

**EVERGAGE, INC. (“EVERGAGE” OR “WE”) IS WILLING TO PROVIDE CERTAIN SERVICES TO YOU AS THE INDIVIDUAL, THE COMPANY, OR THE LEGAL ENTITY (REFERENCED BELOW AS “YOU” OR “YOUR” OR “CUSTOMER”) THAT ENTERS INTO A WRITTEN ORDER FORM, STATEMENT OF WORK OR SIMILAR DOCUMENT WITH EVERGAGE THAT REFERENCES THIS AGREEMENT ONLY ON THE CONDITION THAT YOU ACCEPT ALL OF THE TERMS OF THIS AGREEMENT (“AGREEMENT”). READ THE TERMS AND CONDITIONS OF THIS AGREEMENT CAREFULLY BEFORE PURCHASING ANY SERVICES FROM EVERGAGE. THIS IS A LEGAL AND ENFORCEABLE CONTRACT BETWEEN YOU AND EVERGAGE. BY ENTERING INTO A WRITTEN ORDER FORM, STATEMENT OF WORK OR SIMILAR DOCUMENT WITH EVERGAGE THAT REFERENCES THE AGREEMENT BELOW, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT.**

FOR THE SAKE OF CLARITY, IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF (AND FOR USE ON BEHALF OF) A COMPANY OR OTHER ENTITY (A "CORPORATE ENTITY"), YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH CORPORATE ENTITY TO THE TERMS OF THIS AGREEMENT AND YOU ACKNOWLEDGE THAT THE TERM "YOU" OR "CUSTOMER" REFERENCED BELOW REFERS TO SUCH CORPORATE ENTITY.

## **MASTER SERVICES AGREEMENT**

Evergage and Customer shall herein be referred to each as a “Party” and collectively as the “Parties”. In consideration of the mutual promises and covenants contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### **1. DEFINITIONS**

1.1 Acceptable Use Policy means the Subscription Service’s then current acceptable use policy a copy of which may be found at <http://aws.amazon.com/aup/>.

1.2 Affiliates means any corporation, partnership or other entity now existing or hereafter organized that directly or indirectly controls, is controlled by or under common control with a Party. For purposes of this definition “control” means the direct possession of a majority of the outstanding voting securities of an entity.

1.3 Confidential Information has the meaning given to it in Section 4.1.

1.4 Customer means the person or entity that enters into an Order Form, SOW or similar ordering document with Evergage that expressly references this Agreement.

1.5 Customer Data means all Data made available by the Customer or its Users to Evergage or otherwise provided by Customer or its Users in connection with the provision of the Services.

1.6 Data means text, images, documents, materials, photos, audio, video, clicks, behavioral signals, form entries, and all other forms of data or communication.

1.7 Documentation means the documentation for the Subscription Service generally supplied by Evergage to assist its customers in the use of the Subscription Service, including user and system administrator guides and manuals and other written materials. Documentation can be found at <https://support.evergage.com>.

1.8 Effective Date is the date that the first Order Form or SOW is entered into between the Parties referencing this Agreement.

1.9 Evergage Data means all Data made available by Evergage to Customer in connection with the Customer's use of the Services.

1.10 Feedback means any Customer provided feedback and reports about any errors, problems, or defects in, or suggestions for changes and improvement to the Subscription Service.

1.11 Implementation Services means the configuration and implementation of the Subscription Service and training services set forth and described on an Order Form.

1.12 Inorganic Growth means any increase in Customer's monthly unique visitors as a result of any asset acquisition, stock purchase transaction, merger or other corporate transaction of or by Customer.

1.13 Losses has the meaning given to it in Section 9.1.

1.14 Order Form means each Evergage ordering document signed by duly authorized representatives of both Parties which references this Agreement, identifies the specific Subscription Service and any Implementation Services ordered by Customer from Evergage, sets forth the prices for the Subscription Service and Implementation Services and contains other applicable terms and conditions.

1.15 Professional Services means consulting and/or custom services to be provided by Evergage. All Professional Services will be set forth and described in an SOW.

1.16 Reports means the reports, charts, graphs and other presentation in which the Results are presented to Customer.

1.17 Report Formats means the formatting and look and feel of the Reports.

1.18 Results means the results generated by the Subscription Service that are delivered to Customer by Evergage through the Subscription Service, and which are based on and specific to the Customer Data.

1.19 Services means the Subscription Service, Implementation Services and any Professional Services provided by Evergage pursuant to Section 2.1 hereof.

1.20 SOW means a Statement of Work referencing this Agreement and entered into by both Parties from time to time that describes the Professional Services to be provided by Evergage, sets forth the prices for the Professional Services and contains certain other related terms as agreed between the Parties.

1.21 Subscription Service means Evergage's proprietary subscription-based integrated real-time personalization platform software solution set forth and described on the applicable Order Form.

1.22 Users mean individuals who are authorized by the Customer to use the Services, and, with respect to the Subscription Service, who have been supplied passwords by the Customer (or by Evergage at the Customer's request). Users consist of any employee of the Customer or its Affiliates and any independent contractor of the Customer or its Affiliates.

1.23 Work Product means any deliverables, content, reports, analyses or documentation developed by Evergage on behalf of Customer and delivered to the Customer in the performance of any Professional Services.

## 2. SERVICES

2.1 Services. Evergage shall provide the Customer with the specific Services specified on an Order Form or SOW, as the case may be. Any conflict between the terms and conditions set forth in this Agreement and any Order Form or SOW shall be resolved in favor of this Agreement. The Customer agrees that purchases hereunder are neither contingent on the delivery of any future functionality or features nor dependent on any oral or written comments made by Evergage regarding future functionality or features.

2.2 License Grant. Subject to the terms and conditions of this Agreement, and in consideration for the payment of fees set forth on the applicable Order Form, Evergage hereby grants to the Customer, solely during the term of the applicable Order Form, a non-exclusive, non-transferable (except as set forth in Section 11.2) license to access and use the Subscription Service solely for the Customer's internal business purposes. This license is restricted to use by Customer and its Users and does not include the right to use the Subscription Service on behalf of any third party. The Customer is responsible for procuring and maintaining the network connections that connect the Customer to the Subscription Service. The Customer agrees: (a) that only authorized Users are permitted to use the Subscription Service; (b) that it is responsible for authorized Users' actions or failures to act in connection with activities contemplated under this Agreement and (c) to otherwise take all commercially reasonable steps to protect the Subscription Service and the Documentation from unauthorized use and/or access.

2.3 Licensed Volume. The Customer acknowledges that access and use of the Subscription Service is licensed to the Customer for use up to the number of domains, monthly unique visitors or other metric purchased by the Customer and set forth on the applicable Order Form. In the event that Customer desires to use the Subscription Service with any additional domains (urls) then Customer shall execute an amendment to its Order Form or enter into a new Order Form with Evergage and shall pay Evergage any applicable additional fees set forth on the Order Form. On the other hand, if Customer exceeds the number of purchased monthly unique visitors then Customer shall not be required to purchase any additional monthly unique visitor licenses (i.e. will not be required to

upgrade to a higher monthly unique visitor tier) unless such increase was a result of any Inorganic Growth. Notwithstanding the foregoing, upon any renewal of an Order Form, Customer will then be required to upgrade to the applicable monthly unique visitor tier based upon Customer's average monthly unique visitors during the last six (6) months immediately preceding the expiration of the prior term Order Form. Customer also acknowledges and agrees that in the event that the number of monthly unique visitors is exceeded as a result of any Inorganic Growth then Customer will be required to immediately upgrade to the applicable monthly unique visitor tier and pay Evergage the additional fees based on such higher tier's rates.

2.4 Changes to Order Form/SOW. Either Party may request a change to an Order Form/SOW, and for such purpose shall submit to the other Party a written notice ("Change Request") setting forth the requested change and the reason for such request. Within five (5) business days (or such other period of time as agreed by the Parties) after the receipt of such Change Request, the Parties shall discuss the necessity, desirability and/or acceptability of the Change Request. When and if both Parties have agreed in writing upon the changes, and any resulting change in the estimated (or fixed) fees for the Services, the Parties shall complete and execute a new or revised Order Form or SOW. In the event that the Customer elects to upgrade to a new version of the Subscription Service or elects to license additional functionality and features offered by Evergage, the Parties will enter into a new or amended Order Form specifying such new version and/or such additional functionality and the additional fees to be paid by the Customer.

2.5 Affiliates. Subject to the terms of the Order Form, the Customer may make the Subscription Service available to its Affiliates provided that all licensing restrictions are complied with in each instance by each such Affiliate and that the Customer shall be liable for any breach of the terms and conditions of this Agreement by any of its Affiliates. Any license restrictions set forth on an Order Form shall be deemed to apply to both the Customer and its Affiliates. Customer's Affiliates may also directly acquire Services subject to the terms and conditions of this Agreement by executing one or more Order Forms hereunder directly with Evergage. Each Order Form executed by an Affiliate hereunder shall incorporate the terms of this Agreement by reference and be deemed to be a two party agreement between Evergage and such Affiliate. Each Affiliate executing an Order Form shall be solely responsible for its obligations pursuant to such Order Form as well as for the obligations to be performed pursuant to this Agreement and the liabilities arising out of this Agreement as if it was the named Customer hereunder. Customer shall

have no obligations or liabilities as to such Order Form and Evergage shall look solely to the Affiliate executing such Order Form.

### **3. FEES; PAYMENT TERMS**

3.1 Fees. The Customer agrees to pay Evergage for Services provided and expenses incurred on the basis and at the rates specified in each Order Form or SOW. Unless otherwise set forth on the Order Form or SOW, payment shall be due within thirty (30) days after receipt of Evergage's invoice and shall be made in US Dollars. Customer agrees to pay a late charge of one percent (1%) per month (or part of a month), or the maximum lawful rate permitted by applicable law, whichever is less, for all amounts, not subject to a good faith dispute, and not paid when due. In addition to paying the applicable fees, Customer shall also pay all reasonable travel and out-of-pocket expenses incurred by Evergage in connection with any Services rendered provided the same were pre-approved by Customer in advance in writing.

3.2 Disputed Charges. If the Customer disputes any charge or amount on any invoice and such dispute cannot be resolved promptly through good faith discussions between the Parties, the Customer shall pay the amounts due under this Agreement less the disputed amount, and the Parties shall proceed in good faith to promptly resolve such disputed amount. An amount will be considered disputed in good faith if (i) the Customer delivers a written statement to Evergage on or before the due date of the invoice, describing in detail the basis of the dispute and the amount being withheld by the Customer, (ii) such written statement represents that the amount in dispute has been determined after due investigation of the facts and that such disputed amount has been determined in good faith, and (iii) all other amounts due from the Customer that are not in dispute have been paid as and when required under this Agreement.

3.3 Taxes. Fees are exclusive of taxes. The Customer shall be responsible for the payment of all sales, use and similar taxes arising from or relating to the Services rendered hereunder, except for taxes related to the net income of Evergage and any taxes or obligations imposed upon Evergage under federal, state and local wage laws.

### **4. CONFIDENTIALITY**

4.1 Confidential Information. During the term of this Agreement, each Party will regard any information provided to it by the other Party and designated in writing as proprietary

or confidential to be confidential (“Confidential Information”). Confidential Information shall also include information which, to a reasonable person familiar with the disclosing Party’s business and the industry in which it operates, is of a confidential or proprietary nature. The receiving Party shall hold in confidence, and shall not disclose (or permit or suffer its personnel to disclose) any Confidential Information to any person or entity except to a director, officer, employee, outside consultant, or advisor (collectively “Representatives”) who have a need to know such Confidential Information in the course of the performance of their duties for the receiving Party and who are bound by a duty of confidentiality no less protective of the disclosing Party’s Confidential Information than this Agreement. The receiving Party and its Representatives shall use such Confidential Information only for the purpose for which it was disclosed and shall not use or exploit such Confidential Information for its own benefit or the benefit of another without the prior written consent of the disclosing Party. Each Party accepts responsibility for the actions of its Representatives and shall protect the other Party’s Confidential Information in the same manner as it protects its own valuable confidential information, but in no event shall less than reasonable care be used. The Parties expressly agree that the terms and pricing of this Agreement are Confidential Information and the Customer further agrees that it shall not use the Services for the purposes of conducting comparative analysis, evaluations or product benchmarks with respect to the Services and will not publicly post any analysis or reviews of the Services without Evergage’s prior written approval. A receiving Party shall promptly notify the disclosing Party upon becoming aware of a breach or threatened breach hereunder, and shall cooperate with any reasonable request of the disclosing Party in enforcing its rights.

4.2 Exclusions. Information will not be deemed Confidential Information hereunder if such information: (i) is known prior to receipt from the disclosing Party, without any obligation of confidentiality; (ii) becomes known to the receiving Party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing Party; (iii) becomes publicly known or otherwise publicly available, except through a breach of this Agreement; or (iv) is independently developed by the receiving Party without use of the disclosing Party’s Confidential Information. The receiving Party may disclose Confidential Information pursuant to the requirements of applicable law, legal process or government regulation, provided that it gives the disclosing Party reasonable prior written notice to permit the disclosing Party to contest such disclosure, and such disclosure is otherwise limited to the required disclosure.

4.3 Injunctive Relief. Notwithstanding any other provision of this Agreement, both Parties acknowledge that any use of the disclosing Party's Confidential Information in a manner inconsistent with the provisions of this Agreement may cause the disclosing Party irreparable and immediate damage for which remedies other than injunctive relief may be inadequate. Therefore, both Parties agree that, in addition to any other remedy to which the disclosing Party may be entitled hereunder, at law or equity, the disclosing Party shall be entitled to an injunction or injunctions (without the posting of any bond and without proof of actual damages) to restrain such use in addition to other appropriate remedies available under applicable law.

## 5. WARRANTIES

5.1 General. Each party represents and warrants that it (i) has the legal power to enter into and perform under this Agreement; and (ii) it will comply with all laws and regulations in connection with its performance hereunder. Evergage has implemented and will maintain during the Term security measures reasonably designed to protect the confidentiality, security and availability of the Customer Data.

5.2 Subscription Service Warranty. Evergage warrants that during the term of any Order Form for the Subscription Service, the Subscription Service will conform, in all material respects, with the Documentation. Evergage does not warrant that it will be able to correct all reported defects or that use of the Subscription Service will be uninterrupted or error free. Evergage makes no warranty regarding features or services provided by third parties. For any breach of the above warranty, Evergage will, at no additional cost to Customer, provide remedial services necessary to enable the Subscription Service to conform to the warranty. The Customer will provide Evergage with a reasonable opportunity to remedy any breach and reasonable assistance in remedying any defects. Such warranty shall only apply if the Subscription Service has been utilized by the Customer in accordance with the Order Form and this Agreement.

5.3 Professional Services Warranty. Evergage warrants that any Professional Services provided hereunder shall be provided in a competent manner and in accordance with any specifications set forth in the SOW in all material respects. Evergage further warrants that any Work Product provided pursuant to any Professional Services engagement shall comply, in all material respects, with the specifications set forth in the applicable SOW. If the Services are not performed as warranted or the Work Product does not so comply,



then, upon the Customer's written request, Evergage shall promptly re-perform, or cause to be re-performed, such Professional Services, at no additional charge to the Customer. Such warranties and other obligations shall survive for thirty (30) days following the completion of the Professional Services or the delivery of each applicable portion of the Work Product, as the case may be.

**5.4 No Other Warranty.** EVERGAGE DOES NOT REPRESENT THAT THE SERVICES WILL BE ERROR-FREE OR THAT THE SERVICES WILL MEET CUSTOMER'S REQUIREMENTS OR THAT ALL ERRORS IN THE SERVICES WILL BE CORRECTED OR THAT THE OVERALL SYSTEM THAT MAKES THE SUBSCRIPTION SERVICE AVAILABLE (INCLUDING BUT NOT LIMITED TO THE INTERNET, OTHER TRANSMISSION NETWORKS, AND CUSTOMER'S LOCAL NETWORK AND EQUIPMENT) WILL BE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. THE WARRANTIES STATED IN SECTION 5 ABOVE ARE THE SOLE AND EXCLUSIVE WARRANTIES OFFERED BY EVERGAGE. THERE ARE NO OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THOSE OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS. CUSTOMER ASSUMES ALL RESPONSIBILITY FOR DETERMINING WHETHER THE SERVICES ARE ACCURATE OR SUFFICIENT FOR CUSTOMER'S PURPOSES.

## **6. LIMITATION OF LIABILITY**

**6.1 Consequential Damage Exclusion.** Neither Party will be liable to the other or any third party for loss of profits or for any special, indirect, incidental, consequential or exemplary damages (including without limitation, damages for loss of business profits, loss of goodwill, business interruption, loss of business information and/or data) in connection with the performance of the Services, or the performance of any other obligations under this Agreement, even if it is aware of the possibility of the occurrence of such damages.

**6.2 Limitation of Liability.** The total cumulative liability of Evergage to Customer for any and all claims and damages under this Agreement, whether arising by statute, contract, tort or otherwise, will not exceed the Services fees paid by Customer to Evergage under the Order Form for the Services which form the subject of the claim during the six (6) month period immediately preceding the event giving rise to the claim. The provisions of this

Agreement allocate risks between the Parties. The pricing set forth in each Order Form reflects this allocation of risk and the limitation of liability specified herein.

## **7. TERM**

7.1 Term. This Agreement will commence on the Effective Date and will continue in effect until otherwise terminated in accordance with Section 7.2 below. The term of each Order Form for the Subscription Service shall be set forth on the Order Form. Unless otherwise expressly provided in the applicable Order Form, each Order Form shall automatically renew for additional terms of one (1) year each unless either Party notifies the other Party in writing at least thirty (30) days prior to the then current expiration date that it has elected not to renew such Order Form. Evergage reserves the right to change the rates, applicable charges, and usage policies and to introduce new charges, for such Order Form upon providing the Customer with written notice thereof (which notice may be provided by e-mail) at least sixty (60) days prior to the then current renewal date of the Order Form.

7.2 Termination. Notwithstanding the foregoing, either Party may terminate this Agreement or any Order Form or SOW (i) immediately in the event of a material breach of this Agreement or any such Order Form or SOW by the other Party that is not cured within thirty (30) days of written notice from the other Party, or (ii) immediately if the other Party ceases doing business or is the subject of a voluntary or involuntary bankruptcy, insolvency or similar proceeding, that is not dismissed within sixty (60) days of filing. Termination of an Order Form or SOW shall not be deemed a termination of this Agreement. Termination of this Agreement shall, however, terminate all outstanding Order Forms and SOWs. Either Party may also terminate this Agreement upon no less than thirty (30) days' prior written notice to the other Party for any reason, if at such time there are no outstanding Order Forms or SOWs then currently in effect. All rights and obligations of the Parties which by their nature are reasonably intended to survive such termination or expiration will survive termination or expiration of this Agreement and each Order Form and SOW.

7.3 Effect of Termination. Upon any termination or expiration of this Agreement or any applicable Order Form or SOW, Evergage shall no longer provide the applicable Services to the Customer and the Customer shall promptly cease and cause its Users to promptly cease using the Services. The Customer shall pay Evergage for all fees that had accrued

prior to the termination date. Evergage also reserves the right to suspend Customer's access to the Subscription Service at any time, without having to terminate this Agreement or an Order Form, if Customer is more than thirty (30) days late with respect to any undisputed payments due hereunder or is otherwise in violation of the Acceptable Use Policy. Except as expressly provided herein, termination of this Agreement by either party will be a nonexclusive remedy for breach and will be without prejudice to any other right or remedy of such party. Upon termination of this Agreement, each party shall promptly return or destroy all Confidential Information of the other party in its possession. Within thirty (30) days following termination, the Customer may retrieve the Customer Data in accordance with established and reasonable system access procedures. After such period, Evergage will have no further obligation to store and/or make available the Customer Data and may delete the same.

## **8. OWNERSHIP; USE OF DATA; OBLIGATIONS**

8.1 Subscription Service. The Customer acknowledges and agrees that as between Evergage and the Customer, all right, title and interest in and to the Subscription Service (excluding any Customer Data) and including all modifications and configurations, all Evergage Data and all of Evergage's proprietary technology, including, without limitation, all software, products, processes, algorithms, user interfaces, know-how, techniques, designs and other tangible or intangible technical material or information made available to the Customer by Evergage in providing the Subscription Service and all derivatives thereof are and shall remain Evergage's or its licensors'. The Evergage name, all Evergage logos, and the product names associated with the Subscription Service are trademarks of Evergage or third parties, and no right or license is granted to use them. During the term of this Agreement, Evergage grants to the Customer a limited, worldwide, non-exclusive, non-transferable (except as set forth in Section 11.2), royalty-free right to use, display, transmit, and distribute the Evergage Data solely in connection with the Customer's permitted use of the Subscription Service. Evergage shall have the right to collect, use and distribute aggregated information, analysis, statistics and other data generated by the Subscription Service (or derived from the Customer's use of the Subscription Service) provided, however, that Evergage shall not disclose any such data unless such data is in an anonymized, aggregated form that would not permit a third party to identify the data as associated with the Customer or any of its Users. Notwithstanding any terms to the contrary in this Agreement, in the event Customer provides Evergage with Feedback, Customer hereby grants to Evergage an irrevocable, fully-paid up, non-exclusive, royalty-

free, perpetual and worldwide license to use, reproduce, distribute, create derivative works of, publicly perform, and publicly display such Feedback in any medium or format, whether now known or later developed.

**8.2 Customer Data.** The Customer retains ownership of all right, title and interest in and to all Customer Data. During the term of this Agreement, the Customer hereby grants to Evergage a limited, worldwide, non-exclusive, non-transferable (except as set forth in Section 11.2), royalty-free right to use, display, transmit, and distribute the Customer Data solely as necessary to provide the Subscription Service to the Customer. Customer shall own all right, title and interest (including all intellectual property and other proprietary rights) in and to the Results. Client acknowledges and agrees that the Results will be presented to it in a Report, the Report Format of which is proprietary to Evergage. Client may make copies of the Reports only for its internal purposes in using the Results. Notwithstanding the foregoing, Evergage will continue to own all Evergage Pre-Existing IP. To the extent that Evergage incorporates any Evergage Pre-Existing IP into any of the Results, Evergage hereby grants to the Customer a perpetual, irrevocable, royalty-free, non-exclusive, license to use such Evergage Materials solely as necessary for and specifically in conjunction with the Customer's use of the Results. "Evergage Pre-Existing IP" means all information, methodologies, data, ideas, concepts, materials, templates, know-how, techniques, documentation, software and development tools that Evergage possesses prior to the commencement of the Services or which it develops independently of any activities governed by this Agreement, and any derivatives, modifications or enhancements made to any such property while performing the Services.

**8.3 Customer Obligations.** The Customer is responsible for all activities conducted under its User logins and for its Users' compliance with this Agreement and the Acceptable Use Policy. Unauthorized use, resale or commercial exploitation of the Subscription Service in any way is expressly prohibited. Without Evergage's express prior written consent in each instance, the Customer shall not (and shall not allow any third party to): reverse engineer, decompile, disassemble, or otherwise attempt to derive the source code form or structure of the Subscription Service or access the Subscription Service in order to build a competitive product or service or copy any ideas, features, functions or graphics of the Subscription Service. Except as expressly permitted in this Agreement, the Customer shall not copy, license, sell, transfer, make available, lease, time-share, distribute, or assign this license, the Subscription Service to any third-party. The Customer is solely responsible for all Customer Data. Evergage does not guarantee the accuracy, integrity or quality of such

Customer Data. Neither the Customer nor its Users shall use the Subscription Service to: (a) send, upload or otherwise transmit any Customer Data that is unlawful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable; (b) upload or otherwise transmit, display or distribute any Customer Data that infringes any trademark, trade secret, copyright or other proprietary or intellectual property rights of any person; (c) upload or otherwise transmit any material that contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer software or hardware or telecommunications equipment; (d) interfere with or disrupt the Subscription Service or networks connected to the Subscription Service; or (e) violate any applicable law or regulation.

8.4 Work Product. Unless otherwise expressly set forth on an SOW, Customer will have a non-exclusive, non-transferable (except as set forth in Section 11.2) license to use any Work Product developed by Evergage in the performance of the Professional Services hereunder and delivered to Customer, upon Customer's payment in full of all amounts due hereunder and solely in connection with Customer's permitted use of the Subscription Service. Evergage retains ownership of all information, software and other property owned by it prior to the commencement of any Professional Services or which it develops independently of this Agreement and all Work Product compiled or developed by Evergage in the performance of any Professional Services.

## 9. INDEMNIFICATION

9.1 Evergage Indemnification. Subject to Section 9.3 below, Evergage will indemnify, defend and hold the Customer and its Affiliates harmless from and against any and all costs, liabilities, losses, and expenses (including, but not limited to, reasonable attorneys' fees) (collectively, "Losses") incurred arising out of or in connection with a claim, suit, action, or proceeding brought by any third party against the Customer or any of its Affiliates alleging that the use of the Services or Work Product as permitted hereunder infringes any United States patent, copyright or trademark, or constitutes a misappropriation of a trade secret of a third party. Excluded from the above indemnification obligations are claims to the extent arising from (a) use of the Services or Work Product in violation of this Agreement or applicable law, (b) use of the Services or Work Product after Evergage notifies the Customer to discontinue use because of an infringement claim, (c) any claim relating to any third party products or services or

Customer Data, (d) modifications to the Services or Work Product made other than by Evergage (where the claim would not have arisen but for such modification), (e) the combination, operation, or use of the Work Product with software or equipment which was not provided by Evergage, to the extent that the Customer's liability for such claim would have been avoided in the absence of such combination, operation, or use; or (f) compliance by Evergage with the Customer's custom requirements or specifications if and to the extent such compliance with the Customer's custom requirements or specifications resulted in the infringement. If the Services or Work Product are held to infringe, Evergage will, at its own expense, in its sole discretion use commercially reasonable efforts either (a) to procure a license that will protect the Customer against such claim without cost to the Customer; (b) to replace the Services or Work Product with non-infringing Services or Work Product; or (c) if (a) and (b) are not commercially feasible, terminate the Agreement or the applicable Order Form or SOW and refund to the Customer any prepaid unused fees paid to Evergage for the infringing Services or Work Product. The rights and remedies granted the Customer under this Section 9.1 state Evergage's entire liability, and the Customer's exclusive remedy, with respect to any claim of infringement of the intellectual property rights of a third party, whether arising under statutory or common law or otherwise.

**9.2 Customer Indemnification.** Subject to Section 9.3 below, the Customer shall indemnify, defend, and hold Evergage and its Affiliates harmless from and against any and all Losses resulting from a claim, suit, action, or proceeding brought by any third party against Evergage or any of its Affiliates that arises out of or results from a claim (i) alleging that the Customer Data, or any use thereof, infringes the intellectual property rights or proprietary rights of others, or has caused harm to a third party, or (ii) arising out of the Customer's breach of Sections 8.3 above or violation of any applicable law or regulations or the Acceptable Use Policy.

**9.3 Indemnification Procedure.** The indemnified Party shall (i) promptly notify the indemnifying Party in writing of any claim, suit or proceeding for which indemnity is claimed, provided that failure to so notify will not remove the indemnifying Party's obligation except to the extent it is prejudiced thereby, and (ii) allow the indemnifying Party to solely control the defense of any claim, suit or proceeding and all negotiations for settlement; provided that the indemnifying Party shall not settle any claim without the indemnified Party's prior written consent (such consent not to be unreasonably withheld or

delayed). The indemnified Party shall also provide the indemnifying Party with reasonable cooperation and assistance in defending such claim (at the indemnifying Party's cost).

## **10. INSURANCE**

Evergage shall maintain in full force and effect during the term of any Order Form and SOW the following insurance: (a) Workers' compensation and employers' liability insurance with limits to conform with amounts required by applicable law; (b) Commercial general liability insurance with limits not less than one million dollars (\$1,000,000) combined single limit for bodily injury, death, and property damage, including personal injury, contractual liability, independent contractors, broad-form property damage, and products and completed operations coverage; and (c) Professional liability insurance (Errors and Omissions) with limits not less than one million dollars (\$1,000,000) annual aggregate for all claims each policy year. As evidence of insurance coverage, Evergage shall deliver if requested certificates of insurance issued by Evergage' insurance carrier showing such policies in force during the term of this Agreement. Evergage shall give thirty (30) days' prior written notice to Customer of cancellation, non-renewal, or material change in coverage, scope, or amount of any policy.

## **11. GENERAL**

11.1 Entire Agreement. This Agreement, including all Order Forms and SOWs, contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all prior or contemporaneous proposals, understandings, representations, warranties, covenants, and any other communications (whether written or oral) between the Parties relating thereto and is binding upon the Parties and their permitted successors and assigns. Only a written instrument that refers to this Agreement or the applicable Order Form or SOW and that are duly signed by the authorized representatives of both Parties may amend this Agreement or such Order Form or SOW. Any inconsistent or conflicting terms and conditions contained in any purchase order issued by the Customer shall be of no force or effect, even if the order is accepted by Evergage. This Agreement shall be construed and interpreted fairly, in accordance with the plain meaning of its terms, and there shall be no presumption or inference against the Party drafting this Agreement in construing or interpreting the provisions hereof.

11.2 Assignment. This Agreement shall be binding upon and for the benefit of Evergage, the Customer and their permitted successors and assigns. Either Party may assign this

Agreement and all Order Forms and SOWs as part of a corporate reorganization, consolidation, merger, or sale of all or substantially all of its assets. Except as expressly stated in this Agreement, neither Party may otherwise assign its rights or delegate its duties under this Agreement either in whole or in part without the prior written consent of the other Party, and any attempted assignment or delegation without such consent will be void. Evergage may use independent contractors or subcontractors to assist in the delivery of Services; provided, however, that Evergage shall remain liable for the actions or omissions of such independent contractors or subcontractors and for the payment of their compensation.

11.3 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, USA without regard to its conflict of law provisions.

11.4 Disputes. Any disputes between the Parties arising out of this Agreement shall be resolved as follows: Members of the senior management of both Parties shall meet to attempt to resolve such disputes. If a dispute cannot be resolved within fifteen (15) days, either Party may make a written demand for mediation. Within fifteen (15) days after such written notification, the Parties shall meet for one day with an impartial mediator. The costs and expenses of the mediator shall be shared equally by the Parties. If the dispute is not resolved by mediation, the dispute shall be settled by binding arbitration conducted in accordance with the JAMS procedures pursuant to its Streamlined Arbitration Rules and Procedure, by a single arbitrator, in Boston, Massachusetts. The arbitrator shall be selected as provided in the Streamlined Arbitration Rules and Procedure. Unless provided otherwise herein, the arbitrator may not award non-monetary or equitable relief of any sort. The arbitrator shall have no power to award damages inconsistent with this Agreement. No discovery shall be permitted in connection with the arbitration unless it is expressly authorized by the arbitrator upon a showing of substantial need by the Party seeking discovery. All aspects of the arbitration shall be treated as confidential. Neither the Parties nor the arbitrator may disclose the existence, content or results of the arbitration, except as necessary to comply with legal or regulatory requirements. Before making any such disclosure, a Party shall give written notice to all other Parties and shall afford such Parties a reasonable opportunity to protect their interests. The result of the arbitration shall bind the Parties, and judgment on the arbitrator's award may be entered in any court having jurisdiction. Each Party shall bear its own costs of the arbitration. The fees and expenses of the arbitrator shall be shared equally by the Parties. The parties agree that a



party need not invoke the procedures set forth in this Section 10.4 in order to seek injunctive relief pursuant to Section 4.3.

11.5 Headings. The headings to the sections of this Agreement are for ease of reference only and shall not affect the interpretation or construction of this Agreement.

11.6 Relationship of the Parties. Evergage and the Customer are independent contractors, and nothing in this Agreement shall be construed as making them partners or creating the relationships of employer and employee, master and servant, or principal and agent between them, for any purpose whatsoever. Neither Party shall make any contracts, warranties or representations or assume or create any obligations, express or implied, in the other Party's name or on its behalf.

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

11.8 Notices. Any notice, approval, request, authorization, direction or other communication under this Agreement shall be given in writing and shall be deemed to have been delivered and given for all purposes (i) on the delivery date if delivered personally to the Party to whom the same is directed; (ii) one (1) business day after deposit with a nationally recognized overnight carrier, with written verification of receipt, or (iii) five (5) business days after the mailing date whether or not actually received, if sent by U.S. certified mail, return receipt requested, postage and charges pre-paid or any other means of rapid mail delivery for which a receipt is available, to the address of the Party set forth on the applicable Order Form. Either Party may change its address by giving written notice of such change to the other Party.

11.9 Modifications to Subscription Service. Evergage may make modifications to the Subscription Service or particular components of the Subscription Service from time to time provided that such modifications do not materially degrade any functionality or features of the Subscription Service.

11.10 Publicity. The Customer hereby grants Evergage a non-exclusive license solely during the term of this Agreement to list Customer's name and display the Customer's

logo in the customer section of Evergage's website and to use Customer's name and logo in Evergage's customer lists but only to the extent that other customers of Evergage are also listed on such list. Any other use by Evergage of the Customer's name, logo or trademark requires the Customer's prior written consent.

11.11 No Third Party Beneficiaries. Nothing contained in this Agreement is intended or shall be construed to confer upon any person any rights, benefits or remedies of any kind or character whatsoever, or to create any obligation of a Party to any such person.

11.12 Waiver and Severability. Performance of any obligation required by a Party hereunder may be waived only by a written waiver signed by an authorized representative of the other Party, which waiver shall be effective only with respect to the specific obligation described therein. The failure of either Party to exercise any of its rights under this Agreement will not be deemed a waiver or forfeiture of such rights. The invalidity or unenforceability of one or more provisions of this Agreement will not affect the validity or enforceability of any of the other provisions hereof, and this Agreement will be construed in all respects as if such invalid or unenforceable provision(s) were omitted.