

Terms of Service

Nineyard Solutions, LLC. ("Nineyard," "Company," "We" or "Us") owns and operates an online e-commerce inventory, pricing and marketing system, which enables Nineyard Users to, *inter alia*, import sales and transaction data from their payment processor, keep track of their inventory, and analyze their sales data, modify pricing, and advertise and market their products, using Nineyard software made available through our website portal located at www.nineyard.com (the "Site") in order to gain insights on warehouse management, pricing, re-stocking, and related services ("Services").

These Terms of Service ("Terms"), as may be amended from time to time, explain our obligations as a service provider and govern your access to and use of the Site and Services, including any content, information, products or services provided to you as a customer ("Agreement"). These Terms are binding on any use of the Site and Services and apply to you from the time that Nineyard provides you with access to our software and online portal. These Terms also apply to any other services and deliverables provided, or to be provided, by Nineyard to you, including any services and deliverables under a separate Order Form entered into by you and Nineyards from time to time unless expressly covered by a separate agreement.

These Terms are a legal agreement between you and Nineyard and apply to you whether you have created a Nineyard Account on your own behalf ("Account Owner") or have been authorized by an Account Owner to access its account for a lawful business purpose ("Account User") (collectively, "Nineyard Users").

YOU UNDERSTAND THAT BY CLICKING THE "I AGREE" BUTTON, OR BY USING THE SITE OR SERVICES (INCLUDING ANY CONTENT PROVIDED THEREIN), YOU ARE AGREEING TO BE BOUND BY THESE TERMS OF SERVICE. IF YOU DO NOT ACCEPT THESE TERMS OF SERVICE IN THEIR ENTIRETY, YOU MAY NOT ACCESS OR USE THE SITE OR SERVICES.

1. **Definitions.** Unless the context requires otherwise, capitalized words shall have these meanings:

"Access Credentials" means any user name, identification number, password, license or security key, security token, PIN, or other security code, method, technology, or device used, alone or in combination, to verify an individual's identity and authorization to access and use the Service.

"Account Owner" means, in the case of an individual entering into these Terms on their own behalf, that individual, or in the case of an individual entering into these terms on behalf of an Entity, that Entity.

"Account User" means each employee, agent or contractor of the Account Owner who uses the Service from time to time.

“API” means the application programming interface made available by Nineyard to the Customer that facilitates the incorporation of certain aspects of the Services into the Customer’s existing software and systems.

“Customer Data” means all information uploaded, submitted or transmitted to or through the Service by or on behalf of Customer, excluding Nineyard Data.

“Documentation” means the resources and documentation that Nineyard makes available to Customer through support section of the Services, API documentation, Customer notifications and warnings in the Software and other pages on the Nineyard website.

“Nineyard Data” means information collected or generated by or on behalf of Nineyard for purposes of providing, measuring or improving Nineyard’s products and services, including for benchmarking performance, or preparing statistics or system metrics, and all information developed or derived from its provision of the Service, including any information derived from Customer Data or appearing in solely an anonymized and/or aggregated form. For the avoidance of doubt, “Nineyard Data” shall not include any personally identifiable information of any User or the contents of any data or documents uploaded, submitted or transmitted by or on behalf of any User.

“Nineyard Materials” means the Service, Documentation, Nineyard Data, Work Products and any and all other information, data, documents, materials, works, and other content, devices, methods, processes, hardware, software, and other technologies and inventions, including any deliverables, technical or functional descriptions, requirements, plans, or reports, that are provided or used by Nineyard or any subcontractor in connection with the Service or otherwise comprise or relate to the Service.

"Service" means the online ordering, inventory, purchase order, price list, marketing and advertising, supply chain and stock management services provided under your Subscription Plan(s) accessed and used using your login name and password. These services may be changed or updated from time to time by Nineyard and Customer. “Services” also include services under a signed Order Form, where applicable.

“Subscription Plan” means the modules selected by an Account Owner which determines the extent and type of Service provided by Nineyard, the maximum number of Account Users permitted to access the Service, and the Service Fees charged by Nineyard.

2. **Registration.** When you register to create an account on the Site (“Customer Account”), you will be asked to provide an email address and password to gain. Account access credentials are for designated users and cannot be shared, transferred or used by anyone other than those designated at the time of registration. You are responsible for

safeguarding your password and you agree not to disclose your password to any third party. You agree to notify Nineyard immediately if you suspect misuse, loss of username and password. With your notification, Nineyard will issue a new username and password. Until such allocation, you agree that you will be solely responsible for any activities or actions taken under your password, whether or not you have authorized such activities or actions. You agree that the information that you provide to Nineyard upon registration, and at all other times will be true, accurate, current and complete. Without limiting any other terms of this Terms of Service, you may not impersonate any other person or use an email address or password that you are not authorized to use. If you use the Service on behalf of any entity, you are deemed to have agreed to these Terms on behalf of that entity.

3. **Modification.** The services offered by Nineyard may change over time based on user feedback and modifications/upgrades to software. Nineyard reserves the right, in its sole discretion, to modify, discontinue or terminate the Site and Services, or to modify these Terms, at any time and without advance notice. Nineyard will post the modification on the Site or within the Services. We will also update the “Last Updated Date” in these Terms of Service. To the extent feasible, Nineyard will provide thirty (30) days’ advance notice of any **material** changes through a clickthrough box at the time of logging in to the Site, via email, or through other means. If any modified terms and conditions are not acceptable to you, your sole remedy is to cease using the Site and Services, and if applicable, cancel your Nineyard Account. By continuing to access or use the Site and Services after Nineyard makes any such revision, you agree to be bound by the revised Terms of Service.

4. **Termination and Account Cancellation.**

- a. **Term.** This Agreement will be effective upon the earlier of your registration of a Nineyard Account or the Effective Date set forth in the applicable Order Form and, unless terminated in accordance with the terms herein, will be effective for the term identified in the Order Form (“Term”). At the end of such Term, this Agreement will automatically renew for consecutive terms equal in time to the original Term (each, a new “Term”) on the same terms and conditions until termination by either party. The original term and all renewal terms shall be collectively referred to as “Term”.
- b. **Termination by Convenience.** Either party may terminate these Terms and your Nineyard Account for convenience by giving written notice to the other party at least 30 days before the end of a calendar month. These Terms and your Nineyard Account will then terminate at the end of the calendar month. You are liable to pay all relevant Service charges up to and including the end of the calendar month in which these Terms were terminated.

- c. Nineyard Termination. Without limiting other remedies, Nineyard reserves the right to terminate the Site, Services or your access thereto at any time and for any reason. In addition, Nineyard may take any actions it deems appropriate, without notice to you, if Nineyard suspects or determines, in its own discretion, that you may have: (i) failed to comply with any provision of these Terms of Service or any policies or rules established by Nineyard; or (ii) engaged in actions relating to or in the course of using the Site or Services that may be illegal or cause liability, harm, embarrassment, harassment, abuse or disruption for you, Nineyard Users, Nineyard, any other third parties, or the Site or Services.
 - d. Your Termination. You may terminate your Nineyard Account at any time and for any reason in writing by sending written notice of termination to Nineyard at the following address: admin@nineyard.com . If this Agreement is terminated as a result of Nineyard's breach of this Agreement, or due to a material modification of the Terms, Customer shall be entitled to a refund of (i) the pro rata portion of any fees paid to Nineyard for the base Service under this Agreement for the terminated portion of the Term and (ii) the proportion of the fees paid by Customer for additional Services which were not completed at the date of termination.
 - e. Rights at Termination. Upon termination, all rights granted to you by these Terms of Service will immediately cease. Nineyard is not liable to you or any third party for termination of the Site or Services, or termination of your use of the Site or Services. UPON ANY TERMINATION OR SUSPENSION, ANY INFORMATION THAT YOU HAVE SUBMITTED ON THE SITE OR WHICH IS RELATED TO YOUR ACCOUNT MAY NO LONGER BE ACCESSED BY YOU. Notwithstanding the foregoing, for a period of 30 days following termination of the Site or Services, Nineyard will provide reasonable access to you to retrieve and download your Data. This access is for the retrieval and download of Data only, you will receive no other Services after the termination date. Subject to the foregoing sentence, we reserve the right to delete all your Data stored in the Nineyard Site upon termination of these Terms of Service, and you acknowledge and confirm that your Data cannot be recovered once it is deleted and Nineyard shall not be liable to you or any third party for termination of access to the Services or deletion of your information or account data.
 - f. Survival. Any suspension, termination or cancellation of the Site or Services will not affect your obligations to Nineyard under these Terms of Service (including but not limited to ownership, indemnification and limitation of liability), which by their sense and context are intended to survive such suspension, termination or cancellation.
5. **Use of Nineyard Software and Site**. Nineyard grants you the right to access and use the Site and Services under your Nineyard Account via Nineyard's online portal through a

limited, revocable, non-exclusive, non-transferable, non-sublicensable license. This right of use is non-exclusive, subject to these Terms and any applicable written agreement between Customer and Nineyard, and any other applicable laws. Your use of the Site and Services in your jurisdiction is at your own risk, and you confirm that you have complied with all laws applicable to you when using the Site and Services.

6. **Access to Customer Data.** As between Nineyard and Customer, Customer is the owner of all Customer Data and Nineyard will maintain the confidentiality of such Customer Data in accordance with Section 14. Customer will also be responsible for all Customer Data, including that which contains business information, account registration, account holder information, financial information, and all other data of any kind contained within e-mails or otherwise entered electronically through the Service or under Customer's account. Customer acknowledges and agrees that in connection with the provision of the Service, Nineyard may store and maintain Customer Data for a period of time consistent with Nineyard's standard business processes for the Service. Customer grants Nineyard and Nineyard's Affiliates a non-exclusive license to host, copy, use, transmit and display Customer Data, and to use Customer's systems, in each case as necessary for Nineyard to provide the Services in accordance with this Agreement, including Third Party Services in accordance with Section 15 and as anonymized or aggregated data in accordance with Section 16. Notwithstanding the foregoing, nothing in this Agreement is intended to prevent Nineyard from generating and using Nineyard Data for purposes of providing, measuring, improving and marketing Nineyard's products and services; provided that Nineyard shall not disclose to any third party any information that is identifiable as Customer-specific information.
7. **Intellectual Property.** This Agreement is not a sale and does not convey to Customer any rights of ownership in or related to the Software or Services. Nineyard acknowledges and agrees that (a) as between Customer and Nineyard, Customer owns all right, title and interest in and to the Customer products, sites (including without limitation the look and feel), Customer's Marks, and the technology underlying the Customer products and sites, and (b) nothing in this Agreement will confer in Nineyard or any Affiliate of Nineyard any right of ownership in the foregoing. Customer further acknowledges and agrees that (x) as between Customer and Nineyard, Nineyard owns all right, title and interest, including all intellectual property rights, in and/or related to the Software, API and Services, and the Documentation and all of the content that is made available in connection with the Software, API and Services, including but not limited to visual interfaces, interactive features, graphics, design, databases, the data contained therein (other than Customer Data), computer code, products, SMART Types and all other elements and components of the Software and Services and (y) nothing in this Agreement will confer in Customer or any Affiliate of Customer any right of ownership in the foregoing. Except as specifically authorized by Nineyard in writing, Customer shall not alter, change or remove from the Software or Services any trademark, other proprietary mark or proprietary rights notice. Except as expressly

provided herein, Nineyard does not grant Customer any express or implied rights, and all rights in and to the Software and Services are retained by Nineyard.

8. **Your Obligations.**

- a. **Lawful Use.** Customer must only use the Service and Site for your own lawful internal business purposes in accordance with these Terms and any notice sent by Nineyard or condition posted on the Website. Customer must not use, nor allow any person to use the Services or the Nineyard Account in relation to, or for the purposes of, any other business (including the business of any other Entity or individual). Customer is responsible for ensuring that all usernames and passwords required to access the Service and Site are kept secure and confidential and is responsible for all Account Users' use of the Service. Nineyard has no responsibility or liability for the actions of any Account User. Nineyard will not be a party to any dispute between Customer and an Account User for any reason.

In addition, without limitation, Customer agrees that while using or accessing the Site or Services you will not: (i) circumvent, disable or otherwise interfere with security related features of the Site or Services, or where the services are hosted by a third party, the third-party's computing system or network; (ii) use, or misuse, the Services in any way which may impair the functionality of the Services or Site, or other systems used to deliver the Services or impair the ability of any other Nineyard User to use the Services or Website; (iii) attempt to probe, scan or test the vulnerability of any Nineyard system or network, or breach or impair or circumvent any security or authentication measures protecting the Site or Services; (iv) attempt to decipher, decompile, disassemble or reverse engineer any of the software used to provide the Site or Services; (v) collect, or attempt to collect, any personal data about other Nineyard Users without their express permission; (vi) use the Site or Services in any manner not permitted by these Terms; or (vii) encourage or instruct any other individual to do any of the foregoing or to violate any term of these Terms.

- b. **Configuration.** Customer is responsible for your configuration of the Services and any required hardware and the compatibility of the Services with any required hardware, application or system set up.
- c. **Payments and Refunds.** Customer shall pay Nineyard the fees set forth in the Order Form for the subscribed to service modules ("Service Fee"). The Service Fee is billed on a monthly basis in advance and will be charged to the credit card on file, and is non-refundable. There will be no refunds provided in case of partial months of service, for months of an unused running account and for any upgrades/downgrades. Customer agrees that failure to pay the Service Fee within thirty (30) days after the payment due date will result in the suspension of Customer's Account.

If Customer fails to pay any amount due under this Agreement, Nineyard may initiate a collection action and Customer agrees to reimburse Nineyard for its reasonable costs of collection, including attorney's fees.

- d. Upgrading and Downgrading. On upgrading your Nineyard Account to include additional modules, the additional charges for the upgrade will be added to your monthly Service Fee, and will be automatically billed every month while your account remains active. Downgrading of your account to reduce your Nineyard modules may cause loss of content, features, or capacity of the Service you receive, and Nineyard does not accept any liability for losses arising as a direct or indirect consequence of this.
 - e. Changes to Prices and Features. Nineyard reserves the right to change, delete or discontinue any Service feature, temporarily or permanently without notice. Nineyard reserves the right to modify monthly Service Fees at anytime without prior notice. Nineyard shall not be held liable to Customer or any third party for any changes in prices, features or discontinuance of service.
9. **Technical Support**. In the case of technical problems, Nineyard offers online customer support on the Nineyard website. Additional personalized support may be available in accordance with the Service modules subscribed to by Customer.
10. **Service Interruptions**. It is Nineyard's intention for the Services and Site to be available with an uptime of 99.9%, 24 hours a day, seven days a week. Notwithstanding, it is possible that on occasions the Services or Site may be unavailable. If for any reason Nineyard has to interrupt the Services for longer periods than Nineyard usually anticipates, Nineyard will use reasonable endeavours to publish in advance details of such activity on the Site. Nineyard will have no liability to Customer, Customer's customers, or third parties for unavailability of the Services or Site.
11. **Acknowledgement and Disclaimer of Warranty**.

- a. Acknowledgement. Customer Acknowledges that:

- (i) You are authorized to create the Nineyard Account (where applicable), to access and use the Services and the Site and to use the information and Data that you input into the Site, including any information or Data input into the Site by any person you have authorized to use the Service. You are also authorized to access the processed information and Data that is made available to you through your use of the Nineyard Site and the Services (whether that information and Data is your own or that of anyone else).

- (ii) Nineyard has no responsibility to any person other than you and nothing in these Terms confers, or purports to confer, a benefit on any person other than you. You

may not use the Services or access the Site on behalf of another person, except if you are an Authorized User of a Nineyard Account, accessing the Nineyard Account as permitted by the Account Owner. If you are an Authorized User, you warrant that you have the appropriate permissions from the Account Owner, and acknowledge that you must comply with these Terms, and that you are responsible for all Data you input into the Site;

(iii) You are responsible for authorizing any person who is given access to information or Data, and you agree that Nineyard has no obligation to provide any person access to such information or Data without your authorization and may refer any requests for information to you to address.

(iv) The provision of, access to, and use of, the Services is on an "as is" basis and at your own risk.

(v) Nineyard does not warrant that the use of the Service or Site will be uninterrupted or error free. Among other things, the operation and availability of the systems used for accessing the Service, including public telephone services, computer networks and the Internet, can be unpredictable and may from time to time interfere with or prevent access to the Services. Nineyard is not in any way responsible for any such interference or prevention of your access or use of the Services.

(vi) Nineyard is not your accountant and use of the Services does not constitute the receipt of accounting advice.

(vii) It is your sole responsibility to determine that the Services meet the needs of your business and are suitable for the purposes for which they are used.

(viii) You remain solely responsible for complying with all applicable accounting, tax and other laws. It is your responsibility to check that storage of and access to your Data via the Software and the Site will comply with laws applicable to you (including any laws requiring you to retain records).

(ix) Nineyard may from time to time need to remove modules, or certain functionality within modules, that may be part of your Services. Nineyard will use reasonable efforts to provide you with advance notice of any intention to remove modules or functionality from the Service, but you acknowledge that Nineyard will not be responsible for any failure to do so, and Nineyard will not be responsible for any loss that you may suffer as a result of the removal of that module or that functionality.

- b. Disclaimer of Warranty. Your use of the Site and Services is at your sole discretion and risk. The Site and Services, and all materials, information, products and services

included therein, are provided on an 'AS IS' and 'AS AVAILABLE' basis without warranties of any kind. NINEYARD EXPRESSLY DISCLAIMS ALL WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, RELATING TO THE SITE AND SERVICES, INCLUDING WITHOUT LIMITATION THE WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OF PROPRIETARY RIGHTS, COURSE OF DEALING OR COURSE OF PERFORMANCE. NINEYARD DISCLAIMS ANY WARRANTIES: (I) REGARDING THE SECURITY, ACCURACY, RELIABILITY, TIMELINESS AND PERFORMANCE OF THE SITE OR SERVICES; OR (II) THAT THE SITE OR SERVICES WILL BE ERROR-FREE OR THAT ANY ERRORS WILL BE CORRECTED, OR (III) THAT THE SERVICE WILL MEET CUSTOMER'S REQUIREMENTS OR THAT THE OVERALL SYSTEM THAT MAKES THE SERVICE AVAILABLE (INCLUDING BUT NOT LIMITED TO THE INTERNET, OTHER TRANSMISSION NETWORKS, AND CUSTOMER'S LOCAL NETWORK AND EQUIPMENT) WILL BE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS.

NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM NINEYARD, WILL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THESE TERMS OF SERVICE. NINEYARD EXPRESSLY DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES THAT CUSTOMER'S USE OF THE SERVICE WILL SATISFY ANY STATUTORY OR REGULATORY OBLIGATIONS, OR WILL ASSIST WITH, GUARANTEE OR OTHERWISE ENSURE COMPLIANCE WITH ANY APPLICABLE LAWS OR REGULATIONS. CUSTOMER ASSUMES ALL RESPONSIBILITY FOR DETERMINING WHETHER THE SERVICE OR THE INFORMATION GENERATED THEREBY IS ACCURATE OR SUFFICIENT FOR CUSTOMER'S PURPOSES. Some states or jurisdictions do not allow the exclusion of certain warranties. Accordingly, some of the above exclusions may not apply to you.

- 12. Exclusion of Consequential Damages and Limitation of Liability.** IN NO EVENT WILL NINEYARD, ITS OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS, BE LIABLE TO YOU (OR ANY OTHER PERSON) FOR ANY DAMAGES WHATSOEVER, INCLUDING WITHOUT LIMITATION, INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OR LOSS (INCLUDING BUT NOT LIMITED TO LOSS OR CORRUPTION OF INFORMATION, LOSS OR CORRUPTION OF DATA, THE COST OF RECOVERING SUCH DATA OR INFORMATION AND ANY LOSS OF BUSINESS PROFITS, SAVINGS, GOODWILL, REPUTATIONAL DAMAGE, REFUNDS OR CHARGEBACKS INCURRED, BUSINESS OR ANTICIPATED BUSINESS) OR DAMAGE ARISING OUT OF OR IN CONNECTION WITH ANY USE OF, OR RELIANCE ON, OR INABILITY TO USE OR RELY ON THE SERVICE OR SITE, WHETHER THE DAMAGES ARE FORESEEABLE AND WHETHER OR NOT NINEYARD HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATION OF LIABILITY WILL APPLY TO THE FULLEST EXTENT PERMITTED BY LAW IN THE APPLICABLE JURISDICTION AND IN NO EVENT WILL NINEYARD'S CUMULATIVE LIABILITY TO YOU EXCEED THE GREATER OF: (i) THE TOTAL FEES PAYABLE BY YOU FOR THE SERVICE DURING THE FIRST TWELVE (12) MONTHS OF THIS AGREEMENT; AND (ii) THE TOTAL FEES PAID FOR THE SERVICE GIVING RISE TO THE LIABILITY DURING THE TWELVE

(12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT OUT OF WHICH THE LIABILITY AROSE.

13. **Indemnification**. You agree to defend, indemnify, and hold Nineyard, its respective parents, subsidiaries, affiliates, and the officers, directors, employees and agents of the foregoing, harmless from and against any and all claims, liabilities, damages, losses, and expenses, including without limitation reasonable attorney's fees and costs, arising out of or in any way connected with (i) Customer's gross negligence or willful misconduct, (ii) any Customer Data or use of Customer Data in Customer's access to or use of the Site or Services; (iii) your violation of these Terms of Service; (iii) your violation of any third party right, including without limitation any intellectual property right, publicity, confidentiality, property or privacy right; or (iv) any claim that your use of the Site or Services caused damage to a third party including but not limited to claims brought by Customer's customers or users.

Notwithstanding the foregoing, Customer shall not be required to indemnify Nineyard from any such Claim to the extent it arises out of Nineyard's gross negligence or willful misconduct. Customer shall have the right to control the defense of any action subject to this indemnification, except that Customer shall not enter into any settlement without Nineyard's prior written approval unless it releases Nineyard unconditionally from all liability and imposes no non-monetary or other obligation on Nineyard. Nineyard shall have the right to participate in such defense at its own cost with counsel of its own choosing.

14. **Confidentiality, Data, Security and Privacy**.

- a. **Confidentiality**. "Confidential Information" means any non-public commercial, financial, marketing, business, sales, customer, technical or other data, security measures and procedures, know-how or other information disclosed by or on behalf of the disclosing party to the receiving party in connection with this Agreement, that, under the circumstances, a person exercising reasonable business judgment would understand to be confidential or proprietary, including the features and functionality of the Site and Service and the Terms of Service. For the avoidance of doubt, Customer Data is the Confidential Information of Customer and Nineyard Materials is the Confidential Information of Nineyard. The receiving party shall keep the disclosing party's Confidential Information confidential and secure and not disclose or permit disclosure of the disclosing party's Confidential Information to any third party. This clause does not apply to any disclosure of Confidential Information:
- (i) required to be disclosed by law; or
 - (ii) that the disclosing party agrees to in writing before the disclosure is made; or
 - (iii) is or becomes publicly available through no fault of the receiving party; or
 - (iv) is independently acquired or developed by the receiving party without breaching any of its obligations under this Agreement or at law, and without

- the benefit or use of any of the disclosing party's Confidential Information disclosed by the disclosing party; or
- (v) is in the possession of the receiving party without restriction in relation to disclosure before the date of receipt from the disclosing party; or
 - (vi) is lawfully acquired by the Receiving Party from a third party, provided such information is not obtained as a result of a breach by that third party of any confidentiality obligations owing to the Providing Party.
- b. Data. Nineyard may use Data inputted by you for analysis in aggregate form or for Nineyard's internal training or billing purposes.
- c. Security. Nineyard shall maintain commercially reasonable administrative, physical and technical safeguards designed for the protection, confidentiality and integrity of Customer Data. If Customer is a non-European Union entity, all Customer Data shall be processed in accordance with applicable U.S. local, state, and federal laws. Customer understands that the technical processing and transmission of Customer Data is fundamentally necessary to use of the Service. Customer is responsible for securing DSL, cable or another high speed Internet connection and up-to-date "browser" software in order to utilize the Service. Customer expressly consents to Nineyard's interception and storage of Customer Data as needed to provide the Service, and Customer acknowledges and understands that the Customer Data will be subject to transmission over the Internet, and over various networks, only part of which may be owned and/or operated by Nineyard. No method of electronic transmission or storage is 100% secure and Nineyard cannot ensure or warrant the absolute security of any information Customer transmits or stores in the Software and/or Site. Customer further acknowledges and understands that Customer Data may be accessed by unauthorized parties when communicated across the Internet, network communications facilities, telephone or other electronic means. Without limiting Nineyard's applicable obligations under these Terms in connection with confidentiality and security, Nineyard is not responsible for any Customer Data that is delayed, lost, altered, intercepted or stored during the transmission of any data whatsoever across networks not owned and/or operated by Nineyard, including, but not limited to, the internet and Customer's local network.
- d. Privacy Policy. The Nineyard privacy policy is available online at <https://ecom.datavanced.com/#/privacy-policy> (as amended from time to time, the "Privacy Policy"). Nineyard reserves the right to update the Privacy Policy from time to time and will notify Customer at least thirty (30) days in advance of any material changes.

15. Third Party Service Providers.

- a. Use of Third Party Products and Services. Customer acknowledges that the Software may interact with third party services (such as ecommerce shopping sites, inventory

management, customer relationship management, enterprise resource planning and accounting software providers or third party logistics companies) (collectively, “Third Party Services”). Any use or integration by Customer of such Third Party Services, and any exchange of data between Customer and any Third Party Service provider, is solely between Customer and the applicable Third Party Service provider. Nineyard does not warrant or support, and shall have no liability for, any Third Party Services. Customer acknowledges that it will only use Third Party Services in accordance with the Documentation.

- b. Third Party Services and Customer Data. If Customer installs or enables a Third Party Service for use with the Software or the Services, Customer grants Nineyard permission to allow the provider of that Third Party Service to access Customer Data as required for the integration and interoperation of that Third Party Service with the Services. Nineyard is not responsible for any disclosure, modification or deletion of Customer Data by a Third Party Service.
- c. Integration with Third Party Services. The Software may contain features designed to interoperate with a Third Party Service. To use such features, Customer may be required to obtain access to a Third Party Service directly and may be required to grant Nineyard access to Customer account(s) on the Third Party Service. Nineyard cannot guarantee the continued availability of such Third Party Service features, and may cease providing them without entitling Customer to any refund, credit, or other compensation.
- d. Third Party Service Data. Upon granting access to a Customer account on a Third Party Service, the Software may interact with data that may exist on or subsequently be added to such Third Party Service. Nineyard is not responsible for any disclosure, modification or deletion of data on a Third Party Service by the Software or the Services. Customer acknowledges and agrees that it is responsible for any security incident on Customer’s systems that results in the disclosure of such data. Customer agrees to promptly (and in any event with 48 hours) delete any and/or all such data (in accordance with industry-standard sanitization processes, e.g., NIST 800-88) that it has received from a Third Party Service upon request by a user or from Nineyard and provide certification of such deletion to Nineyard as it may reasonably request, including a signed writing from an officer of Customer.

16. **API**. This section governs the use of Nineyard's application programming interfaces (APIs), and the accompanying Documentation, code and related materials that provide Customer with the ability to programmatically interface with the Software, as well as other functionality as Nineyard may make available from time to time.

- a. API License. Subject to the terms and conditions of this Agreement, Nineyard grants to Customer a limited, non-exclusive, non-transferable, license to: (i) internally use the API Key to access the API and (ii) internally use, perform, display, reproduce the

API solely as necessary to develop, maintain and support Customer's internal business purposes, in accordance with the specifications included in the Documentation.

- b. API Restrictions. Customer acknowledges that its access to and use of the API is subject to the terms of this Agreement. In addition, Customer acknowledges that the API and its structure, organization, and source code constitute valuable trade secrets of Nineyard. Accordingly, except as provided in the Agreement, Customer agrees not to disclose, distribute, sublicense, lease, rent, loan, resell or otherwise transfer the data received from the Software or the API, the Software or the API or the API Key to any third party. Customer will immediately notify Nineyard if Customer becomes aware of any material breach relating to the API. Customer will not make an excessive number of calls to the API, or otherwise use the API in a manner that exceeds reasonable request volume, constitutes excessive or abusive usage, or otherwise fails to comply or is inconsistent with any part of this Agreement.
- c. Nineyard Obligations. Nineyard reserves the right to limit and/or interrupt access to the API by a Customer in order to carry out scheduled maintenance or unscheduled work or to modify or update the API. Nineyard will use commercially reasonable efforts to provide a minimum of 24 hours prior written notice of scheduled maintenance, modification or updates to the API. Nineyard may update, upgrade, enhance or modify the API at its discretion at any time, provided it makes a commercially reasonable effort to give Customer advance notice. Customer acknowledges that any such updates, upgrades, enhancements or modifications may adversely impact how Customer accesses, uses, or communicates with the API. Customer's continued access or use of the API will be deemed to be agreement to the updates and modifications.
- d. Suspension. Notwithstanding anything else herein, Nineyard may revoke Customer's API Key and limit Customer's access to the API if, in Nineyard's sole discretion, it is necessary for Nineyard to maintain the quality of the Services.

17. **General**.

17.1 No Assignment. You will not assign these Terms of Service or assign any rights or delegate any obligations hereunder, in whole or in part, whether voluntarily or by operation of law, without the prior written consent of Nineyard. Any purported assignment or delegation by you without the appropriate prior written consent of Nineyard will be null and void. Nineyard may assign these Terms of Service or any rights hereunder without your consent.

17.2. Relationship of the Parties. For purposes of these Terms of Service, including if you become an Account User, you are not an employee or agent of Nineyard and

Nineyard is not your employee or agent, and you will not represent that you are any of the foregoing. Each party will be independent and act independently and not as a contractor, partner, joint venturer, agent, employee or employer of the other and will not bind or attempt to bind the other to any contract. Each party will be solely responsible for their own costs and expenses incurred in the performance of their obligations under these Terms of Service, including without limitation any expenses associated with the implementation of these Terms of Service.

17.3. Rights of Third Parties: A person who is not a party to these Terms of Service has no right to benefit under or to enforce any term of these Terms.

17.4. Delays. Neither party will be liable for any delay in meeting, or failure to meet, its obligations under this Agreement (other than the obligation to pay money) to the extent that such delay or failure is caused by any event outside its reasonable control (including, without limitation, any delay or failure caused by any act or omission to the other party).

17.5. Severability and Waiver. In the event that any provision in these Terms of Service is held to be invalid or unenforceable, the remaining provisions will remain in full force and effect. The failure of Nineyard to enforce any right or provision of these Terms of Service will not be deemed a waiver of such right or provision.

17.6. Force Majeure. Nineyard will not be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder on account of events beyond its reasonable control, which may include, without limitation, denial-of-service attacks, strikes, shortages, riots, insurrection, fires, flood, storm, explosions, pandemics, acts of God, war, terrorism, governmental action, labor conditions, earthquakes, material shortages, extraordinary Internet congestion or extraordinary connectivity issues experienced by major telecommunications providers (each a "Force Majeure Event"). Upon the occurrence of a Force Majeure Event, Nineyard will be excused from any further performance of its obligations affected by the Force Majeure Event for so long as the event continues.

17.7. Jurisdiction and Governing Law. These Terms of Service and the relationship between you and Nineyard will be governed by the laws of the State of New York without regard to its conflict of law provisions. You and Nineyard agree to submit to the personal and exclusive jurisdiction of the courts located in New York County, New York. Nineyard also may seek injunctive or other equitable relief for breach of this Agreement in any court of competent jurisdiction wherever located. Customer consents to the jurisdiction of and venue in such courts and waive any objection as to inconvenient forum.

17.8. Prohibition of Class and Representative Actions and Non-Individualized Relief.

CUSTOMER AGREES THAT CUSTOMER MAY BRING CLAIMS AGAINST NINEYARD ONLY ON AN INDIVIDUAL BASIS AND HEREBY WAIVES THE RIGHT TO PARTICIPATE AS A PLAINTIFF OR CLASS MEMBER IN ANY CLASS ACTION OR REPRESENTATIVE PROCEEDING, TO THE MAXIMUM EXTENT NOT PROHIBITED BY APPLICABLE LAW. FURTHER, UNLESS BOTH PARTIES OTHERWISE AGREE IN WRITING, THE COURT MAY NOT CONSOLIDATE OR JOIN MORE THAN ONE PERSON'S CLAIMS, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF CONSOLIDATED, REPRESENTATIVE, OR CLASS PROCEEDING.

17.9. Entire Agreement. These Terms, together with the Nineyard Privacy Policy, each Order Form, and the terms of any other notices or instructions given to you under these Terms of Service constitute the entire agreement between the parties and supersede all prior communications, representations, agreements or understandings, either verbal or written, between the parties with respect to the subject matter of this Agreement.

17.10. Notice. Any notice or other communication to be given hereunder will be in writing and given (a) by Nineyard via email to the address that you provide; (b) by Nineyard via a posting on the Site; or (c) by you via email to admin@nineyard.com or to such other addresses as Nineyard may specify in writing. The date of receipt will be deemed the date on which such notice is transmitted.