Services Agreement

Revised and effective: August 30, 2024

AI Software, LLC does business as Capacity, CereProc, Denim Social, Envision, Lucy, LumenVox, SmartAction, and Textel and through its subsidiaries including but not limited to Textel CX, Inc., SmartAction Holdings, Inc., Denim Social, LLC, Equals3 Inc d/b/a Lucy and Envision Telephony, Inc..

AI Software, LLC (referred to herein as "**Capacity**") has updated our Services Agreement ("**Agreement**"). If you are a new Subscriber, then this Services Agreement will be effective as to any Service Order entered into after August 30, 2024. If you are an existing Subscriber of any of our brands which refer to online terms of service, subscription or services agreement or the like as of August 30, 2024, then we are providing you with prior notice of the changes to our Agreement with you, which will be effective as of September 30, 2024. For the previous version of our services agreement, please click here.

BY ENTERING INTO A SERVICE ORDER WITH CAPACITY OR BY ACCESSING OR USING THE SERVICES, THE "SUBSCRIBER" LISTED ON THAT SERVICE ORDER OR THE PERSON OR ENTITY WHO IS ACCESSING OR USING THE SERVICES ("**SUBSCRIBER**") AGREES TO BE BOUND BY THE TERMS OF THIS AGREEMENT.

Any person entering into this Agreement on behalf of a company, organization or another legal entity is agreeing to this Agreement for that entity and representing to Capacity that such person has the authority to bind such entity to this Agreement, in which case the term "Subscriber" refers to such entity and its affiliates.

1. **Definitions**. "**Services**" means the products and services licensed by or provided by Capacity that are used or ordered by Subscriber online through a link or via a Service Order referencing this Agreement. Capacity and Subscriber each may be referred to individually as a

"**Party**" and collectively as "**Parties**". "**Effective Date**" means the date set forth in the first Service Order referencing this Agreement or, if there is no Service Order then the date that Subscriber first accesses or uses the Capacity Services. All other terms used in this Agreement will have the meanings set forth herein or, if none, their plain English (U.S.) meaning. "**Supplemental Terms**" means the Services-specific terms located at https://capacity.com/supplemental-terms as updated from time to time.

2. **Term of this Agreement; Subscription Term of Services.** This Agreement commences on the Effective Date and continues through Subscriber's then-current subscription term ("**Term**"). Services provided under this Agreement commence on the "Services Start Date" set forth in the Service Order (or if none, then the Effective Date) and automatically renew for a period equal to the previous subscription term, unless either Party provides the other Party with notice of non-renewal to renewals@capacity.com at least 60 days prior to the expiration of the applicable subscription term. Capacity reserves the right to increase the fees at the beginning of each subscription term, including any automatically renewed term.

3. **Services.**

3.1 **Provision of Services**. During the Term, Capacity will make the Services available to Subscriber pursuant to this Agreement, the Supplemental Terms (where applicable), and the applicable Service Order, as well as if applicable the Data Processing Addendum (as defined below "**DPA**"), and the BAA (as defined below) if applicable. During the Term, Capacity will use commercially reasonable efforts to provide Subscriber (including Users of Subscriber) with a limited, non-exclusive and non-transferable right to access to and use of the applicable Services on a software-as-a-service basis. Subscriber's total data storage may not exceed 1TB.

3.2 **Service Orders**. Services under this Agreement may be provided pursuant to written service orders (or order forms, SOWs, SaaS Schedule, statements of work or the like) entered into by the Parties and subject to the terms and conditions of this Agreement (each, a "**Service Order**"). Any additional Service Orders will be effective and become a part of this Agreement when executed in writing (or electronically) by authorized representatives of each Party.

3.3 **Subscriber Account and Users.** Subscriber's use of the Services will be established via a Subscriber account ("**Account**"), under which may authorize and provide access to the Services to individuals, affiliates of Subscriber (including their users) or another entity (including its users) (collectively, Subscriber's "**Users**") and set access rights for Users. If per-User pricing is set forth in the Service Order or Account, then access is provided for up to the number of Users included in the Service Order and bills will reflect overages.

3.4 **Subscriber's Responsibilities with respect to Users.** Subscriber will ensure that all information in the Account regarding each User remains confidential, accurate and complete. Subscriber is solely responsible for all use of Services by each User and for compliance by each User with the applicable terms of this Agreement including the Supplemental Terms. Subscriber will notify Capacity promptly of any such unauthorized access or use of the Services, or if any User credentials are lost, stolen, or otherwise compromised. Capacity will not be liable for any damage or loss that may result from Subscriber's breach of the foregoing obligations.

3.6 **Free Trials / Instant Activation**. If Subscriber has created an Account online through a free trial link, Capacity may suspend Subscriber's access to the Services at the end of such free trial (generally 30 days). Additional terms may apply to such a free trial and Capacity reserves the right to terminate a free trial at any time. Any Subscriber Data entered and any configurations of the Services customized during the free trial period will be lost unless Subscriber enters into a Service Order and pays for such Services before the end of the trial period.

3.7 **Modification of the Services**. Subscriber acknowledges that Capacity reserves the right to modify and update any Services on a non-discriminatory basis from time to time during the Term, but Capacity

will not materially decrease the overall functionality of the Services purchased by Subscriber during the subscription term except where such modifications are required for compliance with laws or data security reasons. Updates to our platform may require Users to update third-party software (e.g. User's device's operating system) from time to time in order to continue to use Services.

3.8 **Third-Party Subprocessors**. Capacity engages third parties to support the delivery and availability of the Services. Some of these third parties are engaged as "**Subprocessors**" to host or process Subscriber Data, which may include Personally Identifiable Information. Subprocessors that Capacity uses to host or process Subscriber Data are listed at https://capacity.com/capacity-sub-processors. Subscriber consents to Capacity engaging Subprocessors to process Subscriber Data to the extent necessary or desirable for the Services.

4. Capacity Technology; Subscriber Usage Compliance.

4.1 **Capacity Intellectual Property.** The Services, and any software; algorithms; interfaces; data; system performance data; metadata; machine learning algorithms and aggregated results of such machine learning; data structures; conversation flows, designs, images, photographs, animations, video, audio, music, text, and applets incorporated into the software; hardware, and systems used to provide the Services (collectively, the "**Capacity Technology**") constitute the valuable intellectual property of Capacity.

4.2 **Prohibitions.** As an express condition to the rights granted to Subscriber under this Agreement, Subscriber will not and will not permit any User or third party to: (1) access or use the Capacity Technology or any portion thereof for any purpose except as expressly provided in this Agreement; (2) access or use the Capacity Technology in any unlawful, illegal, or unauthorized manner; (3) modify, adapt, alter, copy, frame, mirror, display, republish or create derivative works from the Capacity Technology; (4) reverse engineer, decompile, disassemble, or otherwise attempt to derive the source code, structure, design, or method of operation for the Capacity Technology; (5) access the Capacity Technology in order to build a competitive product or service, or copy any features, functions or graphics of the Capacity Technology; (6) license, sublicense, sell, resell,

rent, lease, lend, transfer, assign, time share or otherwise commercially exploit or make available the Capacity Technology to any third party, other than to Users as contemplated by this Agreement; (7) access or use the Capacity Technology in any manner that could damage, disable, overburden or impair the operation of the Capacity Technology; or (8) circumvent or overcome (or attempt to circumvent or overcome) any technological protection measures intended to restrict access to the Capacity Technology. Capacity may monitor Subscriber's use of the Services to verify compliance with the terms of this Agreement; Subscriber consents to all such monitoring and to the use by Capacity of all data and information collected through such monitoring.

5. <u>Data Protection and Security</u>.

5.1 **Subscriber Data. "Subscriber Data"** means all documents, electronic data, chats, messages, texts, social media posts, audio recordings or transcriptions, other communications and materials processed by, submitted to and stored within Capacity Services by Subscriber or its Users (excluding contact information of Agents and Administrators). Subscriber is solely responsible for the accuracy, integrity, legality, reliability and appropriateness of the Subscriber Data. Subscriber has and will maintain all rights, licenses, authorizations, and consents necessary to allow Capacity to access, use, disclose to Subscriber's Users, store and process all Subscriber Data as permitted under this Agreement.

5.2 **User Personally Identifiable Information; User Data Privacy Rights.** Subscriber will only provide Capacity with access to Subscriber Data that identifies or, in combination with other data, could reasonably be used to identify an individual ("**Personally Identifiable Information or PII**") to the limited extent necessary or legally required for Capacity to provide the Services. As it pertains to PII, Subscriber is the data controller and Capacity is the data processor or subprocessor (as defined in data protection laws), except that Capacity is the data controller for contact information for Users who are Account administrators. Capacity will promptly inform Subscriber if Capacity receives a request from a User to exercise their rights with respect to their personal information (as defined in data protection laws). Subscriber will be responsible for verification and responding to such

requests and Capacity will not respond to such Users except to acknowledge their requests.

5.3 HIPAA Protected Health Information; Business Associate Addendum. If Subscriber is a covered entity or a business associate (as defined by the Health Insurance Portability and Accountability Act ("**HIPAA**") desiring to have process protected health information (as defined by HIPAA ("**PHI**")) as a business associate, then the Service Order shall expressly include the HIPAA Package, indicating that Capacity is to process PHI, and the Business Associate Addendum available at https://capacity.com/capacity-BAA shall be incorporated herein.

5.4 Data Processing Addendum; Privacy Policy. Capacity and Subscriber will comply with the terms of the DPA available at http://capacity.com/capacity-DPA, which is incorporated herein, with respect to processing personal data (as defined therein). Subscriber understands that Capacity will process Subscriber Data and User information in accordance with applicable data protection laws, this Agreement, including the DPA, and applicable provisions of its Privacy Policy available at https://capacity.com/privacy-policy/.

5.5 Data Security. Capacity will use commercially reasonable efforts to maintain appropriate technical, administrative, and physical measures to protect against an unauthorized access to or disclosure of PII. In the event of an unauthorized access or improper disclosure of PII resulting from Capacity's breach of its obligations (a "**Data Breach**"), Capacity will notify the Subscriber of such Data Breach promptly. Capacity shall reasonably cooperate with the Subscriber in any investigation into the Data Breach, including providing any information reasonably requested by the Subscriber to meet any legal obligations under applicable law, to the extent such information is available to Capacity. Such notification shall not be construed as admission of fault by Capacity for causing said Data Breach. If Capacity becomes aware of any unauthorized access or disclosure of PII not resulting from Capacity's breach of its obligations hereunder (such as, for example, a User granting unauthorized systems access to a third party), then Capacity will notify the Subscriber and the Parties will cooperate with each other, on a commercially reasonable basis, to support any remediation efforts, whether such efforts are led by Subscriber or Capacity.

5.6 **Capacity Employee Background Checks and Training**. Capacity conducts criminal background checks for all Capacity employees involved in providing the Services. The criminal background check includes address history, national sex offender registry check, SSN validation and a widescreen national criminal search. Capacity conducts new hire and annual employee training on Capacity's applicable security policies and procedures and regulatory compliance.

6. Fees and Payment

6.1 **Fees**. In full consideration for the Services and the rights granted under this Agreement, Subscriber agrees to pay the fees and other charges specified in each Service Order or other Account documentation ("**Fees**"). Fees are due in U.S. Dollars.

6.2 **Invoicing and Payment.** All Fees will be due net 30 days from the date of Capacity's invoice (Net 30). All Fees in any invoice will be considered to be accepted by Subscriber unless Subscriber notifies Capacity of a good faith and reasonable dispute regarding such Fees in writing within 10 days of the date of the invoice. Subscriber may not withhold, reduce, or offset payment of any Fees against any amounts due to Subscriber. Any amount not paid when due will be subject to finance charges equal to 1% of the unpaid balance per month or the highest rate permitted by applicable usury law, whichever is less. Subscriber will reimburse any costs or expenses (including, but not limited to, reasonable attorneys' fees) incurred by Capacity to collect any amount that is not paid when due. Capacity may terminate a Service Order and/or this Agreement due to Subscriber's non-payment, in which case all unpaid fees for the remainder of the current Term will be immediately due. Each Service Order may specify any additional payment terms such as credit card processing requirements and fees.

6.3 **Purchases from Channel Partners.** Subscriber may procure use of the Services from a third-party authorized reseller of Capacity, including third party marketplaces ("**Channel Partner**"), pursuant to a separate agreement with the Channel Partner. Subscriber's use of Services procured through a Channel Partner will be subject to the applicable terms of this Agreement, in addition to the rights and responsibilities of each under the terms agreed to between Subscriber and Channel Partner.

7. Termination

7.1. **Termination; Suspension.** Either Party may terminate this Agreement or any Service Order: (a) if the other Party is in material breach under this Agreement and fails to cure such material breach within 30 days of receipt of written Notice of such material breach from the non-breaching party; or (b) upon Notice to the other Party, if the other Party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors. In addition, Capacity may suspend Subscriber's access to the Services upon any actual or reasonably suspected breach of this Agreement by Subscriber (including but not limited to non-payment), or any use of the Services in a manner that may cause damage to Capacity, any other Capacity customer, any User, or any third party.

7.2 **Effect of Termination.** Upon any non-renewal or termination (i) Subscriber will remain liable for any Fee or other amount due hereunder or under any outstanding Service Order; (ii) Subscriber's rights and licenses under this Agreement will terminate, including any right to access or use the Services; and (iii) all obligations of Capacity hereunder and under any Service Order will terminate.

7.3 **Data Export and Retention.** Capacity recommends that Subscriber export its Subscriber Data (if applicable) before Subscriber closes Subscriber's Account. Where Subscriber Data is retained by Capacity and can be exported, Subscriber may: (a) download such data from the Services platform, or (b) contact Capacity at support@capacity.com within thirty 30 days following non-renewal or termination for assistance with exporting such data. Capacity reserves the right to retain Subscriber Data for three (3) months before deleting Subscriber Data in the normal course of operation except as necessary to comply with Capacity's legal obligations, maintain accurate financial and other records, resolve disputes, and enforce its agreements. Subscriber Data cannot be recovered once it is deleted.

8. Ownership and Proprietary Rights

8.1 **Capacity Ownership**. Capacity retains all right, title, and interest, including all intellectual property rights, in and to: (a) the Capacity Technology; (b) all data, information, content, and materials provided through the Services, excluding only (i) Subscriber Data and (ii) third-party

content licensed to Capacity or code created by Capacity for interoperation with the Services of third party and public APIs (collectively, "**Capacity Content**"); and (c) any updates, upgrades, enhancements, modifications, and improvements thereto. Subscriber is not granted any right or license to use any Capacity Content, apart from the rights to access and use the Services as expressly permitted in this Agreement. All business names and logos and product and service names associated with the Services are trademarks of Capacity, and Subscriber is granted no right or license to use them. Subscriber covenants, on behalf of itself and its successors and assigns, not to assert against Capacity any rights, or any claims of any rights, in any Capacity Technology.

8.2 **Subscriber Data**. As between Subscriber and Capacity, Subscriber owns all right, title, and interest, including all intellectual property rights, in and to the Subscriber Data.

8.3 **Usage Data.** Capacity may generate and maintain information based on the use of the Services by Subscriber and Users and collect and maintain User account information, provided that such information does not identify Subscriber or any User or include any PII (collectively "**Usage Data**"). As between Capacity and Subscriber, Capacity owns all right, title, and interest, including all intellectual property rights, in and to all Usage Data and may use any Usage Data for any purpose. Capacity may also collect and maintain billing records, audio media, call, text or messaging logs and traffic routing information, as well as the content and sources of communications sent through or integrated with our Services, such as voice, audio and digital recordings, message bodies, and call recording transcriptions, for purposes including, but not limited to, quality assurance purposes, marketing purposes, and training purposes.

8.4 **Suggestions.** Capacity owns any suggestions, ideas, enhancement requests, feedback, processes, recommendations or other information suggested or provided by Subscriber or any User relating to the features, functionality or operation of the Services and/or the Capacity Technology ("**Suggestions**"). To the extent that Capacity does not for any reason own such Suggestions, Capacity may, but is not obligated, to use such Suggestions for any purpose with no financial, credit, confidentiality or

other obligation to Subscriber. Suggestions will not be used by Capacity in any way that identifies or permits identification of Subscriber or its Users.

9. Confidentiality

9.1 **Definition of Confidential Information**. "**Confidential Information**" means all confidential and proprietary information of a Party ("**Disclosing Party**") disclosed to the other Party ("**Receiving Party**") that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information or the circumstances of disclosure. Without limiting the foregoing, Confidential Information of Subscriber includes Subscriber Data, Subscriber's PII, Subscriber's proprietary APIs used by Capacity to access Subscriber Data or systems, and the API keys and login credentials used by Capacity to access Subscriber Data or systems. Without limiting the foregoing, Confidential Information of Capacity includes the Capacity Technology and the Capacity Content. The obligations in this section shall not apply to any information that: (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party and without an obligation of confidentiality; (iii) was independently developed by the Receiving Party without the use of or reference to the Confidential Information of the Disclosing Party; or (iv) is lawfully received from a third party without breach of any obligation owed to the Disclosing Party and without an obligation of confidentiality.

9.2 **Confidentiality Obligations**. The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party, except as provided in this Agreement, except with the Disclosing Party's prior written permission (given pursuant to the Notice provisions) or except to its employees and advisors who have a need to know such Confidential Information and who are subject to confidentiality obligations comparable in scope to those herein. The Receiving Party shall be liable for any breach of confidentiality obligations by its representatives to which it discloses the Disclosing Party's Confidential Information. The provisions of this section will supersede any non-disclosure agreement by and between the Parties entered into prior to this Agreement that would purport to address the confidentiality of any information shared by the parties, including

Subscriber Data, and such agreement will have no further force or effect with respect to the foregoing. Notwithstanding the foregoing, Receiving Party and its representatives shall not be obligated to destroy any Confidential Information that is in an archived computer system backup in accordance with the Receiving Party's security, compliance, corporate governance, disaster recovery and/or document retention policies or to the extent relevant to demonstrate compliance with any legal, professional or contractual obligation or document retention policy.

9.3 **Remedies**. If the Receiving Party discloses or uses (or threatens to disclose or use) any Confidential Information of the Disclosing Party in breach of the confidentiality protections hereunder, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the Parties that any other available remedies are inadequate.

9.4 **Prior Non-Disclosure Agreement**. Any existing non-disclosure agreement entered into by the Parties is hereby superseded and replaced by the terms in this section, which will govern all disclosures and exchanges of Confidential Information made by the Parties previously under that agreement.

10. Representations and Warranties.

10.1 **Mutual Representations and Warranties**. Each Party represents, warrants, and covenants to the other Party that it has and will maintain the legal power and authority to enter into this Agreement.

10.2 **Subscriber Representations and Warranties.** Subscriber represents, warrants, and covenants to Capacity that: (i) it owns or otherwise has and will maintain sufficient rights in the Subscriber Data to grant to Capacity the rights granted herein to access, use, disclose, store and process the Subscriber Data; (ii) it has sole responsibility for the accuracy, integrity, legality, reliability and appropriateness of all Subscriber Data; (iii) it owns or otherwise has and will maintain sufficient rights to permit third party applications or services to interoperate with Capacity's Services and it will comply with its own contractual commitments including the End User License Agreements under any third-party software connected to the Services by or on behalf of Subscriber; (iv) it has provided and will provide adequate notices and has maintained and will maintain the applicable

permissions, authorizations, and consents (via its employee handbook, privacy policy or otherwise) for Capacity to access, use, disclose, store and process PI and other Subscriber Data as permitted hereunder; and (v) it acknowledges that Capacity's Services may use cookies, pixels, tracking pixels, pixel tags, screen recorders, session replay analytics tools and clear GIFs to enable certain features and functionality of the Services and to enhance user experience by optimizing the efficiency, design and quality of the Services.

10.3 **Capacity Representations and Warranties.** Capacity represents, warrants, and covenants to Subscriber that: (i) it owns or otherwise has and will maintain sufficient rights to grant to Subscriber the license to use the Services granted herein and that it has and will maintain sufficient rights to any open source software or in-licensed third party software incorporated by Capacity in the Services; and (ii) it will use commercially reasonable efforts to make its platform available 24 hours a day, 7 days a week, except for: (a) periodic maintenance; (b) downtime caused by circumstances beyond Capacity's reasonable control; (c) third-party equipment and applications (including social media services) outside of Capacity's control; (d) Subscriber's use of the Services other than in accordance with this Agreement; or (e) at Subscriber's request.

11. Disclaimer. EXCEPT AS EXPRESSLY PROVIDED IN SECTION 10 (REPRESENTATIONS AND WARRANTIES), NEITHER PARTY MAKES ANY WARRANTIES OF ANY KIND WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AS WELL AS ANY WARRANTIES AS TO THIRD-PARTY EQUIPMENT, SOFTWARE OR TELECOMMUNICATIONS NETWORKS OR CARRIERS, OR CONNECTIVITY THERETO (EXCEPT WITH RESPECT TO THE SUBPROCESSORS IDENTIFIED ABOVE), TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. WITH RESPECT TO WARRANTIES REGARDING TITLE AND NON-INFRINGEMENT OF THIRD-PARTY RIGHTS, CAPACITY'S ONLY OBLIGATION WITH RESPECT TO NON-INFRINGEMENT SHALL BE THE INDEMNIFICATION OBLIGATIONS SET FORTH BELOW IN SECTION 12.1 (INDEMNIFICATION).

WITHOUT LIMITING THE FOREGOING PROVISIONS, CAPACITY MAKES NO WARRANTY THAT THE SERVICES WILL BE ERROR-FREE, VIRUS FREE, OR FREE FROM INTERRUPTIONS OR OTHER FAILURES OR THAT THE SERVICES WILL SATISFY SUBSCRIBER'S SPECIFIC REQUIREMENTS OR BE COMPATIBLE WITH SUBSCRIBER'S HARDWARE OR SOFTWARE CONFIGURATION OR THAT INACCURACIES OR ERRORS WILL BE CORRECTED.

If Subscriber's Service Order includes Messaging Services such as SMS, MMS, WhatsApp, and similar messaging channels ("**Messaging Services**"), then Subscriber acknowledges and agrees that Messaging Services are provided by way of transmissions between local and/or international telecommunications networks. Subscriber acknowledges and agrees that Subscriber can have no expectation of privacy concerning the transmission of Subscriber Data by use of such Messaging Services, provided, however, that any Subscriber Data that is ultimately at rest with and stored by Capacity on Subscriber's behalf will be protected in accordance with the relevant terms of this Agreement.

12. Indemnification.

12.1 **Indemnification by Capacity**. Subject to this Agreement, Capacity shall indemnify, defend and hold harmless Subscriber against any claims, demands, suits or proceedings made or brought by a third party ("**Claims**") against Subscriber including against all losses, costs and expenses including reasonable attorneys' fees, "**Losses**") finally awarded against Subscriber by a court of competent jurisdiction or an arbitrator or agreed to in a written settlement agreement signed by Subscriber in connection with such Claims, against Subscriber alleging that the use of the Services as permitted hereunder directly misappropriates or infringes any U.S. patent, copyright, trademark or other intellectual property rights of such third party. If the Services are held or likely to be held infringing, Capacity shall have the option, at its expense to (a) replace or modify the Services as appropriate without materially diminishing functionality, (b) obtain a license for Subscriber to continue using the Services, (c) replace the Services with a functionally equivalent service; or (d) terminate the Services and refund any prepaid, unused fees applicable to the remaining portion of the Term following the effective date of termination. This Section 12.1 states

Capacity's entire liability and Subscriber's exclusive remedy for any Claim of intellectual property infringement or misappropriation. Capacity will have no obligation or liability relating to any Claim that: (i) is based on modifications or customizations of the Services, Subscriber Data or Capacity Content, at the direction of Subscriber; (ii) results from Subscriber's use of the Services in a manner that is inconsistent with its intended use or is in breach of this Agreement; (iii) is based on any Subscriber Data or any use of or compliance with any specifications, requirements, instructions or materials provided by or on behalf of Subscriber; or (iV) is based on compliance with any laws or regulations applicable to Subscriber or Subscriber's industry that are not applicable to SaaS providers.

12.2 **Indemnification by Subscriber**. Subject to this Agreement, Subscriber shall indemnify, defend and hold harmless Capacity against any Claims made or brought against Capacity including Losses finally awarded against Capacity by a court of competent jurisdiction or an arbitrator or agreed to in a written settlement agreement signed by Capacity in connection with such Claims: (a) alleging that the Subscriber Data or Subscriber's use of the Services in a manner other than as authorized under this Agreement or in violation of any End User License Agreement of third-party software connected to the Services by or on behalf of Subscriber, infringes or otherwise violates a third party's property, privacy, intellectual property or other rights, or (b) by a User with respect to Subscriber's privacy policy or any other usage, act or omission under the Account.

12.3 **Indemnification Procedures**. Promptly upon receiving notice of a Claim, the indemnified Party shall (i) give the indemnifying Party prompt written notice of the Claim; (ii) give the indemnifying Party sole control of the defense and settlement of the Claim (provided that the indemnifying Party may not settle or defend any claim unless it unconditionally releases the indemnified Party of all liability); and (iii) provide to the indemnifying Party, at indemnifying Party's cost, all reasonable assistance in the defense or settlement of such Claim.

13. Limitation of Liability.

13.1 **Limitation of Liability**. EXCEPT DAMAGES FROM A PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OR UNDER SECTION 6 (FEES

AND PAYMENT), IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE AMOUNTS ACTUALLY PAID BY AND DUE FROM SUBSCRIBER IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO THE LIABILITY.

13.2 **Exclusion of Consequential and Related Damages**. EXCEPT FOR DAMAGES FROM A PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS OR FOR ANY INDIRECT, PUNITIVE, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES HOWEVER CAUSED AND, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT THE PARTY FROM WHICH DAMAGES ARE BEING SOUGHT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

SUBSCRIBER UNDERSTANDS AND AGREES THAT THE PRIMARY INTENT OF SECTION 13 IS TO DISTRIBUTE THE RISKS ASSOCIATED WITH THIS AGREEMENT BETWEEN BOTH PARTIES. THIS LIMITS POSSIBLE LIABILITIES, TAKING INTO ACCOUNT THE LICENSE FEES. IF CAPACITY WERE TO TAKE ON ADDITIONAL LIABILITY BEYOND WHAT IS SPECIFIED IN THIS AGREEMENT, THE LICENSE FEES WOULD HAVE BEEN MARKEDLY HIGHER.

14. General Provisions.

14.1 **Export Control; Communications Laws**. Subscriber and each of its Users shall adhere to all applicable U.S. and foreign export control laws and shall not export or re-export any regulated item or information to anyone outside the U.S. in connection with this Agreement without first complying with all export control laws and regulations that may be imposed by the U.S. or any country or organization of nations within whose jurisdiction Subscriber operates. Subscriber and each of its Users shall adhere to all applicable laws governing the use of individual information, deceptive and misleading advertising, electronic commercial communications, telemarketing and other similar laws, which include without limitation the U.S. Telephone Consumer Protection Act of 1991, U.S. Controlling the

Assault of Non-Solicited Pornography and Marketing Act of 2003 and the Canada Anti-SPAM Legislation, if applicable, and each as amended.

14.2 **Relationship of the Parties**. The Parties are independent contractors, and nothing herein shall be deemed to constitute the relationship of employer-employee, a partnership, or a joint venture between the Parties hereto. Neither Party is an agent of the other and neither Party is authorized to make any representation, contract, or commitment on behalf of the other Party.

14.3 **Notices**. All notices, requests and other communications under this Agreement (each, a "**notice**") shall be in writing and delivered by nationally recognized overnight courier or U.S mail, or (b) e-mail. Except as otherwise provided in this Agreement, a notice is effective(a) for courier on the day of receipt and on the 3rd day after mailing any notice by certified or registered mail, or (b) for email on the day received unless sent after business hours, then the next day.   Subscriber's address is set forth in the Service Order or such other address that may be designated by a Subscriber from time to time in accordance with this section. The address for notice to Capacity is renewals@capacity.com and 6665 Delmar Blvd., Ste 300, St. Louis, MO 63130 with a copy to legal@capacity.com.

14.4 **Waiver**. No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

14.5 **Assignment**. Neither Party may assign this Agreement without the prior written consent of the other Party (which consent shall not unreasonably withheld), except that either Party may assign this Agreement in its entirety, with written notice to the other Party, but without the consent of the other Party, if (a) to an affiliate, or (b) in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets not involving a direct competitor of the other Party. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the Parties, and their

respective successors and permitted assigns. No assignment or delegation shall relieve the assigning or delegating party of any of its obligations hereunder.

14.6 **Governing Law**. This Agreement and any disputes arising out of or related hereto shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to its conflicts of laws rules.

14.7 **Force Majeure**. Neither Party shall be liable or responsible to the other Party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement (except for any obligations to make payments to the other Party hereunder), when and to the extent such failure or delay is caused by or results from acts beyond the affected Party's reasonable control and cannot be remedied by the exercise of reasonable diligence, including, without limitation: (a) acts of God including pandemic; (b) flood, fire, earthquake or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order or law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; (g) national or regional emergency; (h) failure of a third party API or third party software, and (g) Internet service provider or hosting facility failures, or delays involving hardware, software or power systems not within Capacity's possession or reasonable control (each a **"Force Majeure Event"**). The affected Party shall be relieved from its obligations (or part thereof) as long as the Force Majeure Event lasts and hinders the performance of said obligations (or part thereof). The affected Party shall promptly notify the other Party and make reasonable efforts to mitigate the effects of the Force Majeure Event with reasonable dispatch and shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized.

14.8 **Publicity**. Subscriber agrees that its name, logo, and/or use case may be used by Capacity in marketing materials (**"Promotional Materials"**) for both internal and external purposes. Subscriber may request that Capacity stop the use of Promotional Materials of Customer by submitting an email to

renewals@capacity.com at any time, which Capacity will process within 30 days.

14.9 **Changes to this Agreement**. This Agreement is subject to change by Capacity at any time upon 30 days notice. Capacity will take reasonable steps to notify Subscriber of any material changes or modifications to this Agreement by way of prominent notice on our website, via the Services or by email. Subscriber's continued use of the Services after such notice will be deemed to be conclusive acceptance of such changes or modifications.

14.10 **Entire Agreement**. This Agreement, including any Service Orders, the DPA, the Privacy Policy, and Supplemental Terms, as amended, constitutes the sole and entire agreement of the Parties with respect to the subject matter of this Agreement. In the event of any inconsistencies between such, the order of precedence will be, first, the Service Order, second this Agreement, the DPA, the Supplemental Terms and the Privacy Policy. Any additional or different terms or conditions contained in Subscriber's purchase orders, acknowledgments, invoices, non-disclosure agreements, shrink-wrap, click-wrap, browse-wrap or other documents are null and void.

14.11 **Counterparts**. If executed by the Parties, this Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

14.12 **No Third-Party Beneficiaries**. Nothing in this Agreement shall confer any right, remedy or obligation upon anyone other than the Parties hereto.

14.13 **Survival**. The terms and conditions of this Agreement that by their sense and context are intended to survive after performance of the Services hereunder shall survive the termination or expiration of this Agreement.