



ATIBA SOFTWARE, LLC TERMS AND CONDITIONS

These TERMS AND CONDITIONS (the “Terms and Conditions”) is entered into by and between Atiba Software, LLC (“Atiba”) and the Customer identified (“Customer”) in the Services Agreement.

The entire agreement between the parties shall consist of these Terms and Conditions, the Services Agreement, any exhibits attached thereto and any additional or future statements of work which may be executed by the parties.

1. Definitions.

1.1. “Services” shall mean any services performed by Atiba as specified in the Services Agreement signed by the Parties.

1.2. “Work Product” shall mean all tangible and intangible results and items arising out of the Services delivered to Customer by Atiba under these Terms and Conditions, together with all derivative works and all related intellectual property rights.

2. Services.

2.1. Performance.

Atiba shall use commercially reasonable efforts to perform the Services in accordance with the Statement of Work which is part and parcel of the Services Agreement executed by both parties (each a “Statement of Work”). The parties may execute additional or future Statements of Work which may become part and parcel of the original Services Agreement if agreed to by the parties. Atiba shall perform the Services as described in the Statement of Work. Customer acknowledges that Atiba's performance is dependent in part upon Customer's reasonable assistance and performance of its prerequisite obligations set forth in the Statement of Work. Accordingly, any dates or time periods relevant to Atiba's performance will be equitably extended automatically to account for any delays due to failure of Customer to complete any of its prerequisite obligations or to provide such information or assistance, or due to changes requested by Customer.

2.2. Changes.

Changes to any Statement of Work or the Services to be performed thereunder shall become

effective only when the parties execute a written change order. Such executed written change order shall be deemed to become incorporated into the original Service Agreement between the parties. The Customer agrees that, for the sake of convenience, Atiba has the right to obtain electronic mail consent to any change orders. The Customer's affirmative response to such electronic mail shall constitute written consent to the requested change order.

2.3. Additional Statements of Work.

If Customer desires to engage Atiba for additional services that are not included in the initial Statement of Work, the parties shall in good faith negotiate additional Statements of Work, subject to the availability of Atiba personnel and resources. Upon execution by both parties, each additional Statement of Work shall be deemed a part of the original Services Agreement. Atiba shall only be obligated to provide Services that are set forth in an executed Statement of Work. Accommodations may be made by Atiba to assist the Customer with certain projects or tasks, however these are only to be considered accommodations for convenience purposes and do not create an obligation to perform any such services unless the Services are set forth in an executed Statement of Work.

2.4. Nature of Relationship.

Atiba's relationship with Customer will be that of an independent contractor providing consulting services. Nothing in these Terms and Conditions shall be construed to create a partnership, joint venture, principal-agent or employer-employee relationship.

3. Fees and Payments.

3.1. Fees.

Customer agrees to pay Atiba all fees for Services performed under the applicable Statement of Work (the "Fees"). Atiba's current fee structure shall be set forth in the Services Agreement. Customer agrees that Atiba shall have the right to increase their Fees on January 1 of each year, provided such increases do not exceed the greater of 5% or the corresponding percentage increase in US CPI. The Customer recognizes that the increase in fees will adjust the fee structure in the Statement of Work as the estimated amount of work will remain the same but the rate for such work will increase. Customer agrees that such increases are acceptable.

3.2. Expenses.

Customer shall reimburse Atiba for travel and out-of-pocket expenses reasonably incurred in performing the Services as provided in this Section. Atiba has a Professional Services travel expense policy ("Policy") that is comprehensive and meets IRS regulations. Under this Policy each member of the team submits an expense report, which is approved by the immediate supervisor and reviewed by Atiba's financial group for adherence to the Policy. The Policy requires receipts for all expenses above \$25. Atiba will bill Customer for out of pocket expenses incurred by its staff assigned to the project.

3.3. Payment Terms.

Payment shall be made by Customer within 15 days after receipt of the invoice, provided, however, that if Customer disputes any part of an invoice, Customer must notify Atiba in

writing within 15 days of the date of the invoice and shall pay the undisputed amount. Customer's failure to dispute an invoice or any part of an invoice in writing within 15 days of receipt of the invoice will be conclusive proof that the invoice is accepted. Customer agrees that they waive their rights, if any future legal dispute should arise, to challenge invoices which were not disputed in accordance with the process detailed herein. Any late payment shall be subject to any costs of collection (including reasonable legal fees) and shall bear interest at the rate of 1.5% per month until paid. Atiba may also provide periodic Status Reports (electronically and/or on paper) to Customer summarizing work status, hours worked, and/or general information on the status of the work being performed. Customer's failure to dispute a Status Report or any part of a Status Report in writing within 5 days of receipt of the Status Report will be conclusive proof that the work is accepted and approved. Customer further agrees that they waive their rights, if any future legal dispute should arise, to challenge the quality, scope or nature of the work discussed in any Status Report which was not disputed in accordance with the process detailed herein.

3.4. Taxes.

All fees are exclusive of, and Customer is responsible for, applicable federal, state, or local sales, use, excise, export or other applicable taxes, except for taxes on the net income of Atiba. Atiba may add any such taxes to the applicable invoice. Customer agrees that it shall be their responsibility to seek a refund of any sales or use taxes collected by Atiba which Customer believes to be in excess of what is owed. Customer agrees that they are not permitted to refuse to pay taxes included in any invoice for work performed.

4. Intellectual Property Rights.

4.1. Ownership.

Customer recognizes that certain preexisting software functions, algorithms, code, navigational schema, and other elements owned by Atiba ("Atiba's Preexisting Intellectual Property") may constitute a portion of any deliverables, Work Product and/or software developed under these Terms and Conditions.

Atiba recognizes that certain preexisting copyrightable materials (such as Customer logos, Customer trademarks, Customer trade dress, and other Customer-provided material) may constitute a portion of any deliverables, Work Product and/or software developed under these Terms and Conditions. No ownership of such material is granted to or assumed by Atiba under these Terms and Conditions; however, Customer hereby grants Atiba a nonexclusive, royalty-free, worldwide license to use such material solely for use in preparing the deliverables, Work Product and/or software developed under these Terms and Conditions.

Atiba retains worldwide ownership of its rights to all source code, patents and patent rights, copyrights, trade secret rights, trademark rights, and other intellectual property and proprietary rights embodied in any deliverables and/or software developed, if any, under these Terms and Conditions. Atiba hereby grants to Customer a nonexclusive, nontransferable, nonassignable, worldwide license in perpetuity to reproduce, distribute, perform, and display (publicly or otherwise) deliverables and/or software developed under these Terms and Conditions. Such license shall remain in effect during all periods of time where Customer is current with payment of fees and expenses, as provided

under Section 3.1, to Atiba. If the Customer is in violation of Section 3.3 Atiba, in its sole and absolute discretion, has the right to suspend or revoke the granted license herein. Customer agrees that it shall not have the right to demand the transfer of the licensed material until full and final payment has been made of all invoices.

Upon full and final payment of each monthly invoice for fees and expenses to Atiba, as determined in the sole good faith discretion of Atiba, Customer shall assume ownership of all source code, patents and patent rights, copyrights, trade secret rights, trademark rights, and other intellectual property and proprietary right embodied in any deliverables and/or software developed, if any, under these Terms and Conditions. After full and final payment of all outstanding invoices for fees and services, upon the request of the Customer, Atiba shall transfer full and final ownership of any deliverables and/or software developed, if any, under these Terms and Conditions to the Customer via a quitclaim assignment document.

Customer hereby grants Atiba the right to affix upon the bottom of each webpage, if applicable, a small logo with corresponding text regarding authorship of such website.

Customer hereby grants Atiba the right to display all approved work product throughout the project on Atiba.com's website as "featured work."

4.2. Restrictions.

Customer shall not (and shall not allow any third party to) (a) decompile, disassemble, or otherwise reverse engineer the deliverables and/or software developed, if any, under these Terms and Conditions, (b) remove, alter or obscure any product identification, copyright or other notices contained within or on the deliverables and/or software developed, if any, under these Terms and Conditions, or (c) modify, adapt or create a derivative work of any part of any deliverables and/or software developed, if any, under these Terms and Conditions. This section shall not be applicable if the Customer has made full and final payment of all fees and Atiba has transferred ownership of the deliverables and/or software developed as provided for under Section 4.1.

5. Term and Termination.

5.1. Term.

The term of the Services Agreement shall commence on the Effective Date as listed thereon and shall remain in effect until completion of each Statement of Work issued hereunder, unless terminated earlier as provided herein.

5.2. Termination for Default.

5.2.1 Events of Default.

The following events shall constitute "*Events of Default*," and the occurrence of any one (1) or more of such Events of Default shall constitute a material breach of these Terms and Conditions and/or the applicable Statement of Work that shall afford a party, as applicable, the rights and remedies set forth in this Article:

(a) In the case of Atiba, Atiba's failure to achieve the applicable Statement of Work,

provided that such failure is not due to: (i) the occurrence of a Force Majeure Event; (ii) a delay by Customer; or (iii) Customer's failure, for any reason other than a Atiba-caused delay, to perform or provide, as applicable, any interdependent material, provided that such failure previously was identified by Atiba in writing;

(b) In the case of Atiba, Atiba's material breach of any representation set forth in these Terms and Conditions or in any Statement of Work, provided that: (i) in the case of the representations and warranties, Atiba has failed to provide to Customer an acceptable written plan to cure such breach within a reasonable time frame, following receipt of written notice of such breach; or (ii) in the case of any other representation set forth in these Terms and Conditions, if any, such breach is not cured within thirty (30) calendar days, or if the breach reasonably cannot be cured within thirty (30) calendar days, Atiba has failed to provide to Customer an acceptable written plan to cure such breach within such thirty (30) calendar day period, in each case following receipt of written notice of such breach;

(c) In the case of either party, such party's failure to perform any other material obligation under these Terms and Conditions or any Statement of Work that is not cured within thirty (30) calendar days following receipt of written notice of such failure;

(d) In the case of Atiba or Customer, the institution of bankruptcy, receivership, insolvency, reorganization or other similar proceedings by or against Atiba or Customer under any section or chapter of the United States Bankruptcy Code, as amended, or under any similar laws or statutes of the United States (or any state thereof), if such proceedings have not been dismissed or discharged within sixty (60) calendar days after they are instituted; the insolvency or making of an assignment for the benefit of creditors or the admittance by Atiba or Customer of any involuntary debts as they mature; the institution of any reorganization arrangement or other readjustment of debt plan of Atiba or Customer not involving the United States Bankruptcy Code; or

(e) In the case of Atiba or Customer, Atiba or Customer makes an assignment of all or substantially all of its assets for the benefit of creditors, or Atiba or Customer's management or board of directors takes any corporate action by in furtherance of the above action.

5.2.2. Rights and Remedies of Atiba Upon Default of Customer.

Upon the occurrence of an Event of Default by or with respect to Customer, Atiba shall be entitled to:

(a) Subject to Customer's rights as set forth below, fully or partially terminate these Terms and Conditions and/or the affected Statement of Work; and/or

(b) If the Event of Default is based on Customer's uncured material breach of Section 3, Atiba shall be entitled to terminate Customer's license rights, if any, herein; and/or

(c) Any other additional remedies that may be set forth in a Statement of Work.

5.2.3. Rights and Remedies of Customer Upon Default of Atiba.

Upon the occurrence of an Event of Default by or with respect to Atiba, Customer shall be entitled to:

(a) fully or partially terminate these Terms and Conditions and/or the affected Statement of Works; and/or

(b) obtain a refund of any pre-paid but unearned fees; and/or

(c) any other additional remedies that may be set forth in a Statement of Work.

5.3. Effect of Termination.

In the event of termination of these Terms and Conditions, any amounts owed to Atiba under these Terms and Conditions before such termination will be immediately due and payable. Sections 1, 3, 4.1, 4.2 (unless termination is for Customer's breach), 6, 7, 8.2, and 9 through 11 shall survive termination of these Terms and Conditions.

6. Personnel.

Customer agrees that during the course of these Terms and Conditions and for a period of two years thereafter, Customer will not, directly or indirectly: (a) interfere with, disrupt or attempt to disrupt the relationship, contracted or otherwise, between Atiba and any of its employees; or (b) Solicit, hire, entice or induce any person who is or at any time after the Effective Date as listed on the Services Agreement hereof an employee Atiba to be employed by Customer or by any other person, firm or corporation.

7. Confidential Information.

7.1. Protection of Confidential Information.

Each party ("Receiving Party") agrees to keep confidential and not disclose or use, except in performance of its obligations under these Terms and Conditions, information related to the other party's ("Disclosing Party") technology, finances or business that the Receiving Party learns or obtains in connection with these Terms and Conditions ("Confidential Information"). Neither party shall disclose the terms of these Terms and Conditions to any third party without the prior written consent of the other party, except as required by law or in connection with a merger or financing transaction. Disclosure of the terms of these Terms and Conditions, including, but not limited to, the Scope of Work or Services Agreement, may constitute, at the election of Atiba, a default under Section 5.2 of the Terms and Conditions. Each party shall use reasonable precautions to protect the other's Confidential Information and employ at least those precautions that such party employs to protect its own confidential or proprietary information.

7.2. Exceptions.

Confidential Information shall not include information the Receiving Party can document (a) is in or enters (through no improper action or inaction by the Receiving Party or any affiliate, agent or employee) the public domain, or (b) was rightfully in its possession or known by it prior to receipt

from the Disclosing Party, or (c) was rightfully disclosed to it by another person without restriction, or (d) was independently developed by it by persons without access to such information and without use of any Confidential Information of the Disclosing Party.

7.3. Required Disclosures.

Each party, with prior written notice to the Disclosing Party, may disclose such Confidential Information to the minimum extent it is required to be disclosed pursuant to the lawful requirement or request of a governmental entity or agency (including a court order or subpoena), provided that reasonable measures are taken to seek appropriate confidential treatment or a protective order, or to assist the other party to do so.

7.4. Covenant of Non-Disparagement; Injunctive Relief.

The parties agree that each will not make, at any time or place, any disparaging remarks, verbally or in writing, concerning any of the other party's actions or perceived omissions, regarding any matter connected with these Terms and Conditions or otherwise take any action that would disparage or cast doubt upon the business acumen or judgment of the other party. Each party understands and acknowledges that the other party's business and reputation are of special, unique, and extraordinary character, which gives them a particular value, the loss of which cannot reasonably be compensated in damages in an action at law. Accordingly, each party further agrees that in addition to any other rights or remedies that any other party may possess at law, any aggrieved party will be entitled to injunctive and other equitable relief in order to prevent or remedy a breach of the provisions of this Section by the other party.

8. Representations and Warranties.

8.1. Atiba hereby represents to Customer that the Services shall be performed in a professional and workmanlike manner consistent with industry practices.

8.2. Disclaimer.

EXCEPT AS EXPRESSLY PROVIDED IN SECTION 8.1, THE SERVICES AND WORK PRODUCT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY, AND CUSTOMER'S USE OF THE FOREGOING IS SOLELY AT CUSTOMER'S OWN RISK. Atiba does not warrant that the Services or Work Product will meet Customer's requirements or that the Services or Work Product will be error-free. To the fullest extent permissible under applicable law, Atiba disclaims all representations and warranties, express and implied, concerning or related to these Terms and Conditions, including, but not limited to, any warranties of merchantability, fitness for a particular purpose.

9. Limitations of Liability; Disclaimers.

9.1. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY LOST PROFITS, ANY FORM OF SPECIAL, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES FROM ANY CAUSES OF ACTION ARISING WITH RESPECT TO THESE TERMS AND CONDITIONS, WHETHER ARISING IN TORT (INCLUDING NEGLIGENCE), CONTRACT, STRICT LIABILITY OR OTHERWISE, WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. IN NO EVENT WILL ATIBA

BE LIABLE TO CUSTOMER IN AN AMOUNT THAT EXCEEDS THE FEES PAID FOR THE SERVICES OR WORK PRODUCT GIVING RISE TO THE CLAIM UNDER THE APPLICABLE STATEMENT OF WORK.

9.2. The limitations in section 9.1 shall not apply to any breach of confidentiality or breach of the licenses granted under these Terms and Conditions or with respect to fees owed under section 3.

9.3. Each party to these Terms and Conditions waives the right to a jury trial with respect to any claims related to or arising out of these Terms and Conditions.

10. Force Majeure.

Atiba shall not be liable to Customer or any other person for any delay or failure in the performance of these Terms and Conditions or for loss or damage of any nature whatsoever suffered by such party due to disruption or unavailability of communication facilities, utility or Internet service provider failure, acts of war, acts of vandalism, lightning, fire, strike, natural disaster or any other causes beyond Atiba's reasonable control.

11. Other Important Terms.

11.1. Entire Agreement.

These Terms and Conditions, together with the Services Agreement and any Exhibits thereto and any Statements of Work executed in accordance therewith, constitutes the entire agreement of the parties, and supersedes any and all previous agreements with respect to the subject matter hereof, whether oral or written. Customer agrees that it shall not rely upon matters discussed in contemplation of the engagement of Atiba to provide the expected work. It is the responsibility of the Customer to confirm that the Services Agreement and any Exhibits thereto and any Statements of Work fairly and accurately reflects the services expected to be performed by Atiba for the Customer's benefit. The execution of the Services Agreement signifies the Customer's acknowledgement that the Scope of Work and all Terms and Conditions are to their liking and that they expect the same to be fully enforced.

11.2. Severability; Waiver.

The invalidity or unenforceability of any provision of these Terms and Conditions shall not affect any other provision of these Terms and Conditions, and the remaining provisions shall continue with the same effect as if such unenforceable or invalid provision had not been included in these Terms and Conditions. Except as otherwise expressly provided herein, any provision of these Terms and Conditions may be amended and the observance of any provision of these Terms and Conditions may be waived (either generally or any particular instance and either retroactively or prospectively) only with the written consent of the party against whom such modification or waiver will be enforced.

11.3. Binding Nature; Assignment.

These Terms and Conditions shall be binding and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns. These Terms and Conditions may not be assigned

by Customer without Atiba's prior written consent, such consent not to be unreasonably withheld. Atiba may assign, delegate and/or subcontract any or all of its rights or obligations hereunder.

11.4. Notices.

All notices and consents required or permitted to be given under these Terms and Conditions shall be in writing to the parties at the addresses designated herein or to such other address as either party may designate to the other by written notice, and shall be effective upon receipt. Written notice shall be made by personal delivery or sent by nationally recognized overnight commercial courier service to the other party.

11.5. Governing Law.

These Terms and Conditions shall be governed by and construed under the laws of the State of Tennessee and the United States without regard to conflicts of laws provisions thereof. Unless waived by Atiba in writing for the particular instance, the exclusive venue for actions related to the subject matter hereof shall be in the Tennessee state and federal courts having within their jurisdiction the location of Atiba's principal place of business, and both parties consent to the jurisdiction of such courts. In any action or proceeding to enforce rights under these Terms and Conditions, the prevailing party shall be entitled to recover costs and attorney's fees.

11.6. Counterparts.

These Terms and Conditions may be executed in two counterparts, each of which shall be deemed to be an original, and both of which together shall constitute one contract.

11.7. Dispute Resolution.

Dispute Resolution. It is the objective of the parties to establish procedures to facilitate the informal and inexpensive resolution of any and all disputes by mutual cooperation and without resort to litigation. To accomplish this objective, the parties agree to follow the procedures set forth below if a dispute arises:

- a) If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by and through mediation. The parties agree that they are not permitted to submit the dispute to arbitration or to file a civil action without completing mediation. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator
- b) Within 14 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association. The arbitrators will be selected from a panel of persons having experience with and knowledge of

electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.

- c) The place of arbitration shall be Nashville, Tennessee.
- d) This agreement shall be governed by and interpreted in accordance with the laws of the State of Tennessee.
- e) Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).
- f) The arbitrators will have no authority to award punitive, consequential or other damages not measured by the prevailing party's actual damages. The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.
- g) Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.
- h) The requirements of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation or arbitration process, as the case may be.