMSTANCES AND UNDER NO LEGAL THEORY, WHETHER IN TORT, CONTRACT, OR OTHERWISE, WILL HAWKEYE BE LIABLE TO YOU FOR ANY (I) INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY CHARACTER, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF GOODWILL, LOST PROFITS, LOST SALES OR BUSINESS, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, LOST CONTENT OR DATA, OR FOR ANY AND ALL OTHER DAMAGES OR LOSSES, EVEN IF HAWKEYE HAS BEEN ADVISED, KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES OR (II) DIRECT DAMAGES, COSTS OR LIABILITIES IN EXCESS OF THE AMOUNTS PAID BY YOU DURING THE TWELVE (12) MONTHS PRECEDING THE INCIDENT OR CLAIM. THE FOREGOING PROVISIONS ALLOCATE THE RISKS UNDER THIS AGREEMENT BETWEEN THE PARTIES, AND

THE PARTIES HAVE RELIED ON THE LIMITATIONS SET FORTH HEREIN IN DETERMINING WHETHER TO ENTER INTO THIS AGREEMENT.

## **9. Termination and Suspension**

9.1 Term. The term of this Agreement will commence on the date these Terms are accepted by you and continue until your account is terminated as set forth below.

9.2 Termination and Suspension. You may terminate your account at any time through the account management tools made available through the Service. Hawkeye may terminate or suspend your account in the event you commit any material breach of any provision of these Terms and fail to fix that breach within five (5) days after written notice of that breach. Hawkeye may also terminate or suspend your account immediately for cause if: (a) you violate (or give Hawkeye reason to believe you have violated) the AUP; (b) there is reason to believe the traffic created from your use of the Hawkeye Services or your use of the Hawkeye Services is fraudulent or negatively impacting the operating capability of Hawkeye Services; (c) Hawkeye determines, in its sole discretion, that providing the Hawkeye Services is prohibited by law, or it has become impractical or unfeasible for any legal or regulatory reason to provide the Hawkeye Services; or (d) subject to applicable law, upon your liquidation, commencement of dissolution proceedings, disposal of your assets or change of control, a failure to continue business, assignment for the benefit of creditors, or if you become the subject of bankruptcy or similar proceeding. If Hawkeye suspends your account, Hawkeye will make a reasonable attempt to notify you. Note that no refund will be provided in the event of any suspension or termination of your account.

9.3 Survival. Upon termination of this Agreement all rights and obligations will immediately terminate except that any terms or conditions that by their nature should survive such termination will survive, including the License Restrictions and terms and conditions relating to proprietary rights and confidentiality, disclaimers, indemnification, limitations of liability and termination and the general provisions below.

## **10. General**

10.1 Export Controls. The Hawkeye Services, including any software Hawkeye may provide in connection with the Hawkeye Services, may be subject to applicable export control laws and economic sanctions regulations. In receiving this software or the Hawkeye Services, you agree to comply strictly with all domestic and international export laws and economic sanctions regulations as they apply to this software and the Hawkeye Services, and to the extent consistent with these Terms, to obtain any necessary license or other authorization to export, re-export, or transfer such software or other aspects of the Hawkeye Services. These laws include restrictions on destinations, users and end use. Without limitation, you may not transfer any such software or other aspect of the Hawkeye Service without U.S. government authorization to any entity on a U.S. government exclusion list (e.g., the Department of Commerce's List of Denied Persons, Entity, or Unverified List, and the Treasury Department's List of Specially Designated Nationals and Consolidated Sanctions List). You represent that you are not on a U.S. government exclusion list or under the control of or an agent for any entity on such a list, and you further warrant that you will immediately discontinue use of Hawkeye's software and the Hawkeye Service if you become placed on any such list or under the control of or an agent for any entity placed on such a list.



10.2 Publicity. You agree that Hawkeye may refer to your name and trademarks in Hawkeye's marketing materials and website with your prior written consent (which may be by email).

10.3 Assignment; Delegation. Neither party hereto may assign or otherwise transfer this Agreement, in whole or in part, without the other party's prior written consent, except that either party may assign this Agreement without consent to a successor to all or substantially all of its assets or business related to this Agreement. Any attempted assignment, delegation, or transfer by either party in violation hereof will be null and void. Subject to the foregoing, this Agreement will be binding on the parties and their successors and assigns.

10.4 Waiver. No waiver of any rights hereunder will be effective unless assented to in writing by both parties. Any such waiver will be only to the specific provision and under the specific circumstances for which it was given, and will not apply with respect to any repeated or continued violation of the same provision or any other provision. Failure or delay by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision.

10.5 Amendment. Hawkeye may amend or modify this Agreement from time to time, in which case the new Agreement will supersede prior versions. Hawkeye will notify you via e-mail not less than 30 days prior to the effective date of any such amendment or modification and will inform you about the intended amendments or modifications. If you do not object to the amendment or modification within 30 days from the sending of such notice, such non-objection may be relied upon by Hawkeye as your consent to such amendment. Hawkeye will inform you about its right to object and the consequences of non-objection in such notice. If you object to such amendment, you must do so in writing by written notice to Hawkeye delivered within such 30-day notice period, in which case Hawkeye may elect by written notice (which may be sent by email) to either (a) consider the amendment request rejected and have this Agreement continue without such amendment or (b) terminate this Agreement immediately. Subject to the foregoing, no amendment or modification to this Agreement will be effective unless assented to in writing by both parties.

10.6 Relationship. Nothing contained herein will in any way constitute any association, partnership, agency, employment or joint venture between the parties hereto, or be construed to evidence the intention of the parties to establish any such relationship. Neither party will have the authority to obligate or bind the other in any manner, and nothing herein contained will give rise or is intended to give rise to any rights of any kind to any third parties.

10.7 Unenforceability. If a court of competent jurisdiction determines that any provision of this Agreement is invalid, illegal, or otherwise unenforceable, such provision will be enforced as nearly as possible in accordance with the stated intention of the parties, while the remainder of this Agreement will remain in full force and effect and bind the parties according to its terms.

10.8 Governing Law. The enforceability and interpretation of the arbitration provisions below will be determined by the Federal Arbitration Act (including its procedural provisions). Apart from such arbitration provisions, this Agreement will be governed by the laws of the State of California, USA, exclusive of its rules governing choice of law and conflict of laws, and all disputes arising out of the Agreement will be subject to the exclusive jurisdiction and venue of the state and federal courts of San Francisco, USA, and the parties hereby consent to the personal jurisdiction of these courts. This Agreement will not be governed by the United Nations Convention on Contracts for the International Sale of Goods.



10.9 Notices. Any notice required or permitted to be given hereunder will be given in writing by personal delivery, certified mail, return receipt requested, or by overnight delivery. Notices to you must be sent to your email or other address as set forth in your account information. Notices to Hawkeye must be sent to the following address: Hawkeye Labs, Inc., 302 Carmalita Court, Alamo, CA, 94507, Attn: Legal.

10.10 Entire Agreement. This Agreement comprises the entire agreement between you and Hawkeye with respect to its subject matter, and supersedes all prior and contemporaneous proposals, statements, sales materials or presentations and agreements (oral and written). No oral or written information or advice given by Hawkeye, its agents or employees will create a warranty.

10.11 Force Majeure. Neither party will be deemed in breach hereunder for any cessation, interruption or delay in the performance of its obligations due to causes beyond its reasonable control ("**Force Majeure Event**"), including earthquake, flood, or other natural disaster, act of God, labor controversy, civil disturbance, terrorism, war (whether or not officially declared), cyber attacks (e.g., denial of service attacks), or the inability to obtain sufficient supplies, transportation, or other essential commodity or service required in the conduct of its business, or any change in or the adoption of any law, regulation, judgment or decree.

10.12 Government Terms. Hawkeye provides the Hawkeye Services, including related software and technology, for ultimate federal government end use solely in accordance with the terms of this Agreement. If you (or any of your customers) is an agency, department, or other entity of any government, the use, duplication, reproduction, release, modification, disclosure, or transfer of the Hawkeye Services, or any related documentation of any kind, including technical data, software, and manuals, is restricted by the terms of this Agreement. All other use is prohibited and no rights than those provided in this Agreement are conferred. The Hawkeye Services were developed fully at private expense.

10.13 Interpretation. For purposes hereof, "including" means "including without limitation". All dates and times set forth in this Agreement or any related document are in relation to Greenwich Mean Time (GMT), unless otherwise specified.

## **11. Agreement to Arbitrate**

11.1 First Try Customer Support. If you have any issues with the Hawkeye Services or Hawkeye, you must try to resolve the issue first through Hawkeye customer support

11.2 Agreement to Arbitrate. If the parties are not able to the dispute through Hawkeye customer support, you and your affiliates on one hand, and Hawkeye and any of Hawkeye's affiliates on the other hand, all agree to resolve any dispute arising under these Terms, or under Hawkeye's Privacy Policy, or in relation to the Hawkeye Services by binding arbitration in San Francisco, California, or in another location that both parties agree to. This applies to all claims under any legal theory, unless the claim fits in one the exceptions below. It also applies even after you have stopped using your Hawkeye account or have deleted it. If the parties have a dispute about whether this agreement to arbitrate can be enforced or applies to such dispute, the parties agree that the arbitrator will decide that too.

11.3 Exceptions to Agreement to Arbitrate. You and your affiliates on one hand, and Hawkeye and its affiliates on the other hand, agree that the parties will go to court to resolve disputes relating to (a) your, your affiliate's, Hawkeye's or Hawkeye's affiliates intellectual property (e.g., trademarks, trade

dress, domain names, trade secrets, copyrights or patents); or (b) your violation of the AUP. Also, either party can bring a claim in small claims court either in San Francisco, California, or the county where you live, or some other place both parties agree on, if it qualifies to be brought in that court. In addition, if either party brings a claim in court that should be arbitrated or either party refuses to arbitrate a claim that should be arbitrated, the other party can ask a court to force the parties to go to arbitration to resolve the claim (i.e., compel arbitration). Either party may also ask a court to halt a court proceeding while an arbitration proceeding is ongoing.

#### 11.4 Details of Arbitration Procedure.

(a) Prior to filing any arbitration, both parties jointly agree to seek to resolve any dispute between the parties by mediation conducted by the American Arbitration Association ("**AAA**"), with all mediator fees and expenses paid equally by the parties. If mediation is not successful, either party may initiate an arbitration proceeding with AAA. You can look at AAA's rules and procedures on their website <http://www.adr.org> or you can call them at 1-800-778-7879. The arbitration will be governed by the then-current version of AAA's Commercial Arbitration Rules (the "**Rules**") and will be held with a single arbitrator appointed in accordance with the Rules. To the extent anything described in this agreement to arbitrate conflicts with the Rules, the language of this agreement to arbitrate applies.

(b) Each party will be entitled to get a copy of non-privileged relevant documents in the possession or control of the other party and to take a reasonable number of depositions. All such discovery will be in accordance with procedures approved by the arbitrator. This agreement to arbitrate does not alter in any way the statute of limitations that would apply to any claims or counterclaims asserted by either party.

(c) The arbitrator's award will be based on the evidence admitted and the substantive law of the State of California and the United States, as applicable, and will contain an award for each issue and counterclaim. The award will provide in writing the factual findings and legal reasoning for such award. The arbitrator will not be entitled to modify these Terms.

(d) Except as provided in the Federal Arbitration Act, the arbitration award will be final and binding on the parties. Judgment may be entered in any court of competent jurisdiction.

11.5 Class Action Waiver. Both you and your affiliates, on one hand, and Hawkeye and its affiliates on the other hand, agree that any claims or controversies between the parties must be brought against each other on an individual basis only. That means neither you and your affiliates on one hand nor Hawkeye and its affiliates on the other hand can bring a claim as a plaintiff or class member in a class action, consolidated action, or representative action. The arbitrator cannot combine more than one person's or entity's claims into a single case, and cannot preside over any consolidated, class or representative proceeding (unless both parties agree otherwise). And, the arbitrator's decision or award in one person's or entity's case can only impact the person or entity that brought the claim, not other Hawkeye customers, and cannot be used to decide other disputes with other customers. If a court decides that this class action waiver is not enforceable or valid, then the entire agreement to arbitrate will be null and void, but the rest of the Terms will still apply.