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## Ensighten

Josh Manion, CEO of Ensighten, pulled together his notes in preparation for a call with his attorney, Jim Quinn. It was December 2010, and Manion had moved his software company from Chicago to Silicon Valley—and come out of “stealth” mode—only three months earlier. When the company first announced its product in September it had five customers, and in the past three months, Manion and his team of seven had worked hard to bring more clients on board. After five months of considerable selling effort, Manion was close to landing Global Media, Incorporated (GMI) as a client. GMI was a Fortune 50 company, with leading media properties all over the world. Manion explained the situation:

As a new venture, with little money, trying to establish not just our company but the space itself, it is tempting to do anything to get a deal done. But, I can't set the precedent of giving away the store. There are terms in our licensing contract we need to fight for. . . . Establishing that precedent will save us a lot of fights down the road. By the same token, I don't want to lose this deal.

Quinn, a partner and intellectual property specialist with the law firm Larkin Hoffman in Minneapolis, offered his view:

At the end of the day, you have to figure out what you need to have and fight for it. Your success is a matter not just of your legal strategy but also of the fundamental value proposition of your business . . . how critical is the product or service you are selling and how badly does the customer want it . . . That leverage can buy you a lot.

### Background

Manion, a seasoned entrepreneur, was a 2001 graduate of MIT. He had started his first company while still a student at MIT:

I co-founded a company called forathletes.com that was a very early attempt to build an online community of amateur athletes. My partners and I bootstrapped that company, and then sold it to the big fish in this space called Myteam.com. I stayed with the company for a short time as a consultant. Although Myteam had raised \$50 million, the company struggled to get traction with advertisers. After Myteam was acquired by Active Networks, I took a job

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Senior Lecturers Lena G. Goldberg and Michael J. Roberts prepared this case. The names of certain companies have been disguised. HBS cases are developed solely as the basis for class discussion. Cases are not intended to serve as endorsements, sources of primary data, or illustrations of effective or ineffective management.

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doing strategy and partnership with a small startup in the network technology space in Chicago, but I quickly got tired of working for somebody else. I decided there was a consulting business to be built around web analytics and it was time for me to start another business.

Between 2002 and 2009, Manion built Stratigent, a successful consulting business with about 25 employees. But, he said, "I was always looking for some way to change from the dollars-per-hour model to a software model. I kept seeing the same problem at many of our clients and in the summer of 2009, had the insight that there might be a solution to this problem. I finally decided this is it."

## Web Analytics and Tag Management

The problem that Manion had seen, and that web marketers, managers, and consultants had struggled with for years, involved tracking consumer behavior on a website. Manion explained:

Everyone wants to know where their customers come from, how much time they spend on which parts of the site, and what they buy. But keeping track of all that data can be a nightmare. The earliest solutions were built around "weblogs," a detailed map of all the activity in the browser . . . but tracking and analyzing that data was terribly cumbersome. The follow-up to that approach, introduced in about 2002, was page tagging. Basically, you put an invisible piece of code on every web page, and when that page is opened, it sends a message to an analytical application that is measuring the desired characteristic. So, for instance, if you want to track where a customer comes from, you put a tag on the landing page, and when that page opens, the tag sends a piece of data to the analytical application that is tracking the origin of the customer. The same principle applies to the links people click on, the amount of time they spend on a page, and where they go when they leave.

In practice, there were many analytical applications that required the use of tags to collect the data that could, in turn, be analyzed and acted upon. They included:

- Advertising tools that tracked the effectiveness of ad campaigns, traffic from affiliates, and retargeting or redirection of traffic.
- Analytics packages that tracked where customers came from, how long they stayed, what links they clicked on, if and how much they bought, and where they went. Popular tools in this space were provided by companies like Omniture, Google Analytics, and IBM's Coremetrics.
- Testing and optimization tools that tested different versions of a web page against each other.
- Voice-of-customer packages that tracked surveys and other consumer feedback and input.

Manion explained how this increasing trend toward the collection and analysis of web data had created the opportunity for Ensighten:

The real issue was complexity. A big company could have literally hundreds of sites (or domains) for various product divisions, geographies, and customer types. Then, each site could have tens or even hundreds of thousands of pages. . . . Imagine what the full set of products and web pages looks like for companies such as Sony or 3M. And then, each page could have from 10 to 50 separate tags . . . a tag for each type of data or activity that the company wants to track . . . where did the customer come to that page from, how long did they stay, what did they do when they were there, where did they go next, and what did they buy.

Several of our first clients had over 1 million tags they were trying to manage. Imagine a company implementing a new advertising campaign and wanting to tag every page to track the effectiveness of the campaign. A company could spend \$20 million on an ad campaign, call its IT group and ask them to track its impact, and be told it was eight man weeks of work that would be done in six months. . . . It was crazy.

## Ensighten's Solution

Manion and a small team of coders developed a simple solution to this problem, refined it on several Stratigent customers, and convinced themselves they had a real breakthrough: "Once you had our system up and running, you could do a piece of work like this in literally minutes without sacrificing the richness and complexity of data or analytical output. It was a big idea." (See **Exhibit 1** for a summary of how Ensighten's tag management system worked.)

In late 2009, Manion formally spun the technology out of Stratigent in Chicago into Ensighten LLC, a newly formed company wholly owned and funded by Manion and his wife Julie Oberweis. Manion filed for patents on the core technology, built a small team, and went into stealth mode to develop a real product and get the first customers. Manion decided to invest virtually all of his time and attention on the new venture, and handed over the day-to-day operation of Stratigent to that company's management team in early 2010. Then, in September of that year, Manion and a small team moved to Silicon Valley.

We bootstrapped our way into building the product, and I didn't want to announce what we were doing and attract a lot of attention. . . . I figured we should just get the product finished, get customers, and build a real company. As we got traction and I began to believe how big the idea could be, we decided to move out to Silicon Valley and plant the flag. We announced our product and our first five customers in September 2010. We were half a dozen developers and three salespeople. It took about \$1 million in capital to reach this point. That money came from my wife and me: we were fortunate that Stratigent had been a profitable business for many years.

Despite moving to Silicon Valley, we decided to not raise VC funding; in my view, we don't need the money yet. Every big company knows they have this tag management problem. . . . They get it instantly. But it is a problem shared across many different parts of the business, from IT to marketing to media to operations, and there is no identified budget for it. It doesn't pay to raise a lot of VC and hire more salespeople until the market "tips" or "crosses the chasm." Then, it may make sense to take some money. But for now, capital is not the limiting factor.

Ensighten's product lived in the "cloud." The company had contracts with the largest providers of server capacity in the world with numerous clusters of servers running globally. This was a critical piece of the application, because every client site reached out to Ensighten's hosted server to know what tags to serve to each visitor to the client's site. Ensighten's success in attracting some large clients resulted in this activity quickly building to many billions of requests each month. Ensighten priced its services based on the number of websites or client domains and the amount of traffic on those domains. A typical early deal was approximately \$200,000 in annual licensing fees and a \$25,000 setup and installation charge. Ensighten could usually configure the service for a client in about a week, and the client could be up and running on the service after that. Manion explained:

We develop a set of rules that drive how the tags are placed on which pages. . . . Then, we run that set of rules. . . . It can result in 1 million different permutations of the tags that appear on a page, but it is relatively simple for us to implement. Once a client starts to use our application, it becomes a pretty sticky application. . . . We are saving them months and months of work, and enabling very valuable functionality they struggled to achieve without this tool.

One of the biggest obstacles Ensighten had to overcome was the fact that we needed to convince very large enterprises to rely on us as a mission-critical platform in their infrastructure. In particular, it was much more difficult for our first few customers to place that level of trust in us, and some of this was reflected in the terms that we had to agree to . . . source code escrow, transition plans, restrictions on when we could terminate contracts on our clients, etc.

## Developing a Template Contract

Manion described how the early deals came together:

Working with our law firm in Chicago, we had developed a template for our basic software license. With our first three clients this worked fine, as we did not run into a major level of legal/procurement review. These early agreements helped us to learn what customers were going to push back on and what terms were truly important for us to insist on having; but these early negotiations with clients focused mainly on the business terms and for the most part did not include legal counsel on either side. There were some terms that we stood completely fast on . . . especially ones related to our intellectual property. . . . We weren't going to share that with anyone. I was also reluctant to provide any levels of indemnification that could put us out of business. I was also wary of terms that could put us in the position of having to give a client money back, since we intended to leverage this capital to accelerate our growth. On other issues, I would try to accommodate requested changes if they seemed reasonable, especially if seemed likely that future clients were going to ask for it.

Then, we did a very big deal with one of the largest apparel companies in the world. For the first time, we weren't working off of our contract, but it was a contract the client provided. It was a mess, because it was the kind of contract they would usually use with a consultant, but we were providing a piece of licensed software. Their model was that everything we did was a piece of work for hire, and they owned the IP. We had a big phone conference on this, and I could see that my existing attorney wasn't as much of an expert on all this as I'd assumed. One of our employees had worked with Jim Quinn at her former company and suggested we reach out to him. I did, and he obviously had an expertise in exactly the issues we were wrestling with. I brought him on board to help complete this deal, and continue to work with him whenever any sticky issues come up.

Quinn, who specialized in intellectual property issues in the technology space (see **Exhibit 2** for Quinn's bio), worked with Ensighten and got the deal with the apparel company on track. Manion himself "went to school" on the experience: "I worked closely with Jim and really tried to use it as an education for me so I could do most of this on my own. I didn't want to have to spend \$10,000 in legal fees for every deal we started to negotiate."

Quinn offered his perspective on the general legal arena in which Ensighten's agreement was grounded:

In the old days, there was a pretty clear licensed software model. A license is a revocable, nontransferable, nonexclusive right to use. It made sense for Microsoft to license Word or Oracle to license its database software because the license does not confer ownership, and therefore, it allows the licensor to impose a much more restrictive set of terms on the client. In an outright sale, ownership confers with it the right to do whatever you please with what you have purchased. Software licensors restrict the ability of the licensee with respect to the purpose to which the product is put, for example, the ability to copy or sell services based on the software to others. Intuit may be glad to license a copy of QuickBooks to you, but may not want you preparing thousands of different companies' financial reports on it . . . and they can put that kind of a restriction in a license.

Now, with the guts of the software sitting in the cloud, it is a bit different. The customer doesn't even get a copy of the software. . . . They get a right to access the software that is sitting in the cloud. Essentially, by paying a fee, the customer gets the right to use the functionality of an application without ever putting the actual software on their computer. Of course, the customer still gets a little piece of software that sits on their hardware and serves as a connector, so technically, it may make sense to license that, but the bulk of the functionality takes place in the cloud.

Quinn also talked about the somewhat unusual nature of his relationship with Manion:

I have actually never met Josh. Every now and again he will call and ask me to look at a particular section of a specific agreement he is working on. I am happy to do it, and I understand that, as an entrepreneur who is bootstrapping his business, he needs to husband his cash and watch the legal fees. I am always clear with him that I am simply looking at just what he asks me to and need to disclaim any judgment on any of the rest of the document, indeed, on any follow-on impact my suggested changes may have on any other sections of the agreement.

## GMI

GMI was a \$70 billion company with leading media properties located all over the world. It naturally used many tag-based solutions and wanted extensive tracking of where its customers came from, what they did on the site, the advertising they were served, how effective that advertising was in driving follow-on behavior, and a host of other factors.

Negotiations with GMI had begun in October 2010, and Manion and the business team at GMI had reached substantial agreement on the business terms by early November. Based on this, Manion had provided GMI with Ensighten's standard licensing agreement, the agreement he'd refined based on the first several deals, and an agreement Quinn had blessed after getting involved with the company. After a few weeks, Manion had received a redline version (see **Exhibit 3** for the redlined agreement), with GMI's requested changes to the agreement. While he dearly wanted to land GMI, there were certain changes he was wary of making. He decided it was time to depart from his usual approach. He called Quinn and involved him in the negotiations: "It is a big deal for us, and while I am comfortable having pushed this 80% of the way, I don't want to make a mistake at this point."

Quinn offered his thoughts:

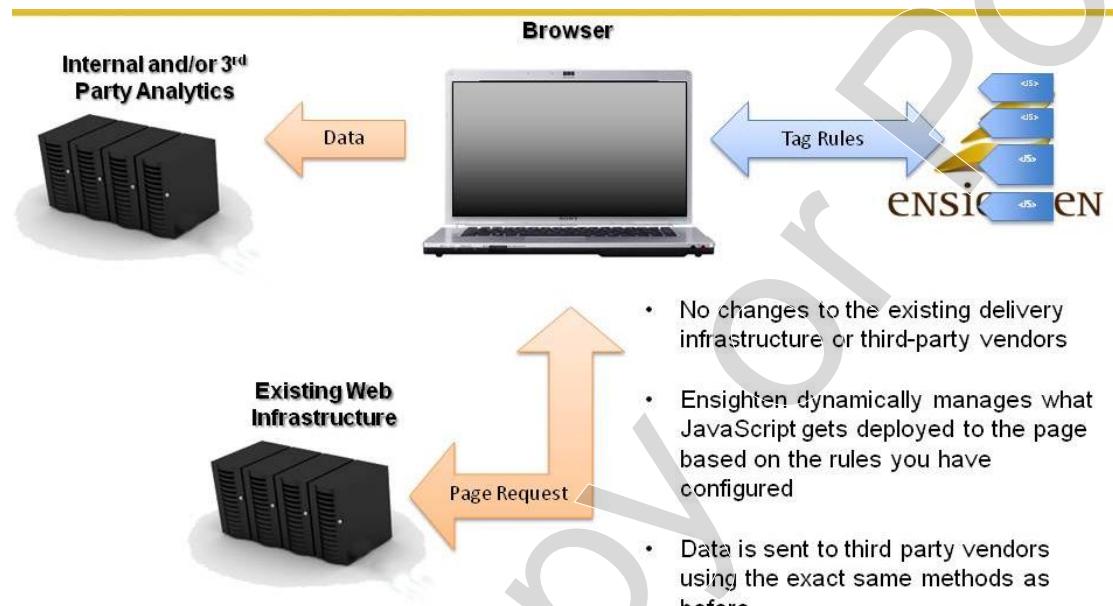
GMI is going the typical route here, using outside counsel. For a company of their size, a \$200,000 deal isn't big enough to pull the general counsel and his staff away from core legal issues. So, their outside attorney is probably working within a fairly fixed set of parameters his client has given him . . . "we never compromise on X, Y, and Z, and see how much you can get us on A, B, and C." The problem is, we don't yet know which issues are which . . . so, we need to push a little on all sides to see where the box really is. And, the hope is that the issues they will compromise on are the ones we need some movement on. We'll see.

\* \* \*

Manion reflected on his agenda for the call:

One issue we need to resolve is around data security. Customers are naturally concerned with this, but the fact is, we don't intentionally keep any data. Every page of traffic passes through our cloud-based servers, and we apply the appropriate set of tags to each page as it moves through, but that is all we do. All of the customer's data—as well as the output generated by the tags—goes to the company or its analytics vendors. We keep nothing.

We've come a long way and I do believe this is a big idea with tremendous upside. But, we have to make progress one deal at a time, and this is a big one. Quinn and I have to come up with a workable approach. I know that the attorneys always feel like they need to stake out aggressive positions so we have somewhere to compromise to, but I do want to be sure we don't scare them away with any positions we take. On the other hand, there are some things we just can't live with in this deal, let alone allow them to become part of agreements with other clients.

**Exhibit 1** Ensighten Systems Logical Data Flow

Source: Company.

**Exhibit 2 James P. Quinn****James P. Quinn Biography**

James P. Quinn is a shareholder in the Intellectual Property, Technology and Internet Department and has served in several management positions at Larkin Hoffman Daly & Lindgren Ltd. He has filed almost 700 trademark applications, and is additionally skilled in copyrights, trade secrets, software and technology development and distribution, e-commerce and all transactions involving intellectual property. He has negotiated and prepared licenses and other agreements dealing with a wide variety of goods and services. As counsel for both system providers and purchasers of hardware and software, Mr. Quinn is experienced in the drafting of agreements for the creation, distribution and use of technology. He has on many occasions represented clients in negotiations to acquire large systems from some of the world's biggest suppliers of hardware and software. His representation of e-commerce businesses, and companies that have successfully transitioned to live commerce sites, has given him broad-based exposure to e-commerce infrastructure. As counsel to clients with a significant online presence, his work includes: the "licensing-in" of the technology that supports an e-commerce system; terms of use and end user agreements; data security and privacy matters; content management; the use of third party intellectual property; payment processing, fulfillment processes, service-level and maintenance obligations, social media, online marketing and online affiliate and sponsored advertising programs. In his practice, he acts as counsel to both large publicly traded companies and privately held businesses. Mr. Quinn's association with attorneys around the world enables him to provide service to clients on a global basis. Mr. Quinn is a 1980 graduate of the William Mitchell College of Law. Through the years he has been active in many professional and civic organizations. Mr. Quinn is a frequent lecturer and writer on matters relating to intellectual property. Mr. Quinn has been a past speaker at the Minnesota Interactive Marketing Association Summits and at a Social Media Breakfast event, where his presentations have focused on such things as trademarks and legal issues in social media. In January 2011 he spoke about contracts and cloud computing at the "Data Privacy & Security for In-House Counsel" continuing legal education seminar sponsored by the Minnesota State Bar Association. In addition, he has made presentations for the Minnesota Chapter of the Association of Corporate Counsel, "Midwest Intellectual Property Institute," and the "Computer Law Institute."

**Bar Admissions**

Minnesota, 1980

U.S. District Court, District of Minnesota

Source: James P. Quinn.

**Exhibit 3**

**GMI Revisions 12-9-10**

**VPA – LICENSE AGREEMENT**

**Vendor Name: Ensighten LLC -1784492**  
**Contract Number: VPA-XXXX-XXXXXX**

**TAG Management Services**

**Contract Start Date: XX/XX/XXXX**  
**Contract End Date: XX/XX/XXXX**

**Version: January 2011**  
**Contract Start Date: XX/XX/2011**  
**Contract End Date: XX/XX/2012**

**VPA - License Agreement**  
**Contact Number: VPA-XXXX-XXXXXX**  
**Case Ref Number: XX-XXXXXX**

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## ENSIGHTEN USER AGREEMENT

This Ensighten User Agreement (the "Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2011 (the "Effective Date") by and between Ensighten LLC ("Ensighten"), with offices located at 1771 Diehl Road, Suite 330, Naperville, IL 60563 and GMI, Inc. ("Customer"), with offices located at 2030 Groupon Lane, Detroit, MI 13669.

1. Preamble. Ensighten provides an online tag management service that a customer can access through Ensighten's web page located at [www.ensighten.com/login/](http://www.ensighten.com/login/) (the "Service"). The Customer wishes to subscribe for the Service. Ensighten is willing to provide the Service to the Customer on the terms and conditions set forth in this Agreement.

2. Accounts, Access, Modules and Support.

2.1 Customer Account. Upon payment of any required amounts and the performance of any other preliminary obligations of the Customer described in this Agreement or Exhibit A, attached hereto and incorporated herein by reference, Ensighten shall create an online password-protected account for the Customer (the "Account"). An Account is required to access the Service and the Service may only be used with respect to that number of domains specified in Exhibit A. The Customer's use of the Service other than as specified in Exhibit A, or with more domains than specified in Exhibit A, will result in additional fees and charges.

2.2 Right to Use Service. Subject to the provisions of this Agreement, during the term of this Agreement, the Customer shall have a non-exclusive, non-transferable (except as otherwise provided for herein), limited right to access and internally use the Service solely for the collection, management, and use of marketing and analytics data collected from websites owned and operated by the Customer, and for no other purposes. The Customer will only have access to the modules within the Service that it elects to subscribe for as specified on Exhibit A. After the creation of the Account, Ensighten shall provide the Customer with a reference code that can be used by the Customer to activate and use the Service with respect to the websites specified in Exhibit A. The Customer is required to insert the reference code supplied by the Company into each domain to be accessed by the Service.

2.3 Modules and Support. The Service will only include the modules the Customer elects to subscribe for as set forth on Exhibit A. The modules will have the functionality described on Exhibit A. Ensighten will provide telephone support to Customer during normal business hours, which are Monday through Friday, 8:30 a.m. through 5:30 p.m. CST, excluding national holidays. The Customer shall have the right to designate up to three (3) persons who shall be the only Customer representatives authorized to interact with Ensighten with respect to support matters (the "Support Contacts"); —and Ensighten shall only be obligated to work with such Support Contacts or other Customer personnel who Customer may designate from time to time. As of the Effective Date, the Support Contacts are as indicated in Exhibit A. The Customer shall have the right to change the Support Contacts from time to time upon at least five (5) days prior written notice to Ensighten.

3. Passwords and Accounts. The Customer is required to have an account with Ensighten for the Customer to use the Service. The Customer agrees to provide accurate and current

information on all registration forms for the Service. ~~The Customer agrees not to impersonate any person or entity, misrepresent any email address, misrepresent the Customer affiliation with a person or entity, or misrepresent the origin of any content distributed by the Customer through the Service.~~ The Customer agrees to allow Ensighten to store and use the Customer contact information, including names, phone numbers, and e-mail addresses solely for the purpose of enabling Ensighten to perform its obligations under this Agreement. The Customer will receive a password and account designation upon completing the Service registration process. The Customer is responsible for maintaining the confidentiality of the Customer user names and passwords. The Customer accepts full responsibility for any actions taken by a person using the Customer usernames or passwords, whether authorized by the Customer or not, and the Customer will not transfer or sell to any third party such user names, passwords, or the Customer access to the Service. Ensighten shall have the right to require the Customer to change the Customer user names or passwords at any time. The Customer agrees to immediately notify Ensighten of any unauthorized use of the Customer usernames or passwords or any other breach of security. Ensighten has no obligation to inquire about the authority of anyone using the Customer user name and password or other information that can be used to identify the Customer account, including a use to request Service. THE CUSTOMER IS SOLELY RESPONSIBLE FOR ANY USE OF THE CUSTOMER USER NAME AND PASSWORD, EVEN IF THE CUSTOMER ISN'T THE ONE USING IT, AND EVEN IF THE CUSTOMER LATER CLAIMS THE USE WASN'T AUTHORIZED. THE CUSTOMER IS SOLELY RESPONSIBLE FOR THE SERVICES REQUESTED BY THE CUSTOMER, OR BY ANYONE USING THE CUSTOMER USER NAME AND PASSWORD AND ALL ACTIVITIES THAT OCCUR IN THE CUSTOMER ACCOUNT. THE CUSTOMER AGREES THAT THE CUSTOMER, AND NOT ENSIGHTEN, IS RESPONSIBLE FOR ANY LOSS OR DAMAGES RESULTING FROM ALL USES OF THE CUSTOMER ACCOUNT, USER NAME, AND PASSWORD. Notwithstanding the foregoing, (i) Ensighten shall maintain and store the Customer Data (as defined below) in secure and segregated files and accounts that are separate from the materials, items, data, information, and content provided by other customers of Ensighten, and (ii) Ensighten shall not be relieved of any of its data security obligations under this Agreement. Ensighten shall not permit its other customers to gain access to the Account or any Customer Data through the use of any services or technology provided by Ensighten.

4. **Ownership.** Ensighten is and shall remain the exclusive owner of all right, title, and interest in and to (i) any and all parts of the Services, (ii) any and all materials, items, information, content, "look and feel," software (in both object and code and source code format), and technology developed, provided, improved, changed, or used by Ensighten in connection with the Service (the "Ensighten Materials"), and (iii) any and all rights of patent, copyright, trademark and service mark, trade secret rights, and all other intellectual property rights (the "Intellectual Property Rights") related to the Service and the Ensighten Materials (the "Ensighten Rights"). All rights not expressly granted by Ensighten to the Customer in this Agreement are reserved to Ensighten. The Customer shall not interfere with Ensighten's ownership, use, and exploitation of the Ensighten Rights. ~~Customer shall not have the right to modify, translate, reverse engineer, disassemble, decompile, reformat, create derivative works of, or otherwise attempt to access or learn the source code or underlying technology related to the Services or the Ensighten Materials.~~ The Customer shall not have the right to (i) license, sublicense, sell, resell, transfer, assign, distribute or otherwise commercially exploit or make available to any third party any portion of the Service in any way, (ii) "frame" or "mirror" any content from the Service on

any server or wireless or Internet-based device, or (iii) use the Service in connection with a service bureau or to provide services to any third party. The Customer shall be the exclusive owner of all right, title, and interest in and to (i) the Customer Data; including without limitation any and all data and information developed through the use of the Services by the Customer, and (ii) any and all materials, items, information, and technology provided by the Customer (clauses (i) and (ii) collectively, the "Customer Materials"), and (iii) any and all materials, items, information, and technology developed by Ensighten for the Customer for the specific or unique needs or requirements of the Customer, all of which, including all Intellectual Property Rights, Ensighten hereby transfers, sells, and assigns to the Customer.

5. Service Standards, Availability, and Performance.

5.1 Manner of Providing Services Ensighten personnel shall be knowledgeable about the products and services of Ensighten, the business of the Customer, the systems and technology used by the Customer, and the means by which the Ensighten products and services can be best integrated and used by the Customer in connection with Customer's business, systems, and technology. Ensighten's engagement of subcontractors shall not in any respect whatsoever relieve Ensighten of any of its obligations under this Agreement. All Ensighten personnel shall conduct themselves in a professional and courteous manner. To the extent they are provided to Ensighten in advance in writing, or are posted at the facilities of Customer, when on the premises of the Customer, Ensighten's employees and permitted subcontractors shall be subject to all the rules, regulations, policies, and programs that the Customer may have in effect from time to time regarding vendor, visitor, employee, and contractor conduct. Ensighten shall be responsible for performing civil and criminal background checks on all of its employees and subcontractors. Ensighten shall be responsible for any and all acts or omissions of its employees and subcontractors. As may be reasonably requested by Customer, Ensighten shall consult and cooperate with, and assist Customer and Customer's agents, suppliers, vendors, contractors, and providers who are providing products or services to Customer that may be used with or affected by any products or services provided by Ensighten.

5.24 Service Availability. The Service will be available to the Customer at least 99.99% of the time during each calendar month, based on the number of minutes in the subject calendar month (the "Availability Commitment").

5.32 Availability Failure. In the event the actual percentage of time the Service is available for a calendar month (the "Availability Percentage," as calculated below) is less than the Availability Commitment, the Customer shall be eligible to receive an immediate refund of credit FiveOne Thousand Dollars (\$54,000) (the "Availability Credit") as described below.

5.43 Calculation. Availability Percentage will be measured over a calendar month and calculated using the following formula:

$$\text{Availability Percentage} = \frac{\text{Base Minutes} - \text{Downtime}}{\text{Base Minutes}} \times 100$$

“Base Minutes” shall mean the total number of minutes in a given calendar month, excluding time for Ensighten’s performance of scheduled maintenance. Ensighten will provide The Customer advance notice of scheduled maintenance whenever possible.

“Downtime” shall mean the total number of minutes the Service is not available in a given calendar month. Downtime does not include any unavailability resulting from: (i) Ensighten’s performance of scheduled maintenance; (ii) denial of service attacks, mail flooding, or sabotage, viruses, worms, other attacks directed toward Ensighten’s network of servers; (iii) Internet anomalies, fires, explosions, or other force majeure events outside of Ensighten’s reasonable control; (iv) Ensighten’s suspension of the Customer’s right to use the Services as described in this Agreement; (v) The Customer’s equipment, software or other technology and/or third party equipment, software or other technology (other than third party equipment within Ensighten’s direct control); (vi) any wrongful acts or omissions~~actions or inactions~~ of the Customer ~~or any third party~~; (vii) Ensighten’s performance of emergency maintenance, such as installing security patches or to remedy conditions likely to cause severe degradation to the Services, as designated by Ensighten in its sole discretion. Ensighten may not be able to provide the Customer advance notice of such emergency maintenance. Downtime will be measured in minutes and commences when ~~If the Customer reports the issue begins to Ensighten~~. Downtime concludes once ~~the Service is available to the Customer for use in the ordinary course of business and as contemplated by this Agreement~~~~Ensighten deems the Service to be available~~.

**5.54 Availability Credits.** To be eligible to receive an Availability Credit, the Customer shall submit a written request to Ensighten that includes the dates and times of the claimed Downtime incident. The Customer’s request for an Availability Credit must be received by Ensighten within ten (10) days after the claimed Downtime incident occurred. Ensighten may reasonably require the Customer to provide additional information to assist Ensighten in its determination of whether Downtime occurred. The Customer’s failure to provide such additional information shall disqualify The Customer from receiving an Availability Credit. Upon timely receipt of the Customer’s request for an Availability Credit and Ensighten’s determination that Downtime has occurred, Ensighten shall determine the Availability Percentage for the applicable month. If such Availability Percentage is less than the Availability Commitment, Ensighten will issue an Availability Credit to the Customer.

**5.65 Multiple Remedies for Failures.** ~~The issuance of the Availability Credits and the Performance Credits as set forth in this Section are the Customer’s sole and exclusive remedies for any failure to achieve the Availability Commitment or the Performance Commitment. Availability Credits and Performance Credits may only be used against future amounts the Customer may owe to Ensighten for Services, and may not be transferred to a third party, used against a different product or service, or be paid to the Customer or anyone in cash or other form of payment. If the Customer retains a credit balance on termination of this Agreement, the Customer will forfeit such credit. In the event the Customer is entitled to Availability Credits more than twice during any four (4) consecutive month period, the Customer may terminate this Agreement and receive an immediate refund of all amounts paid to Ensighten in connection with this Agreement.~~

**6. Fees.** Customer shall pay to Ensighten the fees (the “Service Fees”) and costs in the amounts and at the times specified on Exhibit A. ~~In the event Ensighten provides any services to~~

Customer on an hourly basis, each related invoice shall be accompanied by a report providing detailed information about the services provided, dates services were provided, time spent on each discreet task (in quarter-hour increments), the name of the person providing the services, and such other information as may be reasonably requested by Customer. Customer shall have no obligation to make payment for any idle time. The Customer shall be solely responsible for payment of any and all taxes (excluding taxes on the income of Ensighten) related to this Agreement and the provision of the Service to the Customer. Unless otherwise specified in Exhibit A, all undisputed amounts are due and payable within thirty (30) days after receipt of an invoice by the Customer. Amounts unpaid more than thirty (30) days after their due date shall bear interest at the rate of 1.5% per month. The Customer shall be responsible for any and all expenses incurred by Ensighten in connection with the collection of unpaid amounts, including without limitation, reasonable attorneys fees.

7. Customer Responsibilities. The Customer shall be responsible for: (i) providing Customer trained and competent personnel to assist Ensighten in connection with the provision of the Service; (ii) providing such materials, items, and information as may be reasonably necessary to enable Ensighten to provide the Service; (iii) promptly responding to reasonable requests for information made by Ensighten in connection with the use of the Service; (iv) the substantial accuracy of all information provided by the Customer; (v) ensuring that all electrical, communications technology, and Internet connections of the Customer that are identified by Ensighten as being necessary are present, operating correctly, and appropriate for the use of the Service; (vi) obtaining, installing, and maintaining the hardware and software that are identified by Ensighten as being necessary for the use of the Service; (vii) ensuring the substantially correct operation of the hardware and software of the Customer; and (viii) making back-up hard copies of any of Customer's data or content. Ensighten shall have no liability or responsibility for any substantial failure of the Customer to perform any of its material obligations, or for any delays in performance by Ensighten caused by any substantial failure of the Customer to perform any of its material obligations.

8. Acceptable Use and Restrictions on Use.

8.1 Acceptable Use. The Customer shall not knowingly use the Service for unlawful purposes. The Customer shall not knowingly use the Service to (i) violate any applicable local, state, national or international statute, regulation, or law; (ii) impersonate or use the identity of another person or organization, or falsely state or otherwise misrepresent an affiliation with a person or organization; (iii) engage in any activities or manipulate identifying material to misrepresent the origin of content; (iv) interfere with or otherwise limit the use of the Services or Ensighten's networks by other users; or collect, compile, or store personal information about other users of the Services or Ensighten's networks; or (v) disrupt or interfere with the security of, or otherwise cause harm to, the Services or Ensighten's networks; accounts; usernames and passwords; servers; or other networks connected to or accessible through the Services or any affiliated or linked sites; or (vi) upload, post, use, or otherwise make available, including by e-mail, any material, item, information or content that: (a) is materially false or inaccurate; (b) is unlawful, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, or that could otherwise reasonably be considered to be objectionable to an ordinary person; (c) is subject to any disclosure restrictions; (d) infringes or otherwise violates any patent, copyright, trademark, or any other proprietary rights; (e) is

unsolicited or unauthorized advertising or promotional material, including without limitation, "junk mail," "spam," "chain letters," "pyramid schemes," or any other form of solicitation; or (f) contains software viruses or any other corrupt computer code, files or programs that impair the use of any computer software or hardware or telecommunications equipment.

**8.2 Reverse Engineering.** The Customer shall not (i) violate or attempt to violate or circumvent any security procedures of the Service, (ii) decompile, reverse engineer, disassemble, or otherwise attempt to determine the source code or the underlying ideas, algorithms, structure or organization of any of the Ensighten Materials, or (iii) remove, obscure, or change any proprietary notices or legends used in connection with the Service or the Ensighten Materials.

**8.3 Interoperability.** The Customer and contractors engaged by the Customer have the right to review, access, modify, configure, and reconfigure materials, items, information, content, and technology provided by Ensighten under this Agreement to enable the Customer to integrate and use them with other systems or technology the Company uses in the internal operation of its business.

**9. Confidentiality.** Each party may disclose (the "Discloser") confidential and proprietary information ("Confidential Information") to the other party (the "Recipient"). In each such case, the Recipient shall hold such Confidential Information in confidence and shall protect such information by all reasonable security measures, including but not limited to taking those steps the Recipient would take to protect the confidentiality of its own most highly confidential and Confidential Information. Confidential Information shall only be used to enable the parties to perform their obligations under this Agreement. The Confidential Information shall not be disclosed except to a party's employees or subcontractors who have a need to know such Confidential Information in order to perform such party's obligations under this Agreement and only to the extent necessary for such purposes; provided, that such Recipient shall be responsible for any breach of these confidentiality provisions by its employees and subcontractors. Ensighten's Confidential Information shall include without limitation, financial information; information relating to the trade secrets or business affairs of Ensighten, its affiliates, employees, suppliers or agents; customer lists; marketing and promotion plans and methods; and the systems software, and documentation, development tools, and know-how used by Ensighten to provide the Service. The Customer's Confidential Information shall include without limitation, the Customer Data (as defined below) financial information; information relating to the trade secrets or business affairs of the Customer, its affiliates, employees, suppliers or agents; customer lists, marketing plans, strategic plans, and plans for new products or services . Neither party shall have any rights in the other party's Confidential Information and shall return or destroy all such Confidential Information at the other party's request. Confidential Information shall not include information that: (i) was already in the lawful possession of the Recipient prior to receipt thereof, directly or indirectly, from the Discloser; (ii) lawfully becomes available to Recipient on a non-confidential basis from a source other than Discloser that is not under an obligation to keep such information confidential; (iii) is generally available to the public other than as a result of a breach of this Agreement by Recipient; or (iv) is subsequently and independently developed by Recipient without reference to the Confidential Information of the Discloser. In addition, a party shall not be considered to have breached its obligations by disclosing Confidential Information of the other party as required to satisfy any request of a governmental body or law enforcement agency provided that, promptly upon receiving any such request and to the extent that it may

legally do so, such party advises the other party of the request prior to making such disclosure in order that the other party may interpose an objection to such disclosure, take action to assure confidential handling of the Confidential Information, or take such other action as it deems appropriate to protect the Confidential Information.

10. Data and Data Security. The Customer shall be the exclusive owner of all right, title, and interest in and to any and all data and information provided or used by the Customer, including without limitation, credit card, transactional, customer, and personal information (the "Customer Data"). Ensighten shall at all times provide industry standard security measures to ensure that all Customer Data that is input, processed, transmitted, stored, retrieved, or managed in connection with the Service is maintained and used in compliance with applicable law, and in a manner that prevents the unauthorized disclosure of, unauthorized use of, unauthorized access to, misappropriation of, loss of, or alteration of any Customer Data while it is directly or indirectly in the possession or control of Ensighten. Any failure or a breach by Ensighten to perform or meet its obligations under this Section shall be referred to as a "Data Security Default." Ensighten shall provide immediate notification to the Customer in the event a Data Security Default occurs, or in the event Ensighten has a reasonable basis for believing that a Data Security Default may have occurred. Upon the occurrence of a Data Security Default, the Customer shall have the right to immediately terminate this Agreement. In the event of a Data Security Default, regardless of whether any cure has been made, Ensighten shall be responsible for all expenses and damages incurred or sustained by the Customer which are caused by such Data Security Default (including reasonable attorneys' fees). With respect to third party claims arising from a Data Security Default, Ensighten shall indemnify, defend, and hold the Customer harmless from and against any and all losses, claims, damages, liabilities, costs and expenses (including reasonable attorneys' fees) arising out of such Data Security Default. Ensighten's liability under this Section shall not be subject to any limitation of liability contained in this Agreement.

11. Backup and Disaster Recovery. Ensighten shall provide an initial full backup of Customer Data, and then provide daily backups of the Customer Data. Ensighten will store these data files online for Customer for a period of sixty (60) days. Upon the request of Customer, Ensighten will locate and transfer these data files to Customer's computer. Ensighten shall maintain commercially reasonable business continuity plans providing for continued operation in the event of an occurrence affecting, disrupting, or adversely impacting Ensighten's business operations. Ensighten shall test its business continuity plans at least annually. Ensighten will furnish a copy of its business continuity planning policies and procedures to Customer upon request. Upon the occurrence of an event that triggers Ensighten's business continuity planning procedures, Ensighten shall use reasonable efforts to restore its operations within forty-eight (48) hours or such other time frame as the parties may agree in writing. In the event that a part of Ensighten's business operations remain operable, Ensighten shall provide to Customer no less favorable service than that given to Ensighten's other customers. Ensighten shall maintain commercially reasonable disaster recovery plans providing for continued operation in the event of a catastrophic occurrence affecting Ensighten or Ensighten's ability to provide Services to Customer. Ensighten shall test its disaster recovery plan at least annually, notifying Customer at least thirty (30) days in advance of such test and, if Customer requests, allowing Customer to observe or take part in such annual disaster recovery test. Ensighten shall furnish a copy of, or at least an executive summary of, its disaster recovery plan to Customer.

12. Non-infringement Representation and Warranty. Ensighten represents and warrants that the Customer's use of the Service and the Ensighten Materials shall not infringe or otherwise violate the Intellectual Property Rights of any third party.

9.13. Indemnification. Ensighten shall indemnify the Customer and defend at its expense any third party claim, suit or proceeding (each, a "Claim") brought against the Customer by any third party to the extent such Claim is based upon a claim that the Service infringes such third party's Intellectual Property Rights ~~that are enforceable in the United States~~, and Ensighten shall pay costs ~~(as they are incurred by the Customer)~~ and damages ~~finally~~ awarded against the Customer by a court of competent jurisdiction as a result of any such claim or payable by the Customer pursuant to a settlement agreement to which Ensighten agrees in writing in settlement of such a Claim; provided, however, that the Customer (i) promptly notifies Ensighten in writing of such Claim; (ii) promptly gives Ensighten the sole right to control and direct the investigation, preparation, defense and settlement ~~(that does not have an adverse impact on the Customer)~~ of such Claim, with counsel of Ensighten's own choosing; and (iii) gives reasonable assistance and cooperation ~~(at the expense of Ensighten)~~ for the defense of same. If the Services are, or in Ensighten's opinion, might be held to infringe as set forth above, Ensighten may, at its option, (i) replace or modify the Service so as to avoid infringement, or (ii) procure the right for the Customer to continue the use of the Service, or (iii) terminate this Agreement and pay a refund to Customer ~~of all amounts paid to Ensighten in connection with with respect to the affected portion of the Service for the unexpired term of this Agreement.~~

10.14. Warranty, Disclaimer of Warranties, and Limitations of Liability

14.1 Warranty. Ensighten warrants that the Service will have the features and functionality set forth in Exhibit A ~~and in any other written materials provided by Ensighten~~ when the Service is used substantially as intended and under substantially normal circumstances. In the event of a breach of this warranty, Ensighten's ~~sole obligation~~ shall ~~promptly be to use commercially reasonable efforts to~~ correct any defects ~~within as soon as practicable reasonable time~~ after they have been reported ~~in writing~~ to Ensighten by a Support Contact ~~or other personnel of the Customer~~. If a breach of this warranty substantially interferes with the Customer's use of the Service and Ensighten is unable to correct the defect ~~promptly within a reasonable time~~ after it has been reported, Ensighten may terminate this Agreement and Ensighten's ~~sole obligation to Customer~~ shall ~~be to~~ pay a refund to Customer ~~of all amounts paid by the Customer under this with respect to the affected portion of the Service for the unexpired term of this Agreement during the twelve (12) months preceding the date of the occurrence of the subject defect.~~

14.2 Disclaimer of Warranty. EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT THE SERVICE IS PROVIDED TO THE CUSTOMER "AS IS, WITH ALL FAULTS" AND WITHOUT WARRANTY OF ANY KIND WHATSOEVER, EITHER EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. ENSIGHTEN EXPRESSLY DISCLAIMS ANY AND ALL REPRESENTATIONS AND WARRANTIES CONCERNING ~~THE SERVICE, AND~~ THE ACCURACY OF THE INFORMATION AND CONTENT AVAILABLE THROUGH THE USE OF THE SERVICE. ENSIGHTEN EXPRESSLY DISCLAIMS ANY REPRESENTATIONS AND WARRANTIES THAT (I) THE SERVICE WILL OPERATE ~~IN~~

AN ERROR FREE OF MINOR ERRORS OR UNINTERRUPTIONS; PROVIDED, HOWEVER, SUCH DISCLAIMER SHALL NOT AFFECT ENSIGHTEN'S WARRANTY OBLIGATIONED MANNER; (II) ANY THIRD-PARTY HARDWARE, SOFTWARE, OR OTHER TECHNOLOGY RELATED TO THE PROVISION OF THE SERVICE IS FREE OF VIRUSES OR OTHER HARMFUL ELEMENTS; (III) THE SERVICE WILL SATISFY THE CUSTOMER'S REQUIREMENTS; (IV) THE RESULTS OBTAINED FROM THE USE OF THE SERVICE WILL BE EFFECTIVE, ACCURATE, OR RELIABLE; (V) ENSIGHTEN WILL PREVENT THE UNAUTHORIZED DISCLOSURE OF, UNAUTHORIZED USE OF, UNAUTHORIZED ACCESS TO, MISAPPROPRIATION OF, LOSS OF, OR ALTERATION OF ANY DATA OR INFORMATION PROVIDED, HOWEVER, SUCH DISCLAIMER SHALL NOT AFFECT ENSIGHTEN'S DATA SECURITY OBLIGATIONS SPECIFIED ELSEWHERE IN THIS AGREEMENT; OR (VI) ANY ERRORS OR DEFECTS IN THE SERVICE WILL BE CORRECTED PROVIDED, HOWEVER, SUCH DISCLAIMER SHALL NOT AFFECT THE CUSTOMER'S RIGHTS AND REMEDIES WITH RESPECT TO ANY ERRORS OR DEFECTS. ENSIGHTEN DISCLAIMS ANY REPRESENTATION OR WARRANTY THAT THE USE OF THE SERVICE WILL SATISFY, OR ENABLE THE CUSTOMER TO SATISFY, THE REQUIREMENTS OF ANY GOVERNMENT AGENCY, ASSOCIATION, OR OTHER ORGANIZATION. NOTHING IN THIS AGREEMENT OR IN ANY ORAL OR WRITTEN DESCRIPTION OF THE SERVICE SHALL CONSTITUTE A REPRESENTATION OR WARRANTY WITH RESPECT TO THE SERVICE.

14.3 Limitations of Liability. EXCEPT FOR A BREACH OF ITS CONFIDENTIALITY OBLIGATIONS OR A DATA SECURITY DEFAULT, ENSIGHTEN SHALL NOT BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR PUNITIVE DAMAGES ARISING OUT OF THIS AGREEMENT OR THE CUSTOMER'S USE OF THE SERVICES. THE CUSTOMER SHALL NOT BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR PUNITIVE DAMAGES ARISING OUT OF THIS AGREEMENT OR THE CUSTOMER'S USE OF THE SERVICES.

EXCEPT FOR A BREACH OF ITS CONFIDENTIALITY OBLIGATIONS, A DATA SECURITY DEFAULT, AND ITS INDEMNIFICATION OBLIGATIONS FOR THE INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, UNDER NO CIRCUMSTANCES WHATSOEVER SHALL ENSIGHTEN'S AGGREGATE LIABILITY UNDER THIS AGREEMENT OR OTHERWISE RESULTING FROM THE CUSTOMER'S USE OF THE SERVICES EXCEED THE AMOUNT OF THE SERVICE FEES PAID BY CUSTOMER TO ENSIGHTEN UNDER THIS AGREEMENT DURING THE TWELVE - MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE EVENT GIVING RISE TO A LIABILITY ON THE PART OF ENSIGHTEN. UNDER NO CIRCUMSTANCES WHATSOEVER SHALL THE CUSTOMER'S AGGREGATE LIABILITY UNDER THIS AGREEMENT OR OTHERWISE RESULTING FROM THE CUSTOMER'S USE OF THE SERVICES EXCEED THE AMOUNT OF THE SERVICE FEES PAID BY CUSTOMER TO ENSIGHTEN UNDER THIS AGREEMENT DURING THE TWELVE -MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE EVENT GIVING RISE TO A LIABILITY ON THE PART OF ENSIGHTEN.

**11.15. Term, Termination, and Suspension.**

**152.1 Term.** The term of this Agreement shall begin on the Effective Date and continue for a period of one (1) year thereafter (the “Initial Term”), and shall automatically renew for successive one (1) year terms (each, a “Renewal Term”), unless either party provides the other party with written notice of termination at least ninety (90) days prior to the expiration of the Initial Term or any Renewal Term, as applicable.

**152.2 Termination by Ensighten.** In addition to its termination rights specified elsewhere in this Agreement, Ensighten shall have the right to immediately terminate this Agreement in the event (i) the Customer makes any unauthorized use of the Service, or (ii) the Customer fails to perform any of its other obligations, or is in violation of any of the terms and conditions of this Agreement, and the Customer does not cure such failure within thirty (30) days after Ensighten has provided notice of such failure. ~~Upon termination of this Agreement, all of the Customer's rights to access and use the Service shall terminate immediately.~~

**15.3 Termination by the Customer.** ~~In addition to its termination rights specified elsewhere in this Agreement, the Customer shall have the right to immediately terminate this Agreement in the event Ensighten fails to perform any of its obligations, or is in violation of any of the terms and conditions of this Agreement, and Ensighten does not cure such failure within thirty (30) days after Customer has provided notice of such failure.~~

**152.3 Suspension.** ~~After providing the Customer with at least five (5) days prior written notice, the ability of the Customer to access and use the Service may be restricted or suspended by Ensighten without notice in the event Ensighten determines, in good faith its sole discretion, that the Customer has repeatedly failed to substantially perform any of its material obligations under this Agreement, or is in violation of any of the terms and conditions of this Agreement, or is engaging in conduct or activities that may otherwise be harmful to Ensighten.~~ No refunds will be provided as a result of any such restriction or suspension.

**12.16. Other Software.** If Ensighten makes any software available to the Customer in connection with the Service, Ensighten shall be the exclusive owner of all right, title, and interest in and to such software; including without limitation, any and all related Intellectual Property Rights. In the absence of any separate license agreement governing the Customer’s use of such software, (i) the Customer shall be deemed to have only a revocable, non-transferable, non-sublicensable, and non-exclusive right to internally use such software solely to enable the Customer to use the Service as provided by Ensighten during the term of this Agreement, ~~Ensighten represents and warrants that such software shall be free from defects in materials and workmanship, shall be free from viruses and other harmful elements, and shall operate and function in accordance with applicable specifications, and (ii) Except for the foregoing warranty, SUCH SOFTWARE SHALL BE PROVIDED TO THE CUSTOMER “AS IS, WITH ALL DEFECTS” AND WITHOUT WARRANTY OF ANY KIND WHATSOEVER, EITHER EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT.~~

13.17. Service Changes. After providing written notice to the Customer at least thirty (30) days in advance, Ensighten may in its sole discretion make changes to all or any part of the Service that it deems necessary or useful; including without limitation, making modifications to appearance, functionality, presentation of data and information, manner of access or use, or the addition or deletion of features, functionality, or information; provided, however, in the event Customer determines in its discretion that any such changes have an adverse impact on the Service, the Customer shall have the right to terminate this Agreement and receive a refund of all amounts paid with respect to the unexpired portion of the Initial Term or the then current Renewal Term, as applicable.

14.18. Other Products and Services. The provisions of this Agreement shall not in any respect whatsoever prevent or restrict Ensighten from developing, distributing, or providing any other products or services that do not make use of the Customer Materials or the Confidential Information of the Customer.

15. Comments. Any and all comments, suggestions, feedback and materials the Customer makes, provides, or sends to Ensighten shall become Ensighten's exclusive property; and the Customer hereby transfers, sells, and assigns to Ensighten all of its right, title, and interest in and to any such comments, suggestions, feedback, and materials, including without limitation, any and all related Intellectual Property Rights.

19. Transition Services. In the event of the termination of this Agreement for any reason other than the Customer's failure to perform any of its obligations under this Agreement, at the request of the Customer, Ensighten shall consult and cooperate with, and provide assistance to, Customer and its consultants in connection with the orderly and efficient transition of the Service to another provider of services (which may be the Customer) that are comparable to, or in substitution of, the Service. As compensation for Ensighten's performance of the aforementioned transition services, the Customer shall pay Ensighten on a time and materials basis at Ensighten's then current rates. In addition, in the event of a termination of this Agreement for any reason other than Customer's failure to perform any of its obligations under this Agreement, at the request of the Customer, Ensighten shall, for a period of up to one hundred eighty (180) days after the termination date, continue to provide Customer with the Service at the same rates, and upon the same terms and conditions, as are in effect as of the termination date (the "Transition Period"). During the Transition Period, the Customer shall not be obligated to achieve any minimum volume or usage requirements with respect to the Service.

20. Non-Solicitation. To the extent permitted by applicable law, during the term of this Agreement and for a period of one (1) year after the termination of this Agreement, each party agrees that it shall not knowingly solicit or attempt to solicit any of the other party's executive employees or employees who are key to such party's performance of its obligations under this Agreement. Notwithstanding the foregoing, nothing herein shall prevent either party from hiring or engaging any person who responds to an advertisement for employment placed in the ordinary course of business by that party and/or who initiates contact with that party without any direct solicitation of that person by that party or any agent of that party.

16.21. Force Majeure. Neither party Ensighten shall not be in breach of this Agreement in the event it is unable to perform any of its obligations under this Agreement as a result of natural

disaster, fire, weather, war, terrorism, emergency conditions, labor strife, the inoperability of the Internet, the inability to obtain supplies, or other reasons or conditions beyond its reasonable control; provided, however, in the event such conditions continue for more than thirty (30) days, the Customer shall have the right to terminate this Agreement and receive a refund of all amounts paid with respect to the unexpired portion of the Initial Term or the then current Renewal Term, as applicable.

17.22. English. This Agreement has been prepared in English, and English is the controlling language with respect to all matters concerning this Agreement. Any and all notices or communications related to this Agreement must be in English.

18.23. Equitable Relief. Injunctive or other equitable relief shall be a remedy available to either party~~Ensighten~~ in the event of a breach of any provision of this Agreement by the other party~~Customer~~; but such remedy shall not be the exclusive remedy available to the parties~~Ensighten~~.

19. Filing Limitation. ~~Regardless of any statute or law to the contrary, any claim or cause of action the Customer may have that arises out of or is related to this Agreement must be filed within two (2) years after such claim or cause of action arose or be forever barred.~~

20.24. Notices. Any notices required or permitted to be given to~~Ensighten~~ under this Agreement shall be sufficient if in writing and personally delivered, sent by certified mail, or sent by express courier (by nationally recognized courier) to the its~~the receiving party~~ address of the receiving party~~as~~ set forth above. ~~Any notices required or permitted to be given to the Customer under this Agreement shall be sufficient if sent by email to the email address provided by the Customer, by regular mail at the address provided by the Customer, or by regular mail at the address maintained by Ensighten within the Customer's account.~~

21.25. Survival. The provisions of this Agreement, which, by their terms, require performance after the termination of this Agreement, or have application to events that may occur after the termination of this Agreement, shall survive the termination of this Agreement.

22.26. Assignment. ~~Neither party~~~~The Customer~~ shall not, without the prior written consent of the other party~~Ensighten~~, assign its rights or delegate its duties under this Agreement; provided, however, after providing the other party~~Ensighten~~ with at least ten (10) days advance prior written notice, either party~~Customer~~ may assign its rights and delegate its duties under this Agreement to a person or organization that acquires all or substantially all of the business or assets of the transferring party, whether by means of an asset sale, stock sale, merger, reorganization, or otherwise~~Customer and agrees in advance in writing to be bound by all the terms and conditions of this Agreement. Ensighten may assign its rights and delegate its duties under this Agreement without the consent of the Customer.~~

23.27. Waiver. The waiver of any provision or the breach of any provision of this Agreement by either party~~Ensighten~~ shall not be effective unless made in writing. Any waiver by either party~~Ensighten~~ of any provision or the breach of any provision of this Agreement shall not operate as or be construed to be a continuing waiver of the provision or the breach of the provision.

24.28. **Governing Law.** This Agreement shall be governed by the laws of the State of Michigan~~California~~ (without regard to its choice of law principles or rules) in the United States and the applicable laws of the United States. For the purpose of resolving conflicts related to or arising out of this Agreement, the parties expressly agree that venue shall be in the federal and state courts in the State of Michigan~~California~~, and, in addition, the parties hereby expressly consent to the exclusive jurisdiction of the federal and state courts in Wayne~~San Francisco~~ County in the State of Michigan~~California~~. The parties specifically disclaim application of the United Nations Convention on the International Sale of Goods, 1980.

25.29. **Invalidity.** In the event any portion of this Agreement shall be held to be invalid, the same shall not affect in any respect whatsoever the validity of the remainder of this Agreement, and the portion of this Agreement held to be invalid shall be construed and given lawful effect in a manner that will best achieve the intent and objective of such portion of this Agreement.

26.30. **Entire Agreement.** This Agreement sets forth the entire understanding between the parties with respect to the subject matter hereof, there being no terms, conditions, warranties, or representations other than those contained in this Agreement, and no amendments shall be valid unless made in writing and accepted or signed by the parties to this Agreement.~~—provided, however, Ensighten shall have the right to modify the terms and conditions of this Agreement at any time by posting them in the user section of the Ensighten.com website and providing notice on the website that they have been changed.~~

27.31. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and to constitute one and the same instrument. Electronic copies of this Agreement, including without limitation, those transmitted by facsimile or scanned to an image file, shall be considered originals.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective on the Effective Date.

ENSIGHTEN LLC

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

Date: \_\_\_\_\_

GMI, INC.

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

**EXHIBIT A – Tag Management Services****Effective Date of Agreement:** \_\_\_\_\_, 2009**Contract Duration: 1 Year(s)****Number of Named Support Users: 2**

Name: \_\_\_\_\_ Title: \_\_\_\_\_ Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Name: \_\_\_\_\_ Title: \_\_\_\_\_ Phone: \_\_\_\_\_ Email: \_\_\_\_\_

**Total number of sever calls authorized as part of this agreement: 2,500,000,000****Support Contacts:**

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**Included Modules:**

- Ensighten Tag Management
- Ensighten Flash / Flex Library

**Special Marketing Considerations:**

- Act as reference Client
- Mutually Agreed Upon Press Release
- Approved Use of Logo
- Case study
- Presentations at Industry Trade Shows

**Implementation Begins:** \_\_\_\_\_**Implementation Completed:** \_\_\_\_\_**Implementation Cost: \$35,000 – Payable \_\_\_\_\_****Includes:**

- Ensighten Account Setup
- The creation of 10 custom templates. (Additional custom templates \$1000/ea)
- One day of web based training
  - o UI Operation and Setup
  - o Rules and Templates creation
  - o Customized agenda provided when class is scheduled

Upon the request of the Customer, Ensighten shall provide additional training at the rate of \$ \_\_\_\_\_.

15.

**Annual Service Fees: \$220,000 – \$120,000 payable on the Effective Date with the balance payable upon Acceptance as described below, and annually thereafter at least thirty (30) days prior to the commencement of each Renewal Term.**

**Acceptance Testing - After Ensighten has implemented and made the Service operational for the Customer, Ensighten shall provide the Customer with written notice that the Service is ready for acceptance testing (the "Testing Notice"). The Customer shall have fifteen (15) days after its receipt of the Testing Notice to use and test the Service (the "Acceptance Period"). If the Customer determines during the Acceptance Period that there is a deficiency in the Service, the Customer shall notify Ensighten promptly in writing of such deficiency (the "Deficiency Notice"). Ensighten shall promptly correct such deficiency and demonstrate to the reasonable satisfaction of the Customer that such deficiency has been corrected. "Acceptance" shall mean (i) the failure of Customer to provide a Deficiency Notice prior to the expiration of the Acceptance Period, or (ii) the Customer has provided Ensighten with written acceptance of the Service. In the event Acceptance of the Service has not occurred within forty-five (45) days after the Customer's receipt of the Testing Notice, the Customer shall have the right to immediately terminate this Agreement and receive a refund of all amounts paid to Ensighten in connection with this Agreement.**

IN WITNESS WHEREOF, the parties hereto have executed this Exhibit A to be effective on the Effective Date written above.

**CUSTOMER: GMI, INC.**

Signature

Name

Title

Dated: \_\_\_\_\_

1267289-1367647

**ENSIGHTEN LLC:**

Signature

Name

Title

Dated: \_\_\_\_\_