SAAS TERMS OF SERVICE

These **Terms of Service**, in connection with a **Subscription Order** ("**Order**"), for access and use of the Subscription Services ("Services") are an agreement (collectively the "Agreement") by and between Cre8tive Technology & Design, Inc., a California corporation whose principal place of business is 4660 La Jolla Village Drive, Suite 100, San Diego, CA 92122 ("Cre8tive") and the corporation, LLC, partnership, sole proprietorship, or other business entity executing this Agreement ("Customer"). By manually or electronically executing an Initial Subscription Order referencing these Terms of Service or to which these Terms of Service are attached, Customer agrees to these Terms of Service for all Orders.

This Agreement is effective as of the date identified as the Effective Date in the initial Subscription Order, or if no such date is entered, when Customer clicks "Accepted and Agreed To" or signs or initials below (the "Effective Date"). The Services described on the Order shall be delivered either by means of Customer's permitted access to the Cre8tive infrastructure hosting the Solution (as defined below), Customer's access to the Solution hosted on Customer's premises, Epicor Cloud or Customer's access to the Solution on third party hosting platforms. Customer's access to and use of, and Cre8tive's provision of Cre8tive's Solution (as defined below in Section **Error! Reference source not found.**) are governed by this Agreement. Cre8tive reserves the right to make future changes to these Terms of Service upon reasonable notice to Customer and Customer agrees to be bound by these changes. This Agreement may be electronically signed. The parties agree that the electronic signatures appearing on this Agreement are the same as handwritten signatures for the purposes of validity, enforceability and admissibility.

1. **DEFINITIONS.** The following capitalized terms will have the following meanings whenever used in this Agreement.

1.1. "**AUP**" means Cre8tive's acceptable use policy currently posted at www.ctnd.com/AUP/.

1.2. "**Access**" means use of the Solution either remotely or on-premises by an Authorized End User.

1.3. "**Aggregate Data**" means the aggregate and statistical data Cre8tive collects regarding Customer's use of the Solution.

1.4. "**Assurance**" means support of the Solution so it operates materially in accordance with the Documentation.

1.5. "**Authorized End Users**" means Customer and their employees and independent contractors (but excluding any outsourcer, facilities management providers, managed service provider, or application service provider) that are bound by terms and conditions no less restrictive than those contained herein and are acting on behalf of Customer and not a third party.

1.6. "**Authorized Use Limitation**" means the scope of access and use of the Service authorized in accordance with the Subscription Metric specified on the Order.

1.7. "**Cloud**" means information and resources retrieved from the internet through web-based tools and applications rather than a direct connection to a server including on the Epicor Cloud Environment.

1.8. "**Cre8tive Software**" means the computer software programs owned by Cre8tive and made generally available and licensed to a Client under this SaaS Order pursuant to the applicable SoW or WA including all Versions and Releases.

1.9. "**Customer Data**" means data in electronic form input or collected through the Solution by or from Customer, including without limitation by Authorized End Users.

1.10. "**Distributed**" means the Cre8tive Software designated as distributed that is generally used for independent usage across individual's systems, in the Epicor Cloud environment, hosted by Cre8tive or its subcontractors, or hardware based on the Licensed Metric in a decentralized form of computing.

1.11. "**Documentation**" means Cre8tive's standard manual related to access and use of the Solution, service levels, as well as any statement of criteria for measuring the usage of the Service.

1.12. "**Effective Date**" means either the date set forth in the initial Subscription Order, or identified above as the effective date, or if there is no such date then the date that Customer signs or acknowledges its consent to these Terms of Service. The Subscription Term shall begin on the Effective Date and all upfront Subscription Fees set forth in the Order shall be immediately due and payable.

1.13. "**Force Majeure Event**" means an event that arises out of causes beyond a Party's reasonable control, including, without limitation, war, civil commotion, act of God, strike or other stoppage (whether partial or total) of labor, any law, decree, regulation or order of any government or governmental body (including any court or tribunal) and/or delays or outages caused by an internet service provider or independent hosting facility.

1.14. "**Managed Services**" means the specified services in a SoW, WA or Order provided by Cre8tive to Customer and its Authorized End Users and/or additional services supplied by Cre8tive.

1.15. "**Order**" or "**Subscription Order**" means an order for access to the Solution.

1.16. "**Party**" means Customer or Cre8tive.

1.17. "**Privacy Policy**" means Cre8tive's privacy policy, currently posted at www.CTND.com/privacypolicy/.

1.18. "**Release**" means a general available release of a Cre8tive software product, which may contain minor new software product functionality, code, or compatibility and incorporates all previous fixes (if any exist) since the last Version. Unless otherwise specified by Cre8tive for a particular product, a Release is tied to the preceding Version and is typically designated by a number to the right of the decimal point such as 1.1, 1.2, 1.3, etc.

1.19. "**Service**" or "**Services**" mean Subscription Services.

1.20. **Software.** The Software includes software programs, binary code and documentation. The Software is protected by copyright and other intellectual property laws. Cre8tive owns the title, copyright, and other intellectual property rights in the Cre8tive Software. The Software is not sold or licensed but its use is authorized by subscription pursuant to an Order under these Terms of Service.

1.21. "**Solution**" or "**SaaS**" means Cre8tive's software as a service solution (as identified on the Order) and hosted by Cre8tive, a subcontractor, Epicor Cloud environment or on Customer's premises, for which access and use is available to Customer by subscription for a price and term stated on the Order. Solution also includes Software installed by Cre8tive on Customer's premises and licensed as a Subscription Service.

1.22. "**Start Date**" means the date that billing for the Subscription Services commences.

1.23. "**Subscription Fees**" means the subscription fees payable by the Customer to Cre8tive for the Subscription Term and Subscription Metric.

1.24. "**Subscription Metric**" means the specific criteria for measuring the usage of the Solution (such as Agents, Authorized
End Users, or Customer devices). In no event shall usage of the Solution be authorized for more Customer users or Customer devices than the number of authorized users under Customer's Epicor License.

1.25. "**Subscription Services**" means access to and use of Cre8tive's Solution delivered on a "software as a service" (SaaS) basis and application management or similar services performed on subscription or recurring basis as set forth in an Order.

1.26. "**Subscription Term**" or "**Term**" means that time-period for which Customer and its Authorized users are granted access to and use of the Solution as identified in the Order or subsequent renewals.

1.27. "**Third-Party Software**" means Software that is licensed by Customer directly from a third-party vendor under a separate license or similar agreement and/or maintenance and support agreement (as denoted on an Order) even if Epicor arranges for the license of such third-party software to Customer and invoices Customer for such third-party software.

1.28. "**User**" means any individual who uses the Solution on Customer's behalf or through Customer's account or passwords, whether authorized or not.

2. SOLUTION OFFERING ("SaaS").

2.1. Use of the Solution. During the Term, Cre8tive grants Customer and its Authorized Users a non-exclusive and non-transferable right to access and use the Solution during the Subscription Term pursuant to the terms of any outstanding Order solely for Customer's internal business purposes, including such features and functions as the Order requires.

2.2. Service Levels. Cre8tive shall provide the levels of Service in the Order or Documentation. Any failure of the Solution shall entitle Customer to the remedies set forth in the Warranty section below. Such remedies are Customer's sole remedy for any failure of the Solution, and Customer recognizes and agrees that if the Warranty does not list a remedy for a given failure, it has no remedy.

2.3. Documentation. Customer may reproduce and use the Documentation solely as necessary to support Users' use of the Solution.

2.4. Solution Revisions. Cre8tive may revise Solution features and functions or these Terms of Service at any time, including without limitation by removing such features and functions or reducing service levels. If any such revision to the Solution materially reduces features or functionality provided pursuant to an Order, Customer may within 30 days of notice of the revision terminate such Order, without cause, or terminate this Agreement without cause if such Order is the only one outstanding. If any such revision to the Agreement materially reduces service levels provided pursuant to an outstanding Order, the revisions will not go into effect until the beginning of the next Subscription Term.

2.5. Implementation. Cre8tive will configure the Services utilizing scheduled remote resources. Software module configuration will be based on information and work flows obtained from Customer during the discovery portion of the implementation. Customer shall provide Cre8tive with necessary configuration related information in a timely manner to ensure that mutually agreed implementation schedules are met.

2.6. Support. Cre8tive will provide telephone support 9:00 am to 5:00 pm local time, Monday – Friday. Customer shall also be provided the capability to log questions by email to Cre8tive customer service.

2.7. Cre8tive Subcontractors. may utilize subcontractors in the provision of the Services so long as such subcontractors are bound to contractual terms no less protective of Customer's rights provided hereunder and provided further that any use of subcontractors in the operation of any applicable data center is subject to the same security controls and audits as if performed by Cre8tive employees. The Parties understand and agree that Cre8tive remains fully liable under the terms of the Agreement for any breach caused by a subcontractor of Cre8tive.

2.8. Security.

2.8.1. Safeguards. Cre8tive will maintain and administer a security policy with physical and technical safeguards designed to protect the security, integrity and confidentiality of the Customer Data.

2.8.2. <u>Unauthorized Access</u>. Cre8tive will not be responsible for any unauthorized access, alteration, theft or destruction of Customer Data, unless caused because of Cre8tive's negligence or intentional misconduct, in which case Cre8tive's only obligation and Customer's exclusive remedy is for Cre8tive to use commercially reasonable efforts to restore the Customer Data from the most recent back-up. Cre8tive is not responsible for unauthorized access, alteration, theft or destruction of Customer Data arising from Customer's own or its Authorized Users' actions or omissions in contravention of the Documentation.

2.8.3. <u>Suspension of Services for Security Reasons or Non-payment</u>. Cre8tive may suspend Service upon Cre8tive's sole determination that the Services are about to suffer a significant threat to security or stability based on any unauthorized use. Cre8tive shall provide such notice to Customer in Cre8tive's reasonable discretion based on the nature of the circumstances giving rise to the suspension. Cre8tive will use reasonable efforts to re-establish the affected Services promptly after Cre8tive determines, in its reasonable opinion, that the situation giving rise to the suspension has been cured; however, after any suspension period, Cre8tive will make available to Customer the Customer Data and Service as existing in the Production environment on the date of suspension. Cre8tive may terminate the Services under an Order if any of the foregoing causes of suspension is not cured within 30 days after Cre8tive's initial notice thereof. Any suspension or termination by Cre8tive under this paragraph shall not excuse Customer from its obligation to make payment(s) under this Agreement. Failure to pay Subscription Fees may result in an immediate suspension of Services.

3.   SUBSCRIPTION FEES, USE, RENEWAL & SUSPENSION.

3.1.   <u>Subscription Fee.</u> Customer shall pay Cre8tive the fee set forth in each Order (the "<u>Subscription Fee</u>") for each Subscription Term and for the Authorized Use. Cre8tive will not be required to refund the Subscription Fee under any circumstances. Customer agrees that the purchase of a Subscription for a Service is not contingent on Cre8tive providing any future features or functionality. Customer is required to pay a Subscription Fee for each Epicor authorized user.

3.2.   <u>Billing</u>. On signing or acknowledging its consent to the Agreement, the Customer agrees that all upfront fees are due and payable. All monthly fees are invoiced on the 1st of the month for the current month and are subject to net monthly payment terms. Invoices are for entire months and no rebate will be provided for partial months. If at the mutually agreed start date ("Start Date"), listed above, the Services are not able to begin for any reason other than the direct failure of Cre8tive, the Customer is liable for all monthly costs and charges from the Start Date.

3.3.   <u>Authorized Use Limitation</u>. Cre8tive will monitor Customer's Service usage. In the event Customer exceeds the Authorized Use Limitation, the overage will be treated as an order for excess use and Customer will be billed for the overage.   The overage will be included in the Authorized Use Limitation for the remainder of the Subscription Term.

3.4.   <u>Additional Services</u>. Customer may order additional services or enter into an agreement for consulting services at any time and for an additional fee.

3.5.   <u>Renewal</u>. Unless otherwise specified in the Order, the Subscription Services shall automatically renew for successive one (1) year periods, at the renewal rate set out on the Order or at the then current rate as invoiced for subsequent Subscription Term, unless and until either Party provides the other with written notice of its intention not to renew at least ninety (90) days prior to the expiration of the Subscription Term.

3.6.   <u>Suspension</u>. Cre8tive may suspend any Customer account, access and use of the Solution for a Customer or Authorized End Users if they violate any provision within the Agreement including the AU policy, and any failure to make payment when due.

4.   CUSTOMER DATA & PRIVACY.

4.1.   <u>Use of Customer Data</u>. Unless it receives Customer's prior written consent, Cre8tive: (a) shall not access, process, or otherwise use Customer Data other than as necessary to facilitate the Solution; and (b) shall not intentionally grant any third-party access to Customer Data, including without limitation Cre8tive's other

customers, except subcontractors that are subject to a reasonable nondisclosure agreement. Notwithstanding the foregoing, Cre8tive may disclose Customer Data as required by applicable law or by proper legal or governmental authority. Cre8tive shall give Customer prompt notice of any such legal or governmental demand and reasonably cooperate with Customer in any effort to seek a protective order or otherwise to contest such required disclosure, at Customer's expense.

4.2.   Privacy Policy. The Privacy Policy applies only to the Solution and does not apply to any third-party website or service linked to the Solution or recommended or referred to through the Solution or by Cre8tive's staff.

4.3.   Risk of Exposure. Customer recognizes and agrees that hosting data online involves risks of unauthorized disclosure or exposure and that, in accessing and using the Solution, Customer assumes such risks. Cre8tive offers no representation, warranty, or guarantee that Customer Data will not be exposed or disclosed through errors or the actions of third parties.

4.4.   Data Accuracy. Cre8tive will have no responsibility or liability for the accuracy of data uploaded to the Solution by Customer, including without limitation Customer Data and any other data uploaded by Users.

4.5.   Data Deletion. Cre8tive may permanently erase Customer Data if Customer's account is delinquent, suspended, or terminated for 30 days or more.

4.6.   Excluded Data. Customer represents and warrants that Customer Data does not and will not include, and Customer has not and shall not upload or transmit to Cre8tive's computers or other media, any regulated data ("Excluded Data"). **CUSTOMER RECOGNIZES AND AGREES THAT: (a) CRE8TIVE HAS NO LIABILITY FOR ANY FAILURE TO PROVIDE PROTECTIONS SET FORTH IN ANY EXCLUDED DATA LAWS OR OTHERWISE TO PROTECT EXCLUDED DATA; AND (b) CRE8TIVE'S SOLUTIONS ARE NOT INTENDED FOR MANAGEMENT OR PROTECTION OF EXCLUDED DATA AND MAY NOT PROVIDE ADEQUATE OR LEGALLY REQUIRED SECURITY FOR EXCLUDED DATA.**

4.7.   Aggregate & Anonymized Data. Notwithstanding the provisions above of this Section 4, Cre8tive may use, reproduce, sell, publicize, or otherwise exploit Aggregate Data in any way, in its sole discretion. ("Aggregate Data" refers to Customer Data with the following removed: personally identifiable information, and the names and addresses of Customer and its Users or customers.)

4.8.   Force Majeure Event. In case of a Force Majeure Event, Customer acknowledges and agrees that Customer Data may not be fully recoverable beyond the last restoration archive point, the frequency of which is described in the Documentation.

4.9.   Privacy Information. Customer further agrees not to provide any health, payment card or similarly sensitive personal information that imposes specific data security obligation for the processing of such data unless it is a supported feature in the Order and Documentation for the applicable Service. Customer further agrees to comply with Cre8tive's Privacy Policy which may be found at www.ctnd.com/legal.

5.   **CUSTOMER'S RESPONSIBILITIES & RESTRICTIONS.**

5.1.   Minimum Requirements. Customer acknowledges and agrees that for Customer to access and use the Solution, Customer is required to maintain minimum requirements such as operating system versions, browsers, etc., as stated in the Documentation. Information about updates to minimum requirements will be provided to Customer during the Subscription Term if required.

5.2.   Acceptable Use. Customer shall comply with the AUP. Customer shall not: (a) use the Solution for service bureau or time-sharing purposes or in any other way allow third parties to exploit the Solution; (b) provide Solution passwords or other log-in information to any third party; (c) share non-public Solution features or content with any third party; (d) reverse compile, disassemble or otherwise convert the Solution or other software comprising the Services into uncompiled or unassembled code, or (d) access the Solution in order to build a competitive product or service, to build a product using similar ideas, features, functions or graphics of the Solution, or to copy any ideas, features, functions or graphics of the Solution. If it suspects any breach of the requirements of this Section 5.1, including without limitation by Users, Cre8tive may suspend Customer's access to the Solution without

advanced notice, in addition to such other remedies as Cre8tive may have. Neither this Agreement nor the AUP requires that Cre8tive take any action against Customer or any User or other third party for violating the AUP, this Section 5.1, or this Agreement, but Cre8tive is free to take any such action it sees fit.

5.3.   Unauthorized Access. Customer shall take reasonable steps to prevent unauthorized access to the Solution, including without limitation by protecting its passwords and other log-in information. Customer shall notify Cre8tive immediately of any known or suspected unauthorized use of the Solution or breach of its security and shall use best efforts to stop said breach.

5.4.   Compliance with Laws. In its use of the Solution, Customer shall comply with all applicable laws, including without limitation laws governing the protection of personally identifiable information and other laws applicable to the protection of Customer Data.

5.5.   Users & Solution Access. Customer is responsible and liable for: (a) Users' use of the Solution, including without limitation unauthorized User conduct and any User conduct that would violate the AUP or the requirements of this Agreement applicable to Customer; and (b) any use of the Solution through Customer's account, whether authorized or unauthorized.

5.6.   Trial Use. If the Service is provided on a trial basis, Customer agrees to access and use the Service solely for trial and evaluation purposes during the Trial Period, in accordance with the usage restrictions set forth in the Order. At the end of the Trial Period, Customer's right to access and use the Solution automatically expires and Customer agrees to cease accessing and using the Service and to de-install any agents or copies of software provided by Cre8tive to access the Solution. The Warranties set forth below do not apply to any Trial Period.

6.   INTELLECTUAL PROPERTY & FEEDBACK.

6.1.   Intellectual Property Rights to the Solution. Cre8tive retains all right, title, and interest in and to the Solution, including without limitation all software used to provide the Solution, all underlying code, all graphics, user interfaces, logos, and trademarks reproduced through the Solution. This Agreement does not grant Customer any intellectual property license or rights in or to the Solution or any of its components. Customer recognizes that the Solution and its components are protected by copyright and other laws. You may not modify, use for other purposes or resell the Solutions.

6.2.   Feedback. Cre8tive has not agreed to and does not agree to treat as confidential any Feedback (as defined below) Customer or Users provide to Cre8tive, and nothing in this Agreement or in the parties' dealings arising out of or related to this Agreement will restrict Cre8tive's right to use, profit from, disclose, publish, keep secret, or otherwise exploit Feedback, without compensating or crediting Customer or the User in question. Notwithstanding the provisions of Section 7 below, Feedback will not be considered Confidential Information, provided information Customer transmits with Feedback or related to Feedback may be considered Confidential Information. ("Feedback" refers to any suggestion or idea for improving or otherwise modifying any of Cre8tive's products or services.)

7.   CONFIDENTIAL INFORMATION.

7.1.   Confidential Information. The parties may have access to information that is confidential to one another ("Confidential Information"). Confidential Information shall mean and include any information and/or data, whether disclosed before or after the date of this Agreement, including, but not limited to any kind of business, commercial or technical information and data concerning the party's business prospects, strategy, business objectives, business transactions, financial arrangements, operations, systems and organization, deliverables, methods, standards, specifications, concepts, ideas, plans, projects, programs or procedures, trade secrets, know-how, lists, notes, drawings, reports, software, databases, development methods, system design or any other information of or relating to its business, in any tangible medium of expression, disclosed in connection with this Agreement. Confidential Information shall include copies or abstracts made thereof as well as any modules, samples, prototypes or parts thereto. Confidential Information shall not include any information that (a) is already known to the recipient or its affiliates or received by any of them from a third party, free of any obligation to keep it confidential; (b) is or becomes publicly known through no wrongful act of the recipient or its affiliates; (c) is independently developed by the recipient or its affiliates; or (d) is approved for release by prior written authorization

of the disclosing party, or is (e) Aggregate Data.

7.2.   Protection. Each party agrees to maintain the confidentiality of the Confidential Information and to protect as a trade secret any portion of the other party's Confidential Information by preventing any unauthorized copying, use, distribution, or transfer of possession of such information. Each party agrees to maintain at least the same procedures regarding Confidential Information that it maintains for its own Confidential Information, but in no event will such procedures be less than commercially reasonable. Without limiting the generality of the foregoing, neither party will permit any of its personnel to remove any proprietary or other legend or restrictive notice contained or included in any material provided by the discloser and the recipient shall not permit its personnel to reproduce or copy any such material except as expressly authorized hereunder. One party's Confidential Information may only be used by the other party and its representatives to fulfill its obligations under the Agreement.

7.3.   Compelled Disclosure. Notwithstanding anything to the contrary in this Section 7, a party may disclose Confidential Information as required by law, including by a court of competent jurisdiction or government body or regulatory authority; provided however, that in the event of a proposed disclosure the recipient shall promptly notify the discloser of its disclosure obligation, and shall work with the discloser to obtain an appropriate protective order to preserve the confidential nature of such information prior to making such disclosure, and the parties shall co-operate in good faith regarding the timing and the content of any such disclosure.

7.4.   Injunctive Relief. Both parties acknowledge that any use or disclosure of the other party's Confidential Information in a manner inconsistent with the provisions of the Agreement may cause the non-disclosing party irreparable damage for which remedies other than injunctive relief may be inadequate, and both parties agree that the non-disclosing party may request injunctive or other equitable relief seeking to restrain such use or disclosure. The terms and provisions of this Section 7 shall survive any termination of the Agreement for any reason until the Confidential Information ceases to be considered confidential under Section 7.1.

7.5.   Retention of Rights. This Agreement does not transfer ownership of Confidential Information or grant a license thereto. Cre8tive will retain all right, title, and interest in and to all its Confidential Information.

7.6.   Exception & Immunity. Pursuant to the Defense Trade Secrets Act of 2016, 18 USC Section 1833(b), Recipient is on notice and acknowledges that, notwithstanding the foregoing or any other provision of this Agreement:

7.6.1. An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that- (A) is made- (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

7.6.2. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual- (A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order.

8.   REPRESENTATIONS & WARRANTIES.

8.1.   From Cre8tive.

8.1.1. Cre8tive represents and warrants that it is the owner of the Solution and of each component thereof, or the recipient of a valid license thereto, and that it has and will maintain the full power and authority to grant the rights granted in this Agreement without the further consent of any third party. Cre8tive's representations and warranties in the preceding sentence do not apply to use of the Solution in combination with hardware or software not provided by Cre8tive.

8.1.2. Cre8tive further warrants that the Service and the Solution shall perform materially in accordance with the applicable Documentation subject to Customer's compliance with the Agreement.

8.2. Cre8tive Warranty Remedy.

8.2.1. In the event of a breach of the warranty in Section 8.1.1, Cre8tive, at its own expense, shall promptly take the following actions: (a) secure for Customer the right to continue using the Solution; (b) replace or modify the Solution to make it non-infringing; or (c) terminate the infringing features of the Service and refund to Customer any prepaid fees for such features, in proportion to the portion of the Term left after such termination.

8.2.2. In the event of a breach of the warranty in Section 8.1.2, failure of the Solution to perform in accordance with the Documentation due to a fault of Cre8tives, Cre8tive may, at its option, (i) use reasonable efforts to cure the defect in the Solution; (ii) replace the Solution with SaaS that materially conforms to the specifications in the Documentation; (iii) in the event Cre8tive cannot, after commercially practicable attempts to do so, achieve the remedies in (i) or (ii), Cre8tive may terminate the subscription to the SaaS and provide a refund of pre-paid, unused fees calculated against the remainder of the Subscription Term as of the effective date of such termination. Customer must report the alleged breach of warranty with reasonable specificity in writing within thirty (30) days of its occurrence to benefit from this warranty and the remedies stated herein. The above warranty remedies are Cre8tive's sole obligation and Customer's sole and exclusive remedy for breach of the above warranty.

8.2.3. In conjunction with Customer's right to terminate for breach where applicable, 8.2.1 and 8.2.2 state Cre8tive's sole obligation and liability, and Customer's sole remedy, for breach of the warranty in Section 8.1 and for potential or actual intellectual property infringement by the Solution.

8.3. From Customer. Customer represents and warrants that: (a) it has the full right and authority to enter into, execute, and perform its obligations under this Agreement and that no pending or threatened claim or litigation known to it would have a material adverse impact on its ability to perform as required by this Agreement; (b) it has accurately identified itself and it has not provided any inaccurate information about itself to or through the Solution; (c) it is a corporation, the sole proprietorship of an individual 18 years or older, or another entity authorized to do business pursuant to applicable law, (d) it has the right to transmit Customer Data and any data or information as may be required for the purposes of accessing the Services, (e) it is responsible for all activities that occur in user accounts, and (f) it shall not misuse the Service by sending spam or otherwise duplicative or unsolicited messages, or store infringing, obscene, threatening, or otherwise unlawful material or material that is harmful to persons or violates third party privacy rights.

8.4. Cre8tive Warranty Disclaimers. Except to the extent set forth in Section 8.1 above, CUSTOMER ACCEPTS THE SOLUTION "AS IS" AND AS AVAILABLE, WITH NO REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, OR ANY IMPLIED WARRANTY ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING: (a) CRE8TIVE HAS NO OBLIGATION TO INDEMNIFY OR DEFEND CUSTOMER OR USERS AGAINST CLAIMS RELATED TO INFRINGEMENT OF INTELLECTUAL PROPERTY; (b) CRE8TIVE DOES NOT REPRESENT OR WARRANT THAT THE SOLUTION WILL PERFORM WITHOUT INTERRUPTION OR ERROR; AND (c) CRE8TIVE DOES NOT REPRESENT OR WARRANT THAT THE SOLUTION IS SECURE FROM HACKING OR OTHER UNAUTHORIZED INTRUSION OR THAT CUSTOMER DATA WILL REMAIN PRIVATE OR SECURE.

9. INDEMNIFICATION. Customer shall defend, indemnify, and hold harmless Cre8tive and the Cre8tive Associates (as defined below) against any "Indemnified Claim," meaning any third party claim, suit, or proceeding arising out of or related to Customer's alleged or actual use of, misuse of, or failure to use the Solution, including without limitation: (a) claims by Users or by Customer's employees, as well as by Customer's own customers; (b) claims related to unauthorized disclosure or exposure of personally identifiable information or other private information, including Customer Data; (c) claims related to infringement or violation of a copyright, trademark, trade secret, or privacy or confidentiality right by written material, images, logos or other content uploaded to the Solution through Customer's account, including without limitation by Customer Data; and (d) claims that use of the Solution through Customer's account harasses, defames, or defrauds a third party or violates the CAN-Spam Act of 2003 or any other law or restriction on electronic advertising. Indemnified Claims include, without limitation, claims arising out of or related to Cre8tive's negligence. Customer's obligations set forth in this Section 9 include retention and payment of attorneys and payment of court costs, as well as settlement at Customer's expense and payment of judgments. Cre8tive will have the right, in its reasonable discretion, to reject any settlement or

compromise that requires that it admit wrongdoing or liability or subjects it to any ongoing affirmative obligations. (The "Cre8tive Associates" are Cre8tive's officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns.)

10. LIMITATION OF LIABILITY.

10.1. Dollar Cap. Cre8tive's liability arising out of or related to this Agreement will not exceed the Subscription Fee for the initial Subscription Term of the Service.

10.2. Customer Data. Cre8tive will not be responsible for any unauthorized access, alteration, theft or destruction of Customer Data, unless caused as a result of Cre8tive's sole negligence or intentional misconduct, in which case Cre8tive's only obligation and Customer's exclusive remedy is for Cre8tive to use commercially reasonable efforts to restore the Customer Data from the most recent back-up. Cre8tive is not responsible for unauthorized access, alteration, theft or destruction of Customer Data arising from Customer's own or its Authorized Users' actions or omissions in contravention of the Documentation.

10.3. Exclusion of Consequential Damages. IN NO EVENT WILL CRE8TIVE BE LIABLE TO CUSTOMER FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT.

10.4. CLARIFICATIONS & DISCLAIMERS.

10.4.1. **GENERAL DISCLAIMER. THE LIABILITIES LIMITED BY THIS SECTION 9 APPLY: (a) TO LIABILITY FOR NEGLIGENCE; (b) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE; (c) EVEN IF CRE8TIVE IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (d) EVEN IF CUSTOMER'S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE.** If applicable law limits the application of the provisions of this Section 9, Cre8tive's liability will be limited to the maximum extent permissible. For the avoidance of doubt, Cre8tive's liability limits and other rights set forth in this Section 9 apply likewise to Cre8tive's affiliates, licensors, suppliers, advertisers, agents, sponsors, directors, officers, employees, consultants, and other representatives.

10.4.2. **SUBSCRIPTION DISCLAIMER. CRE8TIVE DOES NOT WARRANT THAT THE SUBSCRIPTION SERVICES WILL BE UNINTERRUPTED OR ERROR FREE. CUSTOMER ACKNOWLEDGES THAT CRE8TIVE DOES NOT CONTROL THE TRANSFER OF DATA OVER COMMUNICATIONS FACILITIES, INCLUDING THE INTERNET, THAT SUBSCRIPTION SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS OR OTHER PROBLEMS INHERENT IN THE USE OF COMMUNICATIONS FACILITIES, AND THAT CRE8TIVE IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.**

11. TERM & TERMINATION.

11.1. Term. The term of this Agreement (the "Term") will commence on the Effective Date and continue for the period set forth in the Order or, if none, for one (1) year. Thereafter, the Term will renew for successive one (1) year periods, unless either party refuses such renewal by written notice 30 or more days before the renewal date.

11.2. Termination for Cause or Failure to Pay. Customer's failure to pay the Subscription Fee when due will result in immediate suspension of Services pending determination of Termination of the Agreement. Either party may terminate this Agreement for the other's material breach by written notice specifying in detail the nature of the breach, provided that, in each instance of a claimed breach: (i) the non-breaching Party notifies the breaching Party in writing of such breach; and (ii) the breaching Party fails to either cure such breach within thirty (30) days (or such other period as mutually agreed by the Parties) from receipt of such notice; (b) upon insolvency of the other Party, if permitted by law or (c) effective immediately if the breach is not subject to cure. Customer agrees to uninstall the Solution upon notice of termination or failure to pay Subscription Fees. Customer authorizes Cre8tive to access Customer's servers, computer system or third-party environment and uninstall the Software immediately upon notice.

11.3. <u>No Release</u>. Termination does not release either Party from any liability which, at the time of such termination, had already accrued to the other Party or which is attributable to a period prior to such termination, nor preclude either Party from pursuing any rights or remedies it may have under law or in equity with respect to any breach of this Agreement. Excepting for termination based on Cre8tive's uncured material breach, all fees are non-cancellable and non-refundable unless a pro-rated refund applies as provided in the Order. In the event of a termination by Cre8tive for an uncured material breach by Customer, all fees shall immediately become due and payable.

11.4. <u>Effects of Termination</u>. Upon termination of this Agreement, Customer shall cease all use of the Solution and delete, destroy, or return all copies of the Documentation in its possession or control.

11.5. <u>Data Availability After Termination</u>. Upon the expiration or termination of the Subscription Service Customer Data will be retained by Cre8tive for no more than thirty (30) days from the effective date of expiration or termination.

11.6. The following provisions will survive termination or expiration of this Agreement: (i) any obligation of Customer to pay fees incurred before termination; (ii) Section 6 (*IP & Feedback*),(iii) Section 7 (*Confidential Information*), (iv) Section 8.4 (*Warranty Disclaimers*), (v) Section 9 (*Indemnification*), and (vi) Section 9 (*Limitation of Liability*); and (c) any other provision of this Agreement that must survive to fulfill its essential purpose.

12. <u>MISCELLANEOUS</u>.

12.1. <u>No Waiver</u>. Any failure by either party to enforce at any time or for any period of time the provisions of this Agreement shall not be construed as a waiver of such provision, or of the right to enforce that provision.

12.2. <u>Injunctive Relief</u>. Each of us agrees that any material breach of this Agreement may cause the other party irreparable harm, and that such non-breaching party may seek injunctive relief.

12.3. <u>Notices</u>. Cre8tive may send notices pursuant to this Agreement to Customer's email contact points provided by Customer, and such notices will be deemed received 24 hours after they are sent. Customer may send notices pursuant to this Agreement to Aaron@ctnd.com , and such notices will be deemed received 72 hours after they are sent.

12.4. <u>No Partnership or Agency</u>. We are acting as an independent contractor under this Agreement. Neither party is, or shall be deemed for any purpose to be, a partner, an employee or agent of the other and neither party shall have the power or authority to bind the other party to any contract or obligation. We retain the right to offer the Solution to others during the Subscription Term.

12.5. <u>Force Majeure</u>. Neither party shall be responsible for failure to perform in a timely manner under the Agreement when its failure results from any of the following causes: acts of God or public enemies, civil war, delay of carriers, terrorism, insurrection or riot, fire, flood, explosion, earthquake or serious accident, strike, labor trouble or work interruption or any cause beyond its reasonable control.

12.6. <u>Assignment & Successors</u>. If Cre8tive assigns or sells or otherwise transfers its rights to a business or product line or substantially all its assets, then Cre8tive may transfer its rights and obligations under this Agreement upon written notice to Customer. Except as permitted above neither party may assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Except to the extent forbidden in this Section 12.66, this Agreement will be binding upon and inure to the benefit of the parties' respective successors and assigns.

12.7. <u>Severability</u>. To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. If a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.

12.8. <u>No Waiver</u>. Neither party will be deemed to have waived any of its rights under this Agreement by lapse of

time or by any statement or representation other than by an authorized representative in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any other breach of this Agreement.

12.9. Choice of Law & Jurisdiction: This Agreement and all claims arising out of or related to this Agreement will be governed solely by the internal laws of the State of California, including without limitation applicable federal law, without reference to: (a) any conflicts of law principle that would apply the substantive laws of another jurisdiction to the parties' rights or duties; (b) the 1980 United Nations Convention on Contracts for the International Sale of Goods; or (c) other international laws. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of San Diego county, California. This Section 12.9 governs all claims arising out of or related to this Agreement, including without limitation tort claims.

12.10. Conflicts. Any conflicts between these Terms and Conditions and the Order shall be controlled by the Order. Any conflicts between the Agreement and the GTC shall be controlled by the Agreement. In the event of any conflict between this Agreement and any Cre8tive policy posted online, including without limitation the AUP or Privacy Policy, the terms of this Agreement will govern.

12.11. Conflicts with Customer's Purchase Order. Any terms that appear on a Customer's purchase order that purport to add to or otherwise vary from the referenced Cre8tive Order (including without limitation pre-printed terms) shall not apply to the Agreement and shall be null and void.

12.12. Technology Export. Customer shall not: (a) permit any third party to access or use the Solution in violation of any U.S. law or regulation; or (b) export any software provided by Cre8tive or otherwise remove it from the United States except in compliance with all applicable U.S. laws and regulations. Without limiting the generality of the foregoing, Customer shall not permit any third party to access or use the Solution in, or export such software to, a country subject to a United States embargo (as of the Effective Date, Crimea region of the Ukraine, Cuba, Iran, North Korea, and Syria).

12.13. Announcements. Customer grants Cre8tive a royalty-free, limited, nontransferable (except in connection with an assignment of this Agreement), nonexclusive license during the term of this Agreement to use and display Customer's logos and trademarks in customer lists, advertising materials, trade show materials and other literature identifying Cre8tive customers. Cre8tive may issue a press release regarding the transaction with Customer.

12.14. Amendment. Cre8tive may amend this Agreement from time to time by posting an amended version at its Website and sending Customer written notice thereof. Such amendment will be deemed accepted and become effective 30 days after such notice (the "Proposed Amendment Date") unless Customer first gives Cre8tive written notice of rejection of the amendment. In the event of such rejection, this Agreement will continue under its original provisions, and the amendment will become effective at the start of Customer's next Term following the Proposed Amendment Date (unless Customer first terminates this Agreement pursuant to Section 10.4.1, *Term & Termination*). Customer's continued use of the Service following the effective date of an amendment will confirm Customer's consent thereto. This Agreement may not be amended in any other way except through a written agreement by authorized representatives of each party. Notwithstanding the foregoing provisions of this Section 12.14, Cre8tive may revise the Privacy Policy and Acceptable Use Policy at any time by posting a new version of either at the Website, and such new version will become effective on the date it is posted.

12.15. Survival. Sections pertaining to Intellectual Property, Confidential Information, Indemnification, Limitation of Liability and Termination shall survive termination of this Agreement.

12.16. Taxes. All Subscription Fees, up-front fees and prices are exclusive of all applicable country, provincial, state, county and local sales, use, value added, excise, privilege, franchise and similar taxes ("Tax or Taxes"). Customer shall be responsible for all Taxes however designated or levied, against the sale, licensing, delivery, or use of the Service (other than Taxes based upon Cre8tive's net income). Taxes shall not be deducted from the payments made to Cre8tive, except as required by law, in which case Customer shall increase the amount payable as necessary so that after making all required deductions and withholdings, Cre8tive receives and retains (free from any Tax liability) an amount equal to the amount it would have received had no such deductions or withholdings been made.

12.17. Headings; Entire Agreement**.** The headings of each provision of this Agreement are for reference

purposes only. This Agreement may not be modified unless the modification is in a writing signed by both parties. This Agreement is complete and constitutes the entire agreement between us with respect to the Services to be provided, and all other prior representations, proposals, and other such information exchanged by the Parties concerning the subject matter is superseded in their entirety by this Agreement.

Your right to access and use the Solution and to receive the Services or Products set forth in the Order is conditioned upon your acceptance of these Terms of Service. You acknowledge that you have read the Terms of Service and agree to be legally bound by them. THE PERSON EXECUTING THIS AGREEMENT ON CUSTOMER'S BEHALF REPRESENTS THAT HE OR SHE HAS THE AUTHORITY TO BIND CUSTOMER TO THESE TERMS OF SERVICE.