

OPTI9 TECHNOLOGIES, LLC TERMS OF SERVICE

These Terms of Service sets out the terms on which Opti9 Technologies, LLC (“**Opti9**”) provides access to its cloud infrastructure and associated services (“**Services**”) described in an Order or purchased through the Opti9 website to you (“**Customer**”). These Terms of Service together with any documentation attached or referenced herein and any Exhibits attached hereto (each as updated from time to time) together with the Cover Sheet constitutes the “**Agreement**”.

1. DEFINITIONS

“**Acceptable Use Policy**” means the policy attached at <https://opti9tech.com/acceptable-use-policy/>, which is incorporated herein by reference.

“**Affiliate**” means an entity which is controlling, controlled by or under common control with a party, and for purposes of this definition, “control” means possessing, directly or indirectly, the power to direct or cause the direction of the management, policies or operations of an entity, whether through ownership of voting securities, by contract or otherwise;

“**Customer Data**” means all electronic data or information submitted by Customer or processed through the Opti9 Services;

“**Opti9 Equipment**” means the equipment owned by Opti9 and used to provide the Opti9 Services;

“**Opti9 Services**” means: (i) the subscription-based cloud solutions ordered by Customer in an Order which may include Opti9 Virtual Private Server, Opti9 File Sharing and Synchronization Services, Opti9 Backup Services and other services that may be added from time to time; and (ii) Support Services;

“**Intellectual Property**” means (a) any rights provided under (i) patent law, (ii) copyright law, (iii) trade-mark law, (iv) design patent or industrial design law or (v) any other statutory provision or common law principle applicable to this Agreement, including trade dress and trade secret law, which may provide a right in either ideas, formulae, algorithms, concepts, inventions or know-how generally, or the expression or use of such ideas, formulae, algorithms, concepts, inventions or know-how; and (b) any and all applications, registrations, licenses, sub-licenses, franchises, agreements or any other evidence of a right in any of the foregoing;

“**Order**” means an order for goods and services in the form of a Cover Sheet to which these Terms are attached or a separate order form provided by Opti9 to Customer;

“**Support Services**” means technical and non-technical support, such as troubleshooting, DNS, data or system recovery and other support offered by Opti9 in connection with the Customer's use of the Opti9 Services

at the hourly rate indicated in the applicable Order; and

“**Term**” has the meaning given in the applicable Order.

2. SERVICE TERMS.

2.1 Provision of Opti9 Services. Conditioned on the terms of this Agreement and Customer's full and timely payment of the applicable fees, Opti9 shall make the Opti9 Services available to Customer during the Term for Customer's internal business use only.

2.2 Customer Affiliates. Customer Affiliates may purchase Opti9 Services by executing Orders hereunder. Customer shall cause each Customer Affiliate to comply with the terms and conditions of this Agreement to the full extent as if such Affiliate were a party hereto, and any act or omission relating to this Agreement by such Customer Affiliate shall be deemed an act or omission of Customer. In addition, each party may use one or more Affiliates to perform its obligations under this Agreement, provided that such use shall not affect such party's obligations hereunder and any act or omission by such Affiliate relating to this Agreement shall be deemed an act or omission of such party.

2.3 Incremental Services. From time to time, certain additional Opti9 or third-party functionality (such functionality being deemed not to be part of the Opti9 Services) may be made available by Opti9 to Customer (in the case of third-party functionality, such functionality being made available on a pass-through basis pursuant to terms specified by the third-party provider of such functionality) , and which Additional Functionality may be purchased by Customer for additional fees in accordance with such terms and conditions as may be applicable to such additional functionality (such terms and conditions prevailing in the event of any inconsistency with the terms and conditions of this Agreement).

2.4 Service Changes. Service downgrades (for instance, when changing to a hosting package that offers fewer options) will take effect at the account's anniversary date (an account anniversary date corresponds to the day of the month at which an account was opened. For instance, if an account was opened on September 8, this account may be modified on the 8th of each month once the original commitment is over). Service upgrades and service downgrades, however, may take effect at any time.

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3. USE OF THE OPTI9 SERVICES.

3.1 Opti9 Responsibilities. Opti9 shall use commercially reasonable efforts to: (a) maintain the security and integrity of the Opti9 Services and the Customer Data; (b) provide basic support to Customer at no additional charge; and (c) make the Opti9 Services available twenty-four (24) hours a day, seven (7) days a week, except for: (i) planned downtime (of which Opti9 shall give at least eight (8) hours' notice via the Opti9 Services; or (ii) any unavailability caused by Force Majeure Events.

3.2 Customer Responsibilities. Customer shall: (a) have sole responsibility for the accuracy, quality, integrity, legality, reliability and appropriateness of all Customer Data; (b) use commercially reasonable efforts to prevent unauthorized access to or use of the Opti9 Services and notify Opti9 promptly of any such unauthorized access or use; (c) be responsible for supplying and maintaining all computer hardware, software, equipment, data, power and communication lines ("**Customer Systems and Materials**") required for its access to the Services, and (d) comply with all applicable local, provincial, state, federal and foreign laws in using the Opti9 Services.

3.3 Acceptable Use Policy. Customer must (and must ensure that its permitted users) at all times comply with the terms and conditions of Opti9's Acceptable Use Policy. Opti9 reserves the right to amend its Acceptable Use Policy and the Customer's continued use of the Opti9 Services after modification of the Acceptable Use Policy constitutes Customer's acceptance of such modifications.

4. FEES AND PAYMENT

4.1 Fees. In consideration for the receipt of the Opti9 Services, Customer shall pay Opti9 the fees indicated in an Order. All amounts are payable in United States dollars unless otherwise stated in the applicable Order. Except as otherwise specified herein or in the applicable Order, (a) fees are based on services purchased and not actual usage, (b) payment obligations are non-cancelable, (c) fees paid are non-refundable, and (d) a subscription cannot be terminated during the relevant subscription term stated in the applicable Order. Because fees are based on monthly units, fees for subscriptions purchased in the middle of a monthly period will be charged on a prorated basis for the monthly period in which the services were used. Upon account activation, Opti9 reserves equipment and resources for the Customer's needs. Customer must pay its account even if not making any use of it.

4.2 Invoicing & Payment. Fees for the Opti9 Services will be invoiced on a monthly basis and due within thirty (30) of the invoice dates unless otherwise set out in an Order. Customer is responsible for maintaining complete and accurate billing and contact information on the Opti9 Services. Invoices are sent by email, and a copy can be sent by postal mail upon request.

4.3 Credit Card Payments. By activating the automatic charge option, Customer (a) agrees that Customer has read and accepts the terms and conditions related to the credit card charges, and (b) grants Opti9 the right to withdraw the amount of the unpaid balance from Customer's credit card on file. Customer also authorizes the financial institution issuing the credit card to charge Customer's account for the amounts related to the Opti9 Services. This authorization will be valid until an authorized person on the account asks to suspend the automatic charges. Customer will not receive any previous notification but will receive a notice after every debit on the credit card. Customer may disable or re-enable the automatic charge by contacting the customer service via the Opti9 web site at www.Opti9.com.

4.4 Credit Authorization. Customer hereby authorizes Opti9 to obtain credit information and bank and other financial references regarding the Customer for the purposes of assessing the Customer's credit worthiness. Customer will promptly execute and deliver to Opti9 such further documents and assurances and take such further actions as Opti9 may from time-to-time reasonably request in order to carry out the intent and purpose of this Section.

4.5 Overdue Payments. Any payment not received from Customer by the due date may accrue (except with respect to charges then under reasonable and good faith dispute), at Opti9' discretion, late charges at the rate of 1.5% of the outstanding balance per month (19.57% per annum), or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid.

4.6 Dispute Payment. In the event part of an invoice is in dispute, Customer agrees to pay the undisputed portion of the invoice and make a note on the invoice regarding the disputed portion within fifteen (15) days from the date of invoice, otherwise Customer will be deemed to agree to such invoices and Opti9 will not be subject to making adjustments to invoices.

4.7 Taxes. Unless otherwise stated, Opti9' fees do not include any direct or indirect local, state, provincial, federal or foreign taxes, levies, duties or similar governmental assessments of any nature, including

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value-added, goods and services, harmonized, use or withholding taxes (collectively, "**Taxes**"). Customer is responsible for paying all Taxes associated with its purchases hereunder, excluding taxes based on Opti9' net income or property. If Opti9 has the legal obligation to pay or collect Taxes for which Customer is responsible under this section, the appropriate amount shall be invoiced to and paid by Customer, unless Customer provides Opti9 with a valid tax exemption certificate authorized by the appropriate taxing authority.

4.8 Suspension of Opti9 Services. If Customer's account is thirty (30) days or more overdue (except with respect to charges then under reasonable and good faith dispute), in addition to any of its other rights or remedies, Opti9 reserves the right to suspend the Opti9 Services provided to Customer, without liability to Customer, until such amounts are paid in full. A service reconnection charge of \$50 will apply to any suspended account that is to be reinstated. In addition, Opti9 may suspend the Services any time if (a) at Opti9's sole discretion, if Customer violates Acceptable Use Policy, and/or (b) if Customer's action risk harm to other customers or the security, availability or integrity of the Services. Where practicable, Opti9 may use commercially reasonable efforts to provide Customer with prior notice of the suspension.

4.9 Fee Changes. Upon thirty (30) days written notice prior to the end of any initial term indicated in an Order, Opti9 may change any fees payable under this Agreement.

4.10 Satisfaction Warranty. Customer may terminate this Agreement within the first thirty (30) days after account opening by giving at least forty-eight (48) hours prior notice contact@opti9tech.com if Customer is not entirely satisfied with the Opti9 Services.

4.11 Refund Policy. Any pre-payment is a commitment regarding the applicable payment period for Opti9 Services. Pre-payments are non-refundable except where Customer is exercising its right to terminate pursuant to Section 4.10 above. If Customer wishes to terminate a product or service and not the entire Agreement, Customer's account may be credited with the value of advanced payments for that product or service and may be applied only to further purchases at Opti9. Billing errors can be credited retroactively for a period of up to two (2) months.

5. PROPRIETARY RIGHTS

5.1 Reservation of Rights. Subject to the limited rights expressly granted hereunder, Opti9 and its

licensors reserves all rights, title and interest in and to the Opti9 Services, including all related Intellectual Property rights. No rights are granted to Customer hereunder other than as expressly set forth herein.

5.2 Restrictions. Customer shall not (and shall not allow any third party to): (a) modify, translate, reverse engineer, decompile, disassemble, or create derivative works based on the Opti9 Services except to the extent that enforcement is prohibited by applicable law notwithstanding a contractual provision to the contrary; (b) circumvent any user limits or other timing or use restrictions that are built into the Opti9 Services; (c) remove any proprietary notices, labels, or marks from the Opti9 Services; (d) frame or mirror any content forming part of the Opti9 Services; (e) access the Opti9 Services in order to: (i) build a competitive product or service, or (ii) copy any ideas, features, functions or graphics of the Opti9 Services.

5.3 Customer Data. As between Opti9 and Customer, Customer exclusively owns all rights, title and interest in and to all Customer Data. Customer will receive full access to Customer Data and its server environments. Customer Data is deemed Confidential Information under this Agreement. Customer hereby grants Opti9 a non-exclusive right and license to access, create derivative works, or otherwise use Customer Data for the purpose of providing the Services. Opti9 shall not access Customer's user accounts, including Customer Data, except to respond to service or technical problems or at Customer's request or for the operation of the Opti9 Services or billing. Customer is solely responsible for the content stored on and served by Customer's virtual private servers. Customer acknowledges and agrees that Opti9 may collect, use and disclose quantitative data derived from Customer's use of the Services (collectively, "**Statistical Data**"), which shall be the solely and exclusively property of Opti9. Customer agrees that Opti9 may use Statistical Data and Customer Data for industry analysis, benchmarking, analytics, marketing, and other business purposes, provided that all Customer Data will be in aggregate form only and will not identify Customer or any of its user.

5.4 Privacy. Opti9 will use the Customer's personal information to provide the Opti9 Services and to collect fees owed and will not disclose such information to any third party except as required by law as evidenced by an order of a court of competent jurisdiction and to collection services if needed. For further information on Opti9's privacy practices please contact at contact@opti9tech.com. OPTI9 ASSUMES NO RESPONSIBILITY FOR THE DELETION OF DATA, LOSS OF DATA, OR THE FAILURE TO STORE DATA. Opti9 has no

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obligation to monitor the use of the Services and/or data transmitted or stored through the Services. To the maximum extent possible under applicable law and notwithstanding the provisions of this Agreement, Opti9 reserves the right at all times to monitor, review, retain and/or disclose any data or other information as necessary to satisfy any applicable law, regulation, legal process, or governmental request, or to investigate any suspected breach of this Agreement.

5.5 Suggestions. Opti9 shall have a royalty - free, worldwide, transferable, sub-licensable, irrevocable, perpetual, unrestricted license to use and/or incorporate into the Services any suggestions, enhancement requests, recommendations or other feedback provided by Customer or its Users relating to the operation of the Opti9 Services.

5.6 Publicity. Neither party may issue press releases relating to this Agreement without the other party's prior written consent, such consent not to be unreasonably withheld; provided that, however, each party may include the name and logo of the other party in lists of customers or vendors and in marketing materials in accordance with the other party's standard trademark guidelines.

6. CONFIDENTIALITY

6.1 Definition of Confidential Information. As used herein, "Confidential Information" means all confidential and proprietary information of a party (the "Disclosing Party") disclosed to the other party (the "Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure, including the terms and conditions of this Agreement, the Customer Data, the Opti9 Services, business and marketing plans, technology and technical information, product designs, and business processes. Confidential Information shall not include 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; (iii) was independently developed by the Receiving Party without breach of any obligation owed to the Disclosing Party; or (iv) is received from a third party without breach of any obligation owed to the Disclosing Party.

6.2 Confidentiality. The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this

Agreement, except with the Disclosing Party's prior written permission.

6.3 Protection. Each party agrees to protect the confidentiality of the Confidential Information of the other party in the same manner that it protects the confidentiality of its own proprietary and confidential information of like kind (but in no event using less than reasonable care).

6.4 Compelled Disclosure. If the Receiving Party is compelled by law to disclose Confidential Information of the Disclosing Party, it shall provide the Disclosing Party with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.

6.5 Return of Confidential Information. Upon expiration or earlier termination of this Agreement, the Receiving Party will promptly return to the Disclosing Party all Confidential Information it has in its possession. Notwithstanding the foregoing, the Receiving Party may retain copies of any Confidential Information preserved, recorded or saved automatically to standard back-up or archival systems to the extent it is impracticable to delete, erase or destroy such information, provided that the Receiving Party shall make no further use of such copies, such information shall remain subject to the confidentiality obligations hereunder and such copies shall be destroyed or deleted in the ordinary course. The Receiving Party shall, at the request of the Disclosing Party, provide written confirmation of such destruction or exception thereto (citing the reason).

6.6 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 requirements in this Agreement, 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 may be inadequate.

7. WARRANTIES AND DISCLAIMERS

7.1 Mutual Warranties. Each party represents and warrants that (a) it has the legal power to enter into this Agreement (b) the execution, delivery and performance of this Agreement and the applicable Order have been duly authorized by such party; (c) no approval, authorization or consent of any governmental or regulatory authority is required to be obtained by it in order for it to enter into and perform its obligations under this Agreement and the applicable Order; and (d)

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the signatory to this Agreement and the applicable Order possesses all necessary authority to enter into the Agreement and applicable Order.

7.2 Opri9 Warranties. Opti9 represents and warrants that it will provide the Opti9 Services in a manner consistent with general industry standards reasonably applicable to the provision thereof.

7.3 Customer Warranties. Customer represents and warrants that: (a) it has all rights and authorizations for Opti9 to access to the Customer Systems; and (b) it is solely responsible for the content and rights to use the Customer Systems and Customer Data and Opti9's use of the Customer Systems and Materials and Customer Data shall not violate the rights of any third party or any Law. Upon request, Customer shall provide reasonable proof of compliance with the provisions set forth in this section and Opti9 shall have no obligation to provide Services where Opti9 reasonably believes that Customer has not so complied.

7.4 Disclaimer. EXCEPT AS EXPRESSLY PROVIDED HEREIN, OPTI9 MAKES NO REPRESENTATIONS AND PROVIDES NO WARRANTIES OR CONDITIONS OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND SPECIFICALLY DISCLAIMS ALL IMPLIED REPRESENTATIONS, WARRANTIES AND/OR CONDITIONS, INCLUDING ANY REPRESENTATIONS, WARRANTIES AND/OR CONDITIONS OF MERCHANTABILITY, MERCHANTABILITY, DURABILITY, TITLE, NON-INFRINGEMENT, SATISFACTORY QUALITY OR FITNESS FOR A PARTICULAR PURPOSE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

8. LIMITATION OF LIABILITY

8.1 Limitation of Liability. SUBJECT TO SECTION 8.3, IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE AMOUNTS ACTUALLY PAID BY CUSTOMER HEREUNDER IN THE THREE MONTHS PRECEDING THE INCIDENT GIVING RISE TO LIABILITY.

8.2 Exclusion of Consequential and Related Damages. SUBJECT TO SECTION 8.3, IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS, LOSS OF PROFITS, BUSINESS INTERRUPTION, LOSS OF DATA, LOST SAVINGS OR OTHER SIMILAR PECUNIARY LOSS) HOWEVER CAUSED AND, WHETHER IN CONTRACT, TORT (INCLUDING

NEGLIGENCE) OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

8.3 Certain Damages Not Excluded.

NOTWITHSTANDING THE GENERALITY OF THE FOREGOING, NO LIMITATION OF EITHER PARTY'S LIABILITY SET FORTH IN THIS AGREEMENT SHALL APPLY TO (I) DAMAGES ARISING FROM A PARTY'S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS, (II) DAMAGES ARISING FROM INFRINGEMENT AND/OR MISAPPROPRIATION OF A PARTY'S INTELLECTUAL PROPERTY RIGHTS; OR (III) ANY CLAIMS FOR NON-PAYMENT.

9. TERM AND TERMINATION

9.1 Term of Agreement. This Agreement shall commence as of the start date indicated on an Order or the date of execution of an Order (as applicable) and shall continue until terminated by either part on the terms hereof.

9.2 Termination. This Agreement may be terminated in the following ways:

- a) termination by either Party without it incurring liability where the other Party commits a material breach of any provision in this Agreement and fails to cure it within thirty (30) days after receipt of written notice of the breach;
- b) termination by Opti9 of at least sixty (60) days written notice;
- c) termination by Customer providing at least forty-eight (48) hours' notice within the 30-day period of the satisfaction warranty as described in Section 4.9.
- d) suspended or terminated by Opti9 without it incurring any liability whatsoever:
 - (i) immediately upon Customer's filing of a bankruptcy petition or similar proceeding under the law of any jurisdiction, or upon Customer becoming insolvent or making any assignment for the benefit of creditors, or upon the dissolution, liquidation, or appointment of a receiver of Customer's property or where any Law prohibits Opti9 from providing Opti9 Services.
 - (ii) upon providing forty-eight (48) hours' notice where possible, where Customer's use of the Services is or is reasonably suspected by Opti9 to be in a fraudulent or illegal manner, or Customer

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fails to meet Opti9's credit requirements; or

- (iii) upon providing Customer with ten (10) days prior written notice, where Customer has failed to make payment in full of all undisputed portions of an invoice.
- (iv) Termination by Customer immediately upon Opti9 filing a bankruptcy petition or similar proceeding under the law of any jurisdiction, or upon Opti9 becoming insolvent or making any assignment for the benefit of creditors, or upon the dissolution, liquidation, or appointment of a receiver of Opti9's property.

9.3 Early Termination Fee. If Customer terminates this Agreement other than in accordance with Section 4.9 or Opti9 terminates this Agreement under Section 9.2(a), Customer will be required to pay to Opti9 as liquidated damages, and not as a penalty, an amount which is equal to: (a) fifty percent (50%) of the average monthly usage (where applicable); plus (b) fifty percent (50%) of the monthly recurring charge for each of the Opti9 Services, multiplied by the number of months remaining in the then current Term. In addition, Customer will be responsible for any other charges that Opti9, acting reasonably, is liable to incur for the remainder of the then current Term, including without limitation, set up fees, technical services, and Customer will forfeit a refund of any prepayment made for Services.

9.4 Outstanding Fees. Termination for any reason shall not relieve Customer of the obligation to pay any fees accrued or payable to Opti9 prior to the effective date of termination.

9.5 Surviving Provisions. The following provisions shall survive any termination or expiration of this Agreement: Sections 5-8, 9.3, 9.6, 10 and 11.

10. INDEMNIFICATION.

10.1 Customer Indemnification. Customer will indemnify, defend and hold harmless Opti9, Opti9's Affiliates, and their respective, officers, directors, employees, agents and representatives (collectively "**Indemnified Parties**") against any actual or asserted losses, claims, damages, liabilities, obligations, penalties, judgments, awards, costs, expenses and disbursements ("**Claims**") arising out of or relating to (a) Customer's breach of this Agreement, (b) any negligent acts or omissions, recklessness or willful misconduct of Customer or Customer's personnel; and/or (c) the infringement of any content, materials, provided or disclosed by Customer to Opti9 (including Customer

Data) upon any patent, copyright, trademark or other Intellectual Property Right of any third party. Such obligations will pertain to all legal fees and other costs incurred by Opti9 in defending any Claims. Customer may control the investigation, preparation, defense and settlement of any Claim, but will not settle or otherwise resolve any Claim without Opti9's prior written approval. Opti9 will give Customer prompt written notice of any Claim, provided that Opti9's failure to provide prompt written notice shall not act as a waiver of Customer's obligations hereunder except to the extent it is materially prejudiced thereby.

10.2 Opti9 Indemnification. Opti9 will indemnify, defend and hold harmless Customer any third-party Claims arising out of or relating to access and use of the Services (or any part thereof) by Customer Indemnified Parties in accordance with the terms of this Agreement infringes a third-party's United States copyright or a United States patent issued as of the effective date of the applicable Order (each, an "**Infringement Claim**"), provided that Opti9 will have no indemnity obligation or other liability hereunder arising from: (a) Customer's negligence, breach of the Agreement or an Order or alteration of the Services as provided by Opti9; (b) the Customer Systems and Materials or Services that are based upon the Customer Systems and Materials, or information, design, specifications, directions, instruction, software, data, or material not furnished by Opti9; (c) combination of the Services with the any materials, products or services not authorized by Opti9 in writing; or any (d) third party products or services. Opti9's indemnification obligation under this Section is conditional on: (i) Customer promptly notifying Opti9 (no later than 10 days) of any Infringement Claim of which it has notice; (ii) Customer not making any admission as to liability or compromise or agreeing to any settlement of any Infringement Claim without the prior written consent of Opti9; and (iii) Opti9 having, at its own expense, sole control of the defense and any related settlement negotiations arising from any Infringement Claim and Customer giving Opti9 all reasonable assistance in connection with those negotiations and such defense at Opti9's request. If an Infringement Claim is or is likely to be made, Opti9 will, at its own expense and sole discretion, exercise one or the following remedies: (A) obtain for Customer the right to continue to use, the Services consistent with this Agreement; (B) modify the Services so they are non-infringing and in compliance with this Agreement; (C) terminate the applicable Services without liability for such termination other than the ongoing indemnity obligation hereunder. The foregoing states the entire obligation of Opti9 and its suppliers, and the exclusive remedy of Customer, with respect to infringement of

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proprietary rights.

11. GENERAL PROVISIONS

11.1 Audit. Customer shall keep complete and accurate records relating to this Agreement (including financial records and documentation sufficient to demonstrate Customer's compliance with the Agreement and all applicable laws) during the term and for five (5) years following the termination or expiration of this Agreement. Customer will permit Opti9 or a certified public accountant retained by Opti9 to audit such records and Customer System at reasonable times during normal business hours upon at least ten (10) days prior written notice with such frequency as Opti9 may require. If an audit of the appropriate documents reveals demonstrable discrepancies, then Customer shall make the necessary corrections related to any audit findings (including repayment of any underpayments discovered). Opti9 will be responsible for the full costs of any audit conducted by Opti9 unless such audit reveals an underpayment of greater than five percent (5%), in which case the cost of such audit shall be borne by Customer.

11.2 Subcontractors. Opti9 shall have sole discretion in staffing the Services and may assign the performance of any portion of the Services to any subcontractor. In the event that Opti9 subcontracts any portion of the Services, Opti9 shall be fully responsible for the acts and omissions of any such subcontractor and shall not be relieved of its obligations under this Agreement.

11.3 Relationship of the Parties. The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship between the parties.

11.4 No Third-Party Beneficiaries. There are no third-party beneficiaries to this Agreement.

11.5 Notices. All notices under this Agreement shall be in writing and shall be deemed to have been given upon: (i) personal delivery; (ii) the second business day after mailing; (iii) the second business day after sending by confirmed facsimile; or (iv) the second business day after sending by email. Notices to Opti9 shall be addressed to the attention of the Legal Department. Notices to Customer shall be addressed to Customer's signatory of this Agreement unless otherwise designated below.

11.6 Waiver and Cumulative Remedies. No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right. Other

than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

11.7 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

11.8 Assignment. Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld).

Notwithstanding the foregoing, each party may assign this Agreement in its entirety (including all orders), without consent of the other party, in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its stock or assets. Any attempt by a party to assign its rights or obligations under this Agreement in breach of this section shall be void and of no effect. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

11.9 Governing Law. This Agreement shall be governed by the laws of the State of New York, without regard to its conflict of law principles. No choice of laws rules of any jurisdiction shall apply to this Agreement. The application of the United Nations Convention on Contracts for the International Sale of Goods to this Agreement is expressly excluded.

11.10 Venue; Waiver of Jury Trial. The provincial and federal courts located in **Garden City, New York** shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to this Agreement. Each party hereby consents to the exclusive jurisdiction of such courts. Each party also hereby waives any right to jury trial in connection with any action or litigation in any way arising out of or related to this Agreement.

11.11 Force Majeure. Except for Customer's payment obligations under this Agreement, neither party shall be responsible for its failure to perform to the extent due to unforeseen circumstances or causes beyond its control, including but not limited to acts of God, acts of government, wars, terrorism, riots, embargoes, acts of civil or military authorities, fires, floods, earthquakes, accidents, or strikes, acts of terror, strikes or other labor problems (other than those involving the employees of the affected party), computer, telecommunications,

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Internet Opti9, denial of service attacks or hosting facility failures or delays involving hardware, software or power systems not within a party's possession or reasonable control (each, a "**Force Majeure Event**"), provided that such party gives the other party prompt written notice of the failure to perform and the reason therefore and uses its reasonable efforts to limit the resulting delay in its performance.

11.12 Export. Customer acknowledges and agrees that the Opti9 Services may be subject to export and import controls under the regulations of the United States, the United States and other countries, and Customer shall comply with all export and import control regulations of such countries. Customer shall not use the Opti9 Services for any purposes prohibited by export laws, including, without limitation, nuclear, chemical or biological weapons proliferation. Customer shall be responsible for procuring all required permissions for any subsequent export, import or use of the Opti9 Services.

11.13 Entire Agreement. This Agreement, including all schedules, Schedules and addenda hereto and all Orders, constitutes the entire agreement between the parties, and supersedes all prior and contemporaneous

agreements, proposals or representations, written or oral, concerning its subject matter. These Terms of Service apply to any Order agreed by the Parties unless a separate agreement is entered into by the parties which expressly supersedes these terms. Opti9 reserves the right to update and modify these terms from time to time and the date of last modification is indicated below. Any revisions to these Terms will apply to new Orders concluded after the date the Terms were updated. For pre-existing Orders already governed by a version of these Terms, no modification, amendment, or waiver of any provision of these Terms shall be effective unless in writing and signed by the party against whom the modification, amendment or waiver is to be asserted. To the extent of any conflict or inconsistency between the provisions in the body of these Terms and any schedule, Schedule or addendum hereto or any Order, the terms of such schedule, Schedule, addendum or Order shall prevail. Notwithstanding any language to the contrary therein, no terms or conditions stated in a Customer purchase order or in any other Customer order documentation shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.