

TERMS AND CONDITIONS

1. SAAS SERVICES AND SUPPORT

- 1.1. Service Level. Subject to the terms of this Agreement, Coolgradient will use commercially reasonable efforts to provide Customer the Services in accordance with the Service Level Terms attached hereto as Exhibit A.
- 1.2. Support. Subject to the terms hereof, Coolgradient will provide Customer with reasonable technical support services in accordance with the terms set forth in Exhibit B.

2. RESTRICTIONS AND RESPONSIBILITIES

- 2.1. Use Restrictions. Customer will not, directly or indirectly: reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas, know-how or algorithms relevant to the Services or any software, documentation or data related to the Services (“**Software**”); modify, translate, or create derivative works based on the Services or any Software (except to the extent expressly permitted by Coolgradient or authorized within the Services); use the Services or any Software for timesharing or service bureau purposes or otherwise for the benefit of a third; or remove any proprietary notices or labels.
- 2.2. Policy. Customer represents, covenants, and warrants that Customer will use the Services only in compliance with Coolgradient’s standard published policies then in effect (the “**Policy**”) and all applicable laws and regulations. Customer hereby agrees to indemnify and hold harmless Coolgradient against any damages, losses, liabilities, settlements and expenses (including without limitation costs and attorneys’ fees) in connection with any claim or action that arises from an alleged violation of the foregoing or otherwise from Customer’s use of Services. Although Coolgradient has no obligation to monitor Customer’s use of the Services, Coolgradient may do so and may prohibit any use of the Services it believes may be (or alleged to be) in violation of the foregoing.
- 2.3. IT Equipment. Customer shall be responsible for obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Services, including, without limitation, modems, hardware, servers, software, operating systems, networking, web servers and the like (collectively, “**IT Equipment**”). Customer shall also be responsible for maintaining the security of the IT Equipment and files, and for all uses of Customer account or the IT Equipment with or without Customer’s knowledge or consent.
- 2.4. Data Center Facility. Customer acknowledges and agrees that Customer has and will retain sole control and responsibility over the operation and management of Customer’s data center facility. The Services solely provide insight and recommendations for optimization of Customer’s data center facility, based on which the Customer can make its own decisions regarding the operation and management of its data center facility. COOLGRADIENT WILL NEVER BE LIABLE FOR ANY DECISIONS, ACTS, OR OMISSIONS REGARDING THE OPERATION AND MANAGEMENT OF CUSTOMER’S DATA CENTER FACILITY MADE BY CUSTOMER BASED ON THE USE OF SERVICES.
- 2.5. Cooperation. Customer shall at all times during the Term: (a) provide Coolgradient personnel with such access to Customer’s premises and Customer Systems as is necessary for Coolgradient to perform the Services;

and (b) provide all cooperation and assistance as Coolgradient may reasonably request to enable Coolgradient to exercise its rights and perform its obligations under and in connection with this Agreement.

- 2.6. Effect of Customer failure or delay. Coolgradient is not responsible or liable for any delay or failure of performance caused in whole or in part by Customer’s delay in performing, or failure to perform, any of its obligations under this Agreement.

3. CONFIDENTIALITY; PROPRIETARY RIGHTS

- 3.1. Each party (the “**Receiving Party**”) understands that the other party (the “**Disclosing Party**”) has disclosed or may disclose business, technical or financial information relating to the Disclosing Party’s business (hereinafter referred to as “**Proprietary Information**” of the Disclosing Party). Proprietary Information of Coolgradient includes non-public information regarding features, functionality and performance of the Service. Proprietary Information of Customer includes non-public data provided by Customer to Coolgradient to enable the provision of the Services (“**Customer Data**”). The Receiving Party agrees: (i) to take reasonable precautions to protect such Proprietary Information, and (ii) not to use (except in performance of the Services or as otherwise permitted herein) or divulge to any third person any such Proprietary Information. The Disclosing Party agrees that the foregoing shall not apply with respect to any information after five (5) years following the disclosure thereof or any information that the Receiving Party can document (a) is or becomes generally available to the public other than by the Receiving Party’s noncompliance with this Agreement, 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 without restriction by a third party, or (d) was independently developed without use of any Proprietary Information of the Disclosing Party or (e) is required to be disclosed by law.
- 3.2. Customer shall own all right, title and interest in and to the Customer Data. Coolgradient shall own and retain all right, title and interest in and to (a) the Services and Software, all improvements, enhancements or modifications thereto, (b) any software, applications, inventions or other technology developed in connection with Implementation Services or support, and (c) all intellectual property rights related to any of the foregoing.
- 3.3. Notwithstanding anything to the contrary, Coolgradient shall have the right collect and analyze data and other information relating to the provision, use and performance of various aspects of the Services and related systems and technologies (including, without limitation, information concerning Customer Data and data derived therefrom), and Coolgradient will be free (during and after the term hereof) to (i) use such information and data to improve and enhance the Services and for other development, diagnostic and corrective purposes in connection with the Services and other Coolgradient offerings, and (ii) disclose such data solely in aggregate or other de-identified form in connection with its business. No rights or licenses are granted except as expressly set forth herein. Coolgradient shall only process the personal data of the Customer in compliance with its privacy statement of which the latest version is published on its corporate website.

4. WARRANTY, DISCLAIMER, REMEDIES

- 4.1. Warranty. Coolgradient shall use commercially reasonable efforts consistent with prevailing industry standards to maintain the Services in a manner which minimizes errors and interruptions in the Services and shall perform the Implementation Services in a professional and workmanlike manner. If the Services provided to Customer was not performed as warranted, Customer must promptly provide Coolgradient with a written notice that describes the deficiency in the Services.
- 4.2. Disclaimer. Services may be temporarily unavailable for scheduled maintenance or for unscheduled emergency maintenance, either by Coolgradient or by third-party providers, or because of other causes beyond Coolgradient's reasonable control. Coolgradient shall use commercially reasonable efforts to provide advance notice in writing or by e-mail of any scheduled service disruption. COOLGRADIENT DOES NOT WARRANT THAT THE SERVICES WILL MEET CUSTOMER'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEM, OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR FREE. NOR DOES COOLGRADIENT MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION, THE SERVICES AND IMPLEMENTATION SERVICES ARE PROVIDED "AS IS" AND COOLGRADIENT DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE.
- 4.3. Exclusive Remedies. FOR ANY BREACH OF THE WARRANTY, CUSTOMER'S EXCLUSIVE REMEDY AND COOLGRADIENT'S ENTIRE LIABILITY SHALL BE CORRECTION OF THE DEFICIENT SERVICE THAT CAUSED THE BREACH OF WARRANTY, OR, IF COOLGRADIENT CANNOT SUBSTANTIALLY CORRECT THE DEFICIENCY IN A COMMERCIALLY REASONABLE MANNER, CUSTOMER MAY TERMINATE THE AGREEMENT.

5. LIMITATION OF LIABILITY

NOTWITHSTANDING ANYTHING TO THE CONTRARY, EXCEPT FOR BODILY INJURY OF A PERSON, COOLGRADIENT AND ITS SERVICE PROVIDERS, SUPPLIERS (INCLUDING BUT NOT LIMITED TO ALL EQUIPMENT AND TECHNOLOGY SUPPLIERS), LICENSORS, OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS AND EMPLOYEES SHALL NOT BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY: (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES; (C) FOR ANY MATTER BEYOND COOLGRADIENT'S REASONABLE CONTROL; OR (D) FOR ANY AMOUNTS

THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID BY CUSTOMER TO COOLGRADIENT FOR THE SERVICES UNDER THIS AGREEMENT IN THE 12 MONTHS PRIOR TO THE ACT THAT GAVE RISE TO THE LIABILITY, IN EACH CASE, WHETHER OR NOT COOLGRADIENT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE.

6. GOVERNING LAW AND FORUM

- 6.1. Governing law. This Agreement shall be governed by the laws of the State of New York without regard to its conflict of laws provisions.
- 6.2. Forum. Any dispute arising out of or relating to this Agreement (including non-contractual disputes) that cannot be settled amicably, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules.
- 6.3. Waiver of Jury Trial. EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT.
- 6.4. Attorneys' Fees. In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees.

7. MISCELLANEOUS

- 7.1. Force Majeure. In no event will Coolgradient be liable or responsible to Customer, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this when and to the extent such failure or delay is caused by any circumstances beyond Coolgradient's reasonable control (a "Force Majeure Event"), including but not limited to, acts of God, fire, flood, hurricane or other natural catastrophe, terrorist actions, laws, orders, regulations, directions or actions of governmental authorities having jurisdiction over the subject matter hereof, or any civil or military authority, national emergency, insurrection, riot or war, labor strikes, general failure of telecommunication or digital transmission links, general failure of the Internet, failure of any third party operating systems, platforms, applications or networks not under reasonable control of Coolgradient, or other similar occurrence. Either party may terminate this Agreement if a Force Majeure Event continues substantially uninterrupted for a period of 30 days or more.
- 7.2. Severability. If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable.
- 7.3. Assignment. This Agreement is not assignable, transferable or sublicenseable by Customer except with Coolgradient's prior written consent. Any purported assignment, transfer or sublicense in violation of this section shall be null and void. Coolgradient may transfer and assign any of its rights and obligations under this Agreement without consent.

- 7.4. Entire Agreement. This Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement.
- 7.5. No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective assigns and nothing herein, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.
- 7.6. Amendment and modification. This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each party hereto.
- 7.7. 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.
- 7.8. Relationship of the Parties. No agency, partnership, joint venture, or employment is created as a result of this Agreement and Customer does not have any authority of any kind to bind Coolgradient in any respect whatsoever.
- 7.9. Notices. All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by facsimile or e-mail; the day after it is sent, if sent for next day delivery by recognized overnight delivery service; and upon receipt, if sent by certified or registered mail, return receipt requested.

EXHIBIT A

Service Level Terms

The Services shall be available 95%, measured monthly, excluding holidays and weekends and scheduled maintenance. If Customer requests maintenance during these hours, any uptime or downtime calculation will exclude periods affected by such maintenance. Further, any downtime resulting from outages of third party connections or utilities or other reasons beyond Coolgradient's control will also be excluded from any such calculation. Downtime shall begin to accrue as soon as Customer (with notice to Coolgradient) recognizes that downtime is taking place, and continues until the availability of the Services is restored. Coolgradient's blocking of data communications or other Service in accordance with its policies shall not be deemed to be a failure of Coolgradient to provide adequate service levels under this Agreement.

Coolgradient will schedule a maximum of 24 hours of maintenance each month, in which the Services will be down. Coolgradient will give a notification of the scheduled maintenance at least 48 hours in advance.

EXHIBIT B

Support Terms

Coolgradient will provide Technical Support to Customer via electronic mail on weekdays during the hours of 9:00 am through 5:00 pm EST, with the exclusion of Federal Holidays (“**Support Hours**”).

Customer may initiate a helpdesk ticket during Support Hours by emailing support@coolgradient.com.

Coolgradient will use commercially reasonable efforts to respond to all helpdesk tickets within one (1) business day.