

## OTTEMO MASTER SUBSCRIPTION AGREEMENT

THIS MASTER SUBSCRIPTION AGREEMENT ("AGREEMENT") IS A LEGAL AGREEMENT BETWEEN YOU ("CUSTOMER") AND OTTEMO, INC. ("OTTEMO"). BY EXECUTING AN ORDER FORM OR STATEMENT OF WORK THAT INCLUDES THESE TERMS BY REFERENCE, CUSTOMER ACKNOWLEDGES THAT CUSTOMER HAS REVIEWED AND ACCEPTS THE TERMS OF THIS AGREEMENT. IF YOU ARE AGREEING TO THESE TERMS AS AN INDIVIDUAL "CUSTOMER" REFERS TO YOU INDIVIDUALLY. IF YOU ARE AGREEING TO THESE TERMS AS A REPRESENTATIVE OF AN ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND THAT ENTITY AND "CUSTOMER" REFERS TO THAT ENTITY AND ALL THE USERS SPECIFIED IN THE ORDER FORM. IF CUSTOMER DOES NOT AGREE WITH ALL OF THESE TERMS, CUSTOMER NOT ACCESS OR OTHERWISE USE THE OTTEMO PLATFORM (AS DEFINED BELOW).

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

### 1. Definitions.

**"Development Services"** means the web site design, development and implementation services that may be provided by Ottemo to Customer from time to time under the terms of one or more Statements of Work (as defined in Section 6, below).

**"Customer Data"** means all electronic data or information submitted by Customer to the Ottemo eCommerce Platform.

**"Customer Storefront"** means the look and feel of the Customer Web Site developed by or for Customer, Ottemo, or Ottemo's authorized representatives; provided that the Customer Storefront shall exclude all rights of Ottemo or Ottemo's suppliers in the underlying code, tools or other materials necessary to effect the look and feel of the Customer Web Site and provided by Ottemo or by third parties on behalf of Ottemo.

**"Customer Systems"** means all computer hardware, software and communications equipment required for Customer to access the Services

**"Customer Web Site"** means Customer's e-commerce web site made available, through use of the Services, to customers of Customer.

**"Ottemo eCommerce Platform"** means Ottemo's online, electronic commerce platform to be made available to be made available to Customer under the terms of this Agreement.

**"Ottemo IP Rights"** means any patent, copyright, trade secret, trademark or other intellectual property right embodied in or related to the Ottemo Technology.

**"Ottemo Marks"** means the Ottemo name and logo, the Ottemo.io name and logo, the Ottemo.io domain name, and any other product and service names used by Ottemo in connection with the Services.

**"Ottemo Technology"** means the proprietary and third party technology (including, without limitation, audio and visual data and information), documents, software (including, without limitation, the Ottemo eCommerce Platform), hardware, products, processes, algorithms, user interfaces, know-how, trade secrets, techniques, designs, inventions and other tangible or intangible technical material or information used or provided by Ottemo in connection with the Services and Ottemo eCommerce Platform; all software, technology or other works developed or created by or for Customer with

respect to its use of the Services; and any modifications, improvements to, or derivative works of, any of the foregoing.

**"Order Form"** means collectively the Ottemo ordering documents representing Customer's initial purchase of Services as well as any subsequent purchases of Services agreed to between the parties in writing from time to time and that specify, among other things, the number of subscriptions ordered, the subscription term and the applicable fees. The initial Order Form is attached hereto as Exhibit A. Such Order Form and each additional Order Form are hereby incorporated by reference into this Agreement.

**"Services"** means the online, electronic commerce service and related operating and hosting services provided by Ottemo, utilizing the Ottemo eCommerce Platform.

**"Third-Party Providers"** means those certain third-party providers, some of which may be listed on pages within Ottemo's website, that provide software, hosting, payment processing and other functionality related to Ottemo's provision of the Services.

**"Users"** means Customer's employees, consultants, contractors or agents who are authorized to use the Services and have been supplied a user identification and password by Customer (or by Ottemo at Customer's request).

### 2. Services.

**2.1 Provision of Services and Ottemo eCommerce Platform.** Ottemo shall make the Services and Ottemo eCommerce Platform available to Customer pursuant to the terms and conditions set forth in this Agreement and applicable Order Forms.

**2.2 Changes.** Ottemo reserves the right to modify the Services from time to time. Ottemo shall make known to Customer by email or written notice (at Ottemo's option) any material modification to the Services at least thirty (30) calendar days prior to the effectiveness of such modification. If such modifications materially and adversely affect the functionality of the Services, Customer may terminate the Services pursuant to Section 11.3(b) hereof.

**2.3 No Contingencies.** Customer agrees that its purchase of subscriptions is not contingent upon the delivery of any future functionality or features nor is it dependent upon any oral or written public or private comments made by Ottemo with respect to future functionality or features.

### **3. Use of the Services.**

**3.1 Ottemo Responsibilities.** Ottemo shall: (i) use reasonable efforts to maintain the security and integrity of the Services and the Customer Data; (ii) provide telephone and online standard support to Customer, at no additional charge, in accordance with the terms and conditions of this Agreement; and (iii) use commercially reasonable efforts to make the Services generally available 24 hours a day, 7 days a week.

Ottemo shall also obtain or contract for the use of all computer hardware, software and communications equipment needed to operate the Services, and for paying all related charges (e.g. hosting, third party database services) it incurs in the provision of the Services, but specifically excluding any fees or expenses incurred by Customer in connection with the Customer Systems or services provided to Customer by a Third Party Provider (e.g. payment processing services).

Ottemo will not be responsible or liable for (i) any loss or damage to Customer Data or any inconvenience suffered by Customer or by any third person arising out of the use of the Services by Customer, or (ii) the performance, adequacy, accuracy, concurrency or other matters related to the Customer Systems.

**3.2 Customer Responsibilities.** Customer is responsible for all activities that occur under Customer's User accounts and by customers using the Customer Web Site. Customer shall: (i) have sole responsibility for the accuracy, quality, integrity, legality, reliability, and appropriateness of all Customer Data and Customer Content (as defined in Section 6.3 below); (ii) use commercially reasonable efforts to prevent unauthorized control or tampering or any other unauthorized access to, or use of, the Services or the systems operated by or on behalf of Customer that capture, store or transmit Customer's Data; (iii) comply with all applicable local, state, federal, and foreign laws (including laws regarding privacy and protection of consumer information) in using the Services and, if using the Services outside of the United States, not use the Services in a manner that would violate any federal or state laws of the United States if conducted therein; (iv) obtain and maintain all Customer Systems, and pay all access charges (e.g., ISP) incurred in connection with its and its Users' use the Services; and (v) obtain all customer consents necessary for Ottemo's use of Customer Data belonging to Customer's customers, including consent to process and store such Customer Data in the United States or other countries. To the extent deemed necessary by Customer, Customer shall implement security procedures necessary to limit access to the Services by Customer's Users. Customer shall notify Ottemo immediately if there is a security breach or unauthorized use of the Services. Customer shall permit Ottemo to review/audit Customer's use of the Services, which review/audit will occur during regular business hours on reasonable advance notice and will not interfere unreasonably with Customer's business activities.

Customer shall be responsible for the purchase, sale and delivery of all merchandise ordered and paid for through the Customer Web Site. Merchandise provided for sale through the Customer Web Site will be determined by Customer, provided that Ottemo may reject the inclusion of any merchandise if it reasonably believes that its offer for sale may create a material negative impact on Ottemo's business, branding elements, reputation or public perception. Customer will be responsible for receiving and collecting all revenues from the applicable payment processing company for all such sales. The parties agree that the payment processing company for the Ottemo eCommerce Platform shall be Authorize.net. Any other payment processing company utilized for the Ottemo eCommerce Platform shall be subject to mutual written agreement of the parties. Customer shall order, pay for, warehouse and sell all merchandise available through the Customer Website. Customer shall purchase merchandise from suppliers, handle all customer complaints, process all customer refunds and product returns and any other matters related to the purchase of merchandise through the Customer Web Site.

**3.3 Use Guidelines.** Customer shall use the Services solely for its business purposes as contemplated by this Agreement and shall not itself or encourage third parties to: (i) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share or otherwise commercially exploit or make the Services available to any third party, other than as expressly permitted by this Agreement; (ii) generate, distribute, publish or facilitate spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (iii) send or store infringing, obscene, threatening, libelous, fraudulent or otherwise unlawful, unsafe, malicious, abusive or tortious material, including material harmful to children or violative of third party privacy rights; (iv) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (v) interfere with or disrupt the integrity or performance of the Services or the data contained therein; (vi) attempt to gain unauthorized access to the Services or Ottemo's or its Third Party Suppliers' related systems or networks; or (vii) otherwise engage in, promote or encourage illegal activity.

**3.4 Third-Party Providers.** Ottemo does not provide any warranties, guaranties or indemnification regarding any Third-Party Providers or any of their products or services, whether or not such products or services are designated by Ottemo as "certified," "validated" or otherwise. Third party components (which may include open source software) of the Services may be subject to separate license agreements. To the limited extent a third party license expressly supersedes this Agreement, that third party license instead governs Customer's that specific third party component.

**3.5 Press Releases; References.** Customer agrees to participate in mutually agreed upon co-marketing and referral activities. During the term of this Agreement but after the commercial launch of the Customer Web Site, Ottemo may publicly refer to Customer orally, in writing, and on the

Ottemo website, as a customer of Ottemo, and may put Customer's name and logo on Ottemo's web site. Ottemo agrees that during the term of this Agreement Customer may publicly refer to Ottemo orally, in writing, and on Customer's web site, as a service provider of Customer.

**3.6 Privacy Policy.** Ottemo's use of any personally identifiable information provides through Customer's or its customers' use of the Services shall be governed by Ottemo's privacy policy, the current version of which may be accessed at <http://www.ottemo.io/privacy-policy>.

#### **4. Fees & Payment.**

**4.1 Fees.** Customer shall pay all fees specified in all Order Forms. Except as otherwise provided, all fees are quoted in United States dollars. Fees will be calculated in accordance with the pricing schedule that accompanies the Order Form. Except as otherwise provided, fees are non-refundable.

**4.2 Invoicing & Payment.** Ottemo will invoice Customer according to the prices and schedule indicated on the Order Form. Unless otherwise stated in the Order Form, all fees and charges are due net 15 days from the invoice date. Unless otherwise stated in the Order Form, all payments made under this Agreement shall be in United States dollars.

**4.3 Overdue Payments.** Any payment not received from Customer by the due date may accrue (except with respect to charges then under reasonable and good faith dispute), at Ottemo's discretion, late charges at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid.

**4.4 Suspension of Services.** If Customer's account is thirty (30) days or more overdue (except with respect to charges then under reasonable and good faith dispute), in addition to any of its other rights or remedies available to Ottemo hereunder or at law or equity, Ottemo reserves the right to suspend the Services provided to Customer, without liability to Customer, until such undisputed amounts are paid in full.

**4.5 Taxes.** Unless otherwise stated in an Order Form, Ottemo's fees do not include any local, state, federal or foreign taxes, levies or duties of any nature ("**Taxes**"). Customer is responsible for paying all Taxes, excluding only taxes based on Ottemo's income. If Ottemo has the legal obligation to pay or collect Taxes for which Customer is responsible under this section, the appropriate amount shall be invoiced to and paid by Customer to Ottemo unless Customer provides Ottemo with a valid tax exemption certificate authorized by the appropriate taxing authority.

**4.6 Billing and Contact Information.** Customer shall maintain complete and accurate billing and contact information on the Services at all times.

#### **5. Proprietary Rights.**

**5.1 Reservation of Rights.** As between Customer and Ottemo, Ottemo owns all right, title and interest in and to the Services, Ottemo Marks, Ottemo Technology, Ottemo IP

Rights, and all rights of Ottemo or Ottemo's suppliers in the underlying code, tools or other materials necessary to supply the Services and effect the look and feel of the Customer Web Site. Ottemo shall also own all Ottemo eCommerce Platform visitor information, including, but not limited to, visitor's name, contact information, ordering information, billing information and web pages visited (collectively, "**Usage Data**"). Customer's use of the Ottemo Marks as authorized herein shall not create in Customer's favor any right, title or interest therein. Customer hereby assigns and will assign and will cause each of its Users to assign to Ottemo all right, title and interest in and to any and all Ottemo Technology created, developed or reduced to practice by or on behalf of Customer or any of its Users, other than the limited license rights granted in this Agreement. Other than as expressly set forth in this Agreement, no license or other rights in or to the Services, Ottemo Technology or Ottemo IP Rights are granted to Customer, and all such licenses and rights are hereby expressly reserved.

**5.2 License Grant.** Subject to the terms and conditions of this Agreement, Ottemo grants Customer and its Users a limited, worldwide, non-exclusive, non-transferable (except in connection with an assignment permitted under Section 12.6 of this Agreement), non-sublicenseable right to (i) access and use the Services; and (ii) configure and customize the Ottemo eCommerce Platform, excluding any Ottemo Mark, in each case solely as permitted by the applicable Service and in accordance with the terms of this Agreement.

**5.3 Restrictions.** Except as expressly permitted by this Agreement, Customer shall not (i) modify, copy or create derivative works based on the Services and/or Ottemo Technology; or (ii) disassemble, reverse engineer, or decompile any Service or Ottemo Technology, or (iii) access or use the Services in any manner not expressly permitted under this Agreement, including, but not limited to, in order to (A) build a competitive product or service, (B) build a product or service using similar ideas, features, functions or graphics of the Services, or (C) copy any ideas, features, functions or graphics of the Services.

**5.4 Customer Property.** As between Ottemo and Customer, all Customer Data, Customer Content and the Customer Storefront is owned exclusively by Customer. Customer Data shall be considered Confidential Information subject to the terms of this Agreement. Customer hereby grants Ottemo a non-exclusive, royalty-free, worldwide license (including the right to sublicense through multiple tiers) to access, use, reproduce, distribute, store, transmit, modify, adapt, reformat, display, and create derivative works of the Customer Data, Customer Content and Customer Storefront, solely in connection with providing the Services and performing the Development Services and other related services, including support and technical services and analysis of bills. The parties acknowledge and agree that all right, title and interest in and to the Customer Content and Customer Storefront shall, as between Customer and Ottemo, remain the sole and

exclusive property of Customer, provided, however, that Customer's use thereof shall be subject to the applicable restrictions set forth in Section 5.3 of this Agreement.

**5.5 Suggestions.** Without limiting anything in Section 5.4 above, Customer hereby grants Ottemo a royalty-free, worldwide, perpetual, sublicenseable license and right to use any suggestions, ideas, inventions, information, processes, know-how and/or techniques expressed in any information provided by Customer or its Users relating to the operation of the Services and/or any Customer Data (collectively, "**Customer Suggestions**"), including the right to make, have made, sell, have sold, offer for sale, distribute, import, have imported and lease products and services which practice and/or embody Customer Suggestions.

## **6. Development Services**

**6.1 Statements of Work and Deliverables.** If agreed by the parties, Ottemo shall design, develop and host the Customer Web Site, and perform such other services described in the statement of work attached hereto as Exhibit B, and each subsequent statement of work agreed to by the parties in writing (each a "**Statement of Work**"). Except for the Statement of Work attached hereto as Exhibit B (if any), which shall be effective upon the execution of this Agreement by both parties, each Statement of Work shall be effective and appended to this Agreement once mutually agreed upon and duly executed by the parties. Each Statement of Work shall include: (a) a description of the Development Services to be performed and any materials to be delivered to Customer (collectively, the "**Deliverables**"), (b) the specifications or other requirements for the Customer Web Site and other Deliverables (collectively, the "**Specifications**"), (c) the schedule and milestone dates for the anticipated completion and delivery of each Deliverable (the "**Milestone Schedule**"), (d) a responsibility matrix that specifies each party's personnel roles and responsibilities in connection therewith, including any Customer deliverables, responsibilities, approvals or resources which are required or necessary for the implementation and performance of Development Services and completion of the Deliverables, (e) the amounts payable by Customer for the Development Services and Deliverables under that Statement of Work, and (f) any additional information, terms and conditions the parties may mutually agree to include.

**6.2 Development.** Ottemo agrees to develop the Customer Web Site(s) and other Deliverables listed in each Statement of Work in accordance with the Milestone Schedule specified in the applicable Statement of Work. Notwithstanding the foregoing, the due date for any Customer Web Site or other Deliverable or performance of any assigned task, the performance of which was delayed on account of failure of Customer to complete any of its prerequisite obligations in timely fashion, will be extended by at least one (1) business day for each day of Customer's lateness.

**6.3 Provision of Customer Content.** "**Customer Content**" shall mean any materials provided by Customer for

incorporation in the Customer Web Site including, without limitation, any images, photographs, illustrations, graphics, audio clips, video clips or text. Customer shall deliver Customer Content to Ottemo in an electronic file format mutually agreed to by the parties and accessible by Ottemo (e.g., .txt, .jpg), or as otherwise specified in the applicable Statement of Work.

**6.4 Domain Name Administration.** Customer and Ottemo acknowledge and agree that Ottemo will operate the Customer Web Site under domain name(s) to be determined by the parties (the "**Domain Names**"). Customer shall register the Domain Names and execute all documents and perform all actions necessary to appoint Ottemo as the technical contact for the Domain Names; provided, however, Ottemo's use of the Domain Names shall be limited solely to operating the Customer Web Site and directing customers and users to the Customer Web Site. Customer shall remain, at all times, the administrative contact, registrant and owner of all such Domain Names.

**6.5 Acceptance Testing.** Customer acknowledges that the Customer Web Site will be located within the Ottemo eCommerce Platform and that Customer has investigated the eCommerce Platform prior to the Go Live Date (as defined in the applicable Order Form) and, based on such investigation, accepts the Ottemo eCommerce Platform and all errors, problem or limitations inherent therein. Thus, for purposes of this Section 6.5, the term "**Final Deliverable**" shall refer to the final version of the Customer Web Site and final versions of the other Deliverables made available to Customer. Following completion of a Final Deliverable, Customer shall have a period of ten (10) days to perform acceptance testing to ensure that it substantially conforms to, and operates in all material respects in accordance with, its applicable Specifications ("**Acceptance Testing**"). Customer shall notify Ottemo in writing of any non-acceptance; failure to notify Ottemo in writing of non-acceptance during the 10-day Acceptance Testing period shall constitute Customer's acceptance of that Final Deliverable. For each rejected Final Deliverable, Ottemo shall promptly correct and resubmit it to Customer for additional Acceptance Testing under the terms of this Section 6.5. This Acceptance Testing process shall be repeated until all Final Deliverables have been accepted. There is no acceptance testing rights for interim Deliverables (if any), nor shall Customer's acceptance testing rights apply to the existing features and functionality of the Ottemo eCommerce Platform.

**6.6 Use of Subcontractors.** Customer acknowledges that in the course of performing the Development Services and producing and providing the Customer Web Site and other Deliverables, Ottemo may desire or require the use or assistance of third party subcontractors (each, a "**Subcontractor**"). Ottemo shall have the right to use Subcontractors, provided that (a) Ottemo is responsible for supervising each Subcontractor, and (b) the use of such Subcontractors shall not relieve Ottemo of primary

responsibility for the performance of any its obligations under this Agreement that are subcontracted.

## **7. Confidentiality.**

**7.1 Definition of Confidential Information.** As used herein, "Confidential Information" means all confidential and proprietary information of a party ("Disclosing Party") disclosed to the other party ("Receiving Party"), whether orally or in writing, that is either marked or designated as confidential or is identified in writing as confidential or proprietary within fifteen (15) days of disclosure to the Receiving Party; provided that the following shall be deemed to be Confidential Information even if not so marked or identified: the terms and conditions of this Agreement (including pricing and other terms reflected in all Order Forms hereunder), the Customer Data, the Services, the Ottemo Technology, the Disclosing Party's business and marketing plans, technology and technical information, product designs, and business processes, any information or materials with the name, sign, trade name or trademark of the Disclosing Party and any information that a reasonable person would deem confidential or proprietary given the nature of the information and the circumstances under which it is disclosed.

Confidential Information (except for Customer Data) shall not include any information that a Receiving Party can show: (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party; (iii) was independently developed by the Receiving Party without breach of any obligation owed to the Disclosing Party; or (iv) is received from a third party without breach of any obligation owed to the Disclosing Party.

**7.2 Confidentiality.** The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, except with the Disclosing Party's prior written permission; provided that a Receiving Party may disclose any Confidential Information of the Disclosing Party to its employees who have a need to know such Confidential Information for purposes of this Agreement and who are bound to a written agreement protecting such Confidential Information as required hereby.

**7.3 Protection.** Each party agrees to protect the confidentiality of the Confidential Information of the other party in the same manner that it protects the confidentiality of its own proprietary and confidential information of like kind, but in no event shall either party exercise less than reasonable care in protecting such Confidential Information.

**7.4 Compelled Disclosure.** If the Receiving Party is compelled by law to disclose Confidential Information of the Disclosing Party, it shall provide the Disclosing Party with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.

**7.5 Remedies.** If the Receiving Party discloses or uses (or threatens to disclose or use) any Confidential Information of

the Disclosing Party in breach of this Section 6, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies may be inadequate.

**8. Disclaimer of Warranties.** EXCEPT AS EXPRESSLY PROVIDED HEREIN, OTTEMO MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, OTTEMO HEREBY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF TITLE, MERCHANTABILITY, NON-INFRINGEMENT OR FITNESS FOR A PARTICULAR PURPOSE.

OTTEMO DOES NOT REPRESENT OR WARRANT THAT: (i) THE SERVICE WILL MEET CUSTOMER'S BUSINESS REQUIREMENTS; (ii) THE SERVICE WILL BE ERROR-FREE OR UNINTERRUPTED OR THAT THE RESULTS OBTAINED FROM ITS USE WILL BE ACCURATE OR RELIABLE; OR (iii) ALL DEFICIENCIES IN THE SERVICE CAN BE FOUND OR CORRECTED. FURTHER, THE SERVICE MAY BE INTERRUPTED OR UNAVAILABLE FOR THE PURPOSES OF PERFORMING MAINTENANCE OR UPGRADES. OTTEMO WILL NOT BE RESPONSIBLE FOR: (A) SERVICE IMPAIRMENTS CAUSED BY ACTS WITHIN THE CONTROL OF CUSTOMER OR ANY USER; (B) INTEROPERABILITY OF SPECIFIC CUSTOMER APPLICATIONS OR EQUIPMENT; (C) SERVICE PROVIDED BY OTHER SERVICE PROVIDERS; OR (D) THE INABILITY OF CUSTOMER TO ACCESS OR INTERACT WITH ANY SERVICE PROVIDER THROUGH THE INTERNET, OTHER NETWORKS OR USERS THAT COMPRISE THE INTERNET OR THE INFORMATIONAL OR COMPUTING RESOURCES AVAILABLE THROUGH THE INTERNET.

## **9. Mutual Indemnification.**

**9.1 Indemnification by Ottemo.** Subject to this Agreement, Ottemo shall defend, indemnify and hold Customer harmless against any loss or damage (including reasonable attorneys' fees) incurred in connection with claims, demands, suits, or proceedings ("Claims") made or brought against Customer by a third party alleging that the Services or the Deliverables infringe any U.S. patent, copyright or trade secret rights of a third party. Notwithstanding anything to the contrary in this Agreement, the foregoing states Ottemo's entire liability and Customer's exclusive remedy for patent, copyright, trademark or other proprietary rights infringement.

**9.2 Indemnity Conditions/Limitations.** Ottemo's obligations under Section 9.1 above are subject to each of the following conditions and/or limitations: (A) Customer shall (i) promptly give written notice of the Claim to Ottemo; (ii) give Ottemo sole control of the defense and settlement of the Claim (provided that Ottemo may not settle or defend any Claim without Customer's prior written consent, which will

not be unreasonably withheld, unless it unconditionally releases Customer of all liability); and (iii) provide to Ottemo, at Ottemo's cost, all reasonable assistance. (B) In the event that the Services or any part thereof are likely to, in Ottemo's sole opinion, or do, become the subject of an infringement related Claim, and Ottemo cannot, at its option and expense, procure for Customer the right to continue using the Services, or any part thereof, or modify the Services, or any part thereof, to make them non-infringing, then Ottemo may terminate the Services. (C) Ottemo shall have no liability for any claim of infringement based on (i) the use or combination of the Services or any part thereof with software, hardware, or other materials not provided by Ottemo, or (ii) modification of the Services by a party other than Ottemo, where the use of unmodified Services would not constitute infringement.

**9.3 Indemnification by Customer.** Subject to this Agreement, Customer shall defend, indemnify and hold Ottemo, its affiliates, employees, officers, directors and shareholders harmless against any loss or damage (including reasonable attorneys' fees) (i) incurred in connection with Claims made or brought against Ottemo by a third party alleging that the Customer Data and/or Customer Content misappropriates or infringes the proprietary rights of, or has otherwise harmed, a third party, (ii) Claims by any third party to the extent that such Claims are based upon or arise out of Customer's use of the Services or Customer's actions and (iii) arising from any breach by Customer of this Agreement; provided, that Ottemo (a) promptly gives written notice of the Claim to Customer; (b) gives Customer sole control of the defense and settlement of the Claim (provided that Customer may not settle or defend any Claim, without Ottemo's prior written consent, which will not be unreasonably withheld, unless it unconditionally releases Ottemo of all liability); and (c) provides to Customer, at Customer's cost, all reasonable assistance.

## **10. Limitation of Liability.**

**10.1 Limitation of Liability.** EXCEPT FOR LIABILITY ARISING FROM A PARTY'S INDEMNIFICATION OBLIGATIONS OR LIABILITY ARISING FROM A BREACH BY EITHER PARTY OF SECTION 7 HEREOF, IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE GREATER OF \$500,000 OR THE AMOUNTS ACTUALLY PAID BY AND DUE FROM CUSTOMER HEREUNDER DURING THE 12 MONTHS PRIOR TO THE DATE ON WHICH SUCH CLAIM OR CAUSE OF ACTION AROSE.

**10.2 Exclusion of Consequential and Related Damages.** EXCEPT FOR LIABILITY ARISING FROM A PARTY'S INDEMNIFICATION OBLIGATIONS OR LIABILITY ARISING FROM A BREACH BY EITHER PARTY OF SECTION 7 HEREOF, IN NO EVENT SHALL EITHER PARTY OR ANY THIRD PARTY PROVIDER HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST

PROFITS, LOSS OF USE, COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES HOWEVER CAUSED AND, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. SOME STATES AND JURISDICTIONS DO NOT ALLOW LIMITATIONS ON DURATION OR THE EXCLUSION OF AN IMPLIED WARRANTY, SO THE ABOVE LIMITATION MAY NOT APPLY. EACH PARTY MAY ALSO HAVE ADDITIONAL RIGHTS NOT STATED IN THIS DOCUMENT.

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, OTTEMO SHALL NOT BE LIABLE FOR UNAUTHORIZED ACCESS TO OR ALTERATION, THEFT, LOSS OR DESTRUCTION OF ANY DATA, EQUIPMENT OR THE SERVICES, INCLUDING THROUGH ACCIDENT, FRAUDULENT MEANS OR DEVICES, OR ANY OTHER METHOD.

Neither party shall be responsible or liable to the other for any loss, damage or inconvenience suffered by the other or by any third person, to the extent that such loss, damage or inconvenience is caused by the failure of the other party to comply with its obligations under this Agreement.

**10.3 Limitation of Action.** Except for actions for non-payment or breach of either party's intellectual property rights, no action (regardless of form) arising out of this Agreement may be commenced by either party more than one (1) year after the cause of action has accrued.

## **11. Term & Termination.**

**11.1 Term of Agreement.** This Agreement shall commence on the effective date of the Customer's first Order Form and, except as otherwise set forth in Section 11.3 below, continues until all subscriptions granted in accordance with this Agreement have expired or been terminated.

**11.2 Term of Subscriptions.** Subscriptions commence on the start date specified in the relevant Order Form and continue for the subscription term specified therein.

**11.3 Termination.** This Agreement may be terminated:

(a) by Ottemo (i) if Customer fails to make any payment when due or any interest thereon to Ottemo under this Agreement and fails to cure such default within fifteen (15) days of receiving notice in writing from Ottemo to do so (whether or not Ottemo avails itself of its right to suspend the Services pursuant to Section 4.3 hereof); or (ii) immediately, without notice or liability to Ottemo, in the event of a breach by Customer of Section 5.3 hereof (Restrictions) or Section 7.2 hereof (Confidentiality);

(b) by Customer (i) by providing written notice to Ottemo within thirty (30) days of receiving notification from Ottemo of any material and adverse change in the functionality of the Services or of any increase in the fees for the Services; or

(ii) immediately in the event of a breach by Ottemo of Section 7.2 hereof (Confidentiality);

(c) by either party in the event the other party materially breaches any of its duties, obligations or responsibilities under this Agreement (other than breaches covered in Sections 11.3(a) and (b) hereof), and fails to cure such breach or provide the other party with an acceptable plan for curing such breach within thirty (30) days after receipt by the breaching party of written notice specifying the breach; or

(d) by either party in the event: (i) a receiver, trustee, administrator, or administrative receiver is appointed for the other party or its property; (ii) the other party makes an assignment for the benefit of creditors; (iii) any proceedings should be commenced against the other party under any bankruptcy, insolvency, or debtor's relief law, and such proceedings shall not be vacated or set aside within sixty (60) days from the date of commencement thereof; or (iv) the other party is liquidated or dissolved.

**11.4 Outstanding Fees.** Termination shall not relieve Customer of the obligation to pay any fees accrued or payable to Ottemo prior to the effective date of termination.

**11.5 Return of Customer Data.** Upon request by Customer made within 30 days of the effective date of termination, Ottemo will make available to Customer a facility for exporting Customer Data. After such 30-day period, Ottemo shall have no obligation to maintain or provide any Customer Data and shall thereafter delete all Customer Data in its systems or otherwise in its possession or under its control.

**11.6 Surviving Provisions.** The following provisions shall survive the termination or expiration of this Agreement for any reason and shall remain in effect after any such termination or expiration: Sections 4, 5 (excluding Section 5.2), 7, 8, 9, 10, 11 and 12.

## **12. General Provisions.**

**12.1 Relationship of the Parties.** This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties and Ottemo will be considered an independent contractor when performing any services hereunder.

**12.2 No Benefit to Others.** There are no intended third party beneficiaries of this Agreement. The representations, warranties, covenants, and agreements contained in this Agreement are for the sole benefit of the parties and their respective successors and permitted assigns, and they are not to be construed as conferring any rights on any other persons.

**12.3 Notices.** All notices under this Agreement shall be in writing and shall be delivered to the addresses first set forth in applicable Order Forms. Notice shall be deemed to have been given upon receipt. Notices to Ottemo shall be addressed to the attention of its CEO. Notices to Customer are to be addressed "Attn: Chris Dukelow." Either party may change its address for notice by giving notice of such address change in the manner provided herein.

**12.4 Waiver and Cumulative Remedies.** No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

**12.5 Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

**12.6 Assignment.** Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior express written consent of the other party. Notwithstanding the foregoing, either party may assign this Agreement together with all rights and obligations hereunder, without consent of the other party, in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets related to this Agreement not involving a direct competitor of the other party. Any attempt by a party to assign its rights or obligations under this Agreement in breach of this section shall be void and of no effect. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

**12.7 Governing Law.** This Agreement shall be governed by and construed in accordance with Washington State Law, without regard to its conflict of law provisions. The United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement. Furthermore, this Agreement will not be governed or interpreted in any way by referring to any law based on the Uniform Computer Information Transactions Act (UCITA) or any other act derived from or related to UCITA. Each party consents to, and agrees that each party is subject to, the exclusive jurisdiction of the state and federal courts of the Commonwealth of Massachusetts with respect to any actions for enforcement of or breach of this Agreement.

**12.8 Export Control Laws.** Each party shall comply with all United States and foreign export control laws or regulations applicable to its performance under this Agreement.

**12.9 Force Majeure.** Except for the obligation to make payments, nonperformance of either party shall be excused to the extent that performance is rendered impossible by strike, fire, flood, governmental acts or orders or restrictions, failure of suppliers, or any other reason where failure to perform is beyond the reasonable control of the non-performing party.

**12.10 Entire Agreement.** This Agreement, including all exhibits and addenda hereto, along with all Order Forms executed hereunder, constitute the entire agreement between the parties as to its subject matter, and supersede all previous and contemporaneous agreements, proposals or representations, written or oral, concerning the subject matter of this Agreement. No modification, amendment, or waiver of

any provision of this Agreement shall be effective unless in writing and signed by the party against whom the modification, amendment, or waiver is to be asserted. In the event of any conflict between the provisions in this Master Subscription Agreement and any exhibit or addendum hereto, or Order Form executed hereunder, the terms of such exhibit, addendum or Order Form shall prevail to the extent of any inconsistency. Notwithstanding any language to the contrary therein, no terms or conditions stated in a Customer purchase order or in any other Customer order documentation shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.

**12.11 Counterparts.** This Agreement may be executed in counterparts, which taken together shall form one legal instrument.

**12.12 Construction.** The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (i) references to the plural include the singular, the singular the plural, and the part the whole, (ii) references to one gender include all genders, (iii) "or" has the inclusive meaning frequently identified with the phrase "and/or," (iv) "including" has the inclusive meaning frequently identified with the phrase "including but not limited to" or "including without limitation," and (v) references to "hereunder," "herein" or "hereof" relate to this Agreement as a whole. Any reference in this Agreement to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time. The parties agree that this Agreement shall be fairly interpreted in accordance with its terms without any strict construction in favor of or against either party and that ambiguities shall not be interpreted against the drafting party.



