

SYMPHONY TERMS OF SERVICES

VERSION: MARCH 2021

IMPORTANT NOTICE! PLEASE SCROLL THROUGH AND READ ALL OF THE FOLLOWING SOFTWARE AS A SERVICE AGREEMENT TERMS AND CONDITIONS (THE "AGREEMENT") CAREFULLY BEFORE CONCLUDING YOUR SUBSCRIPTION PROCESS. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY TO THE TERMS AND CONDITIONS OF THIS AGREEMENT, AND IN SUCH EVENT, THE TERM "SUBSCRIBER" AS USED IN THIS AGREEMENT SHALL REFER TO SUCH ENTITY.

BY CLICKING THE "I AGREE" BUTTON OR SIMILAR AFFIRMATION AS APPLICABLE THAT APPEARS DURING ACTIVATION OF YOUR REGISTRATION/SUBSCRIPTION, OR USING THE SERVICES, YOU AGREE TO FOLLOW TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO BE LEGALLY BOUND BY THIS AGREEMENT, THEN YOU MUST NOT CLICK "I AGREE" AND NOT USE THE SERVICES.

You ("Subscriber", "You" or related terms) are acquiring a subscription to a Service (as defined below) provided by us ("Us", "Commend" or "Provider") from an unrelated third party authorized to sell such subscriptions ("Commend Dealer") under a separate agreement with Commend ("Reseller Agreement"). In addition to any terms and conditions related to Your use of the Service pursuant to any agreement by and between You and the Commend Dealer, this Agreement contains the terms and conditions that govern your access to and use of the Service. Commend is an express beneficiary of this Agreement, in acquiring a subscription to the Service, You expressly acknowledge and agree that Commend shall have the right to enforce this Agreement against You and that this Agreement constitutes the entire agreement and supersedes any and all prior agreements between You and Commend with regard to Your subscription to the Service or Your access to our use thereof under this Agreement and Your agreement between You and the Commend Dealer.

This Software as a Service Agreement (the "**Agreement**"), effective as of the date, the registration process has been completed (the "**Effective Date**"), is by and between Commend, Inc., a Texas corporation with offices located at 63 Ramapo Valley Rd., Suite 201, Mahwah, New Jersey 07430 ("**Provider**") and You ("**Subscriber**").

WHEREAS, Provider provides access to its software-as-a-service offerings to its Subscribers;

WHEREAS, Subscriber desires to access certain software-as-a-service offerings described herein, and Provider desires to provide Subscriber access to such offerings, subject to the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, terms, and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. DEFINITIONS

"Access Credentials" means any user name, identification number, password, license or security key, security token, PIN, or other security code, method, technology, or device used, alone or in combination, to verify an individual's identity and authorization to access and use the Services.

"Action" means any claim, action, cause of action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation, citation, summons, subpoena, or investigation of any nature, civil, criminal, administrative, regulatory, or other, whether at law, in equity, or otherwise.

"Affiliate" of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person.

"Agreement" has the meaning set forth in the preamble.

"Authorized Users" means Subscriber's employees, consultants, contractors, and agents (a) who are authorized by Subscriber to access and use the Services under the rights granted to Subscriber pursuant to this Agreement; and (b) for whom access to the Services has been purchased hereunder.

"Subscriber" has the meaning set forth in the preamble.

"Subscriber Data" means information, data, and other content, in any form or medium, that is collected, downloaded, or otherwise received, directly or indirectly from Subscriber or an Authorized User by or through the Services. For the avoidance of doubt, Subscriber Data does not include Resultant Data, or any other information reflecting the access or use of the Services by or on behalf of Subscriber or any Authorized User.

"Subscriber Systems" means the Subscriber's information technology infrastructure, including computers, software, hardware, databases, electronic systems (including database management systems), and networks, whether operated directly by Subscriber or through the use of third-party services.

"Subscription Term" means the length of time the Subscriber is authorized and licensed to access and utilize the Services, as set forth in the Purchase Order between Subscriber and the Commend Dealer as defined below.

"Documentation" means any manuals, instructions, or other documents or materials that the Provider provides or makes available to Subscriber in any form or medium and which describe the functionality, components, features, or requirements of the Services or Provider Materials, including any aspect of the installation, configuration, integration, operation, use, support, or maintenance thereof.

"Effective Date" shall mean the date the Subscriber first activates the Services.

"Harmful Code" means any software, hardware, or other technology, device, or means, including any virus, worm, malware, or other malicious computer code, the purpose or effect of which is to (a) permit unauthorized access to, or to destroy, disrupt, disable, distort, or otherwise harm or impede in any manner any (i) computer, software, firmware, hardware, system, or network; or (ii) any application or function of any of the foregoing or the security, integrity, confidentiality, or use of any data Processed thereby; or (b) prevent Subscriber or any Authorized User from accessing or using the Services or Provider Systems as intended by this Agreement. Harmful Code does not include any Provider Disabling Device.

"Intellectual Property Rights" means any and all registered and unregistered rights granted, applied for, or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection, or other intellectual property rights laws, and all similar or equivalent rights or forms of protection, in any part of the world.

"Law" means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, or other requirement of any federal, state, local, or foreign government or political subdivision thereof, or any arbitrator, court, or tribunal of competent jurisdiction.

"Losses" means any and all losses, damages, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys' fees and the costs of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers.

"Permitted Use" means any use of the Services by an Authorized User for the benefit of Subscriber in the ordinary course of its internal business operations.

"Person" means an individual, corporation, partnership, joint venture, limited liability entity, governmental authority, unincorporated organization, trust, association, or other entity.

"Process" means to take any action or perform any operation or set of operations that the SaaS Services are capable of taking or performing on any data, information, or other content. **"Processing"** and **"Processed"** have correlative meanings.

"Provider" has the meaning set forth in the preamble.

"Provider Disabling Device" means any software, hardware, or other technology, device, or means (including any back door, time bomb, time out, drop dead device, software routine, or other disabling device) used by Provider or its designee to disable Subscriber's or any Authorized User's access to or use of the Services automatically with the passage of time or under the positive control of Provider or its designee.

"Provider Materials" means the Services, Specifications, Documentation, and Provider Systems and any and all other information, data, documents, materials, works, and other content, devices, methods, processes, hardware, software, and other technologies and inventions, including any deliverables, technical or functional descriptions, requirements, plans, or reports, that are provided or used by Provider or any Subcontractor in connection with the Services or otherwise comprise or relate to the Services or Provider Systems. For the avoidance of doubt, Provider Materials include Resultant Data and any information,

data, or other content derived from Provider's monitoring of Subscriber's access to or use of the Services, but do not include Subscriber Data.

"**Provider Personnel**" means all individuals involved in the performance of Services as employees, agents, or independent contractors of Provider or any Subcontractor.

"**Provider Systems**" means the information technology infrastructure used by or on behalf of Provider in performing the Services, including all computers, software, hardware, databases, electronic systems (including database management systems), and networks, whether operated directly by Provider or through the use of third-party services.

"**Representatives**" means, with respect to a party, that party's employees, officers, directors, consultants, agents, independent contractors, service providers, sublicensees, subcontractors, and legal advisors.

"**Resultant Data**" means data and information related to Subscriber's use of the Services that is used by Provider in an aggregate and anonymized manner, including to compile statistical and performance information related to the provisions and operation of the Services.

"**Services**" means the software-as-a-service offering described in the Purchase Order (as defined below).

"**Territory**" means United States of America and Canada.

"**Third-Party Materials**" means materials and information, in any form or medium, including any open-source or other software, documents, data, content, specifications, products, equipment, or components of or relating to the Services that are not proprietary to Provider.

2. SERVICES

- 2.1 **Access and Use.** Subject to and conditioned on Subscriber's payment of Fees and compliance with all other terms and conditions of this Agreement, Provider hereby grants Subscriber a non-exclusive, non-transferable (except in compliance with Section 14 (4)) right to access and use the **Services** during the Term, solely for use by Authorized Users in accordance with the terms and conditions herein. Such use is limited to Subscriber's internal use. Provider shall provide to Subscriber the necessary passwords and network links or connections to allow Subscriber to access the **Services**. The total number of Authorized Users will not exceed the number set forth by **separate Purchase Order between the Commend Dealer and Subscriber** (the "Purchase Order"), except as expressly agreed to in writing by the Parties and subject to any appropriate adjustment of the Fees payable hereunder (the "Adjustment of Authorized Users"). If Subscriber exceeds the total number of Authorized Users under the Purchase Order without obtaining Adjustment of Authorized Users first, Provider shall have the right to retroactively adjust the Fees (the "Adjusted Fees") payable hereunder and Subscriber shall pay the Adjusted Fees within ten days upon receipt of the invoice.

- 2.2 Documentation License. Provider hereby grants to Subscriber a non-exclusive, non-sublicensable, non-transferable (except in compliance with Section 0) license to use the Documentation during the Term solely for Subscriber's internal business purposes in connection with its use of the Services.
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- 2.3 Downloadable Software. Use of the Services may require or include use of downloadable software. Provider grants Subscriber a non-transferable, non-exclusive, non-assignable, limited right for Authorized Users to use downloadable software provided as part of the Services. Any Third-Party Materials that consist of downloadable software are subject to the use restrictions in Section 3.
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- 2.4 Service and System Control. Except as otherwise expressly provided in this Agreement, as between the parties:
- a) Provider has and will retain sole control over the operation, provision, maintenance, and management of the Provider Materials; and
 - b) Subscriber has and will retain sole control over the operation, maintenance, and management of, and all access to and use of, the Subscriber Systems, and sole responsibility for all access to and use of the Provider Materials by any Person by or through the Subscriber Systems or any other means controlled by Subscriber or any Authorized User, including any: (i) information, instructions, or materials provided by any of them to the Services or Provider; (ii) results obtained from any use of the Services or Provider Materials; and (iii) conclusions, decisions, or actions based on such use.
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- 2.5 Reservation of Rights. Nothing in this Agreement grants any right, title, or interest in or to (including any license under) any Intellectual Property Rights in or relating to, the Services, Provider Materials, or Third-Party Materials, whether expressly, by implication, estoppel, or otherwise. All right, title, and interest in and to the Services, the Provider Materials, and the Third-Party Materials are and will remain with Provider and the respective rights holders in the Third-Party Materials.
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- 2.6 Changes. Provider reserves the right, in its sole discretion, to make any changes to the Services and Provider Materials that it deems necessary or useful to: (a) maintain or enhance: (i) the quality or delivery of Provider's services to its Subscribers; (ii) the competitive strength of or market for Provider's services; or (iii) the Services' cost efficiency or performance; or (b) to comply with applicable Law.
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- 2.7 Subcontractors. Provider may from time to time in its discretion engage third parties to perform Services (each, a "**Subcontractor**").
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- 2.8 Suspension or Termination of Services. Provider may, directly or indirectly, and by use of a Provider Disabling Device or any other lawful means, suspend, terminate, or otherwise deny Subscriber's, any Authorized User's, or any other Person's access to or use of all or any part of the Services or Provider Materials, without incurring any resulting obligation or liability, if: (a) Provider receives a judicial or other governmental demand or order, subpoena, or law enforcement request that expressly or by

reasonable implication requires Provider to do so; or (b) Provider believes, in its good faith and reasonable discretion, that: (i) Subscriber has failed to comply with any material term of this Agreement, including but not limited to its payment obligation, or accessed or used the Services beyond the scope of the rights granted or for a purpose not authorized under this Agreement or in any manner that does not comply with any material instruction or requirement of the specifications; (ii) Subscriber, has been, or is likely to be involved in any fraudulent, misleading, or unlawful activities relating to or in connection with any of the Services; or (iii) this Agreement expires or is terminated. In addition, under the terms and conditions of our agreement with the Commend Dealer, Provider is entitled to suspend or terminate the subscription to the Service, Subscriber's rights to access and use of the Service or Account, and remove and discard any Service Data if: (a) Provider is notified by the Commend Dealer of Subscriber's failure to pay amounts due to the Commend Dealer with respect to the subscription to the Service; or (b) the Commend Dealer fails to pay any amounts due to Provider pursuant to the Reseller Agreement with respect to Subscriber's subscription to a Service. Subscriber acknowledges and consents to these suspension and termination rights and acknowledges and agrees that Provider shall have no liability to Subscriber of any kind with respect to any such suspension or termination. Subscriber's sole recourse with respect to any such suspension or termination shall be against the Commend Dealer. This Section 2.8 does not limit any of Provider's other rights or remedies, whether at law, in equity, or under this Agreement.

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- 2.9 911 Emergency Services Feature. Provider's Cloud Subscription Service includes an option for a 911 emergency services feature. The supplemental terms, attached as Exhibit A hereto, shall apply to Subscriber if the 911 emergency service feature is part of the Cloud Subscription Service.
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3. USE RESTRICTIONS; SERVICE USAGE AND DATA STORAGE

- 3.1 Use Restrictions. Subscriber shall not, and shall not permit any other Person to, access or use the Services or Provider Materials except as expressly permitted by this Agreement and, in the case of Third-Party Materials, the applicable third-party license agreement. For purposes of clarity and without limiting the generality of the foregoing, Subscriber shall not, except as this Agreement expressly permits (i) copy, modify, or create derivative works or improvements of the Services or Provider Materials; (ii) rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer, or otherwise make available any Services or Provider Materials to any Person, including on or in connection with the internet or any time-sharing, service bureau, software as a service, cloud, or other technology or service; (iii) reverse engineer, disassemble, decompile, decode, adapt, or otherwise attempt to derive or gain access to the source code of the Services or Provider Materials, in whole or in part; (iv) damage, destroy, disrupt, disable, impair, interfere with, or otherwise impede or harm in any manner the Services, Provider Systems, or Provider's provision of services to any third party, in whole or in part; (v) remove, delete, alter, or obscure any trademarks, Specifications, Documentation, warranties, or disclaimers, or any copyright, trademark, patent, or other intellectual property or proprietary rights notices from any Services or Provider Materials, including any copy thereof; or (vi) access or use the Services or Provider Materials in any manner

or for any purpose that infringes, misappropriates, or otherwise violates any Intellectual Property Right or other right of any third party or that violates any applicable Law;

4. SUBSCRIBER OBLIGATIONS

- 4.1 Subscriber Systems and Cooperation. Subscriber shall at all times during the Term: (a) set up, maintain, and operate in good repair and in accordance with the Specifications all Subscriber Systems on or through which the Services are accessed or used; (b) provide Provider Personnel with such access to Subscriber's premises and Subscriber Systems as is necessary for Provider to perform the Services in accordance with the Availability Requirement and Specifications; and (c) provide all cooperation and assistance as Provider may reasonably request to enable Provider to exercise its rights and perform its obligations under and in connection with this Agreement.
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- 4.2 Effect of Subscriber Failure or Delay. Provider is not responsible or liable for any delay or failure of performance caused in whole or in part by Subscriber's delay in performing, or failure to perform, any of its obligations under this Agreement (each, a "**Subscriber Failure**").
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- 4.2 Corrective Action and Notice. If Subscriber becomes aware of any actual or threatened activity prohibited by Section 0, Subscriber shall, and shall cause its Authorized Users to, immediately: (a) take all reasonable and lawful measures within their respective control that are necessary to stop the activity or threatened activity and to mitigate its effects (including, where applicable, by discontinuing and preventing any unauthorized access to the Services and Provider Materials and permanently erasing from their systems and destroying any data to which any of them have gained unauthorized access); and (b) notify Provider of any such actual or threatened activity.
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- 4.3 Data Backup. The Services do not replace the need for Subscriber to maintain regular backups or redundant data archives.
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5. SERVICE LEVELS

- 5.1 Service Levels. Subject to the terms and conditions of this Agreement, Provider will use commercially reasonable efforts to make the Services available for the Subscriber ninety-eight percent (98%) of the time measured over the course of each calendar month during the Term (each calendar month, a "Service Period"), excluding unavailability as a result of any of the Exceptions described below in this Section 5 (the "Availability Requirement") as follows:
- (i) Maintenance and service windows announced on our website at least five (5) calendar days in advance;
 - (ii) Any system, software, network or hardware failure occurring outside Commend's reasonable control or resulting from Force Majeure;

- (iii) Failure or errors caused by the Subscriber or third parties attributable to the Subscriber, in particular but not limited due to improper operation, failure to comply with technical specifications and/or requirements and conditions of use or the use of incompatible devices.
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6. SECURITY AND DATA PROTECTION

- 6.1 Subscriber Control and Responsibility. Subscriber has and will retain sole responsibility for: (a) all Subscriber Data, including its content and use; (b) all information, instructions, and materials provided by or on behalf of Subscriber or any Authorized User in connection with the Services; (c) Subscriber's information technology infrastructure, including computers, software, databases, electronic systems (including database management systems), and networks, whether operated directly by Subscriber or through the use of third-party services ("Subscriber Systems"); (d) the security and use of Subscriber's and its Authorized Users' Access Credentials; and (e) all access to and use of the Services and Provider Materials directly or indirectly by or through the Subscriber Systems or its or its Authorized Users' Access Credentials.
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- 6.2 Access and Security. Subscriber shall employ all physical, administrative, and technical controls, screening, and security procedures and other safeguards necessary to: (a) securely administer the distribution and use of all Access Credentials and protect against any unauthorized access to or use of the Services.
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- 6.3 Data Protection. Dealing professionally and diligently with all personal data is of the greatest importance for Provider. Provider complies with all applicable privacy laws and has implemented appropriate and state-of-the-art data security measures. Provider's privacy policy is posted on Provider's website at <https://symphony.commend.com/privacy-policy>.
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7. FEES AND PAYMENT

- 7.1 Fees. Subscriber shall pay all fees and charges as agreed separately between the Subscriber and the Commend Dealer ("**Fees**") directly to the Commend Dealer according to the terms of the agreement between Subscriber and the Commend Dealer. The Subscriber acknowledges that the consideration for Subscriber's subscription under this Agreement shall be paid to us directly by the Commend Dealer pursuant to the Reseller Agreement.
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8. CONFIDENTIALITY

- 8.1 Confidential Information. In connection with this Agreement each party (as the "**Disclosing Party**") may disclose or make available Confidential Information to the other party (as the "**Receiving Party**"). Subject to Section 0, "**Confidential Information**" means information in any form or medium (whether oral, written, electronic, or other) that the Disclosing Party considers confidential or proprietary,

including information consisting of or relating to the Disclosing Party's technology, trade secrets, know-how, business operations, plans, strategies, Subscribers, and pricing, and information with respect to which the Disclosing Party has contractual or other confidentiality obligations, in each case whether or not marked, designated, or otherwise identified as "confidential".

8.2 Exclusions. Confidential Information does not include information that (a) was rightfully known to the Receiving Party without restriction on use or disclosure prior to such information's being disclosed or made available to the Receiving Party in connection with this Agreement; (b) was or becomes generally known by the public other than by the Receiving Party's or any of its Representatives' noncompliance with this Agreement; (c) was or is received by the Receiving Party on a non-confidential basis from a third party that was not or is not, at the time of such receipt, under any obligation to maintain its confidentiality; or (d) was or is independently developed by the Receiving Party without reference to or use of any Confidential Information.

8.3 Protection of Confidential Information. As a condition to being provided with any disclosure of or access to Confidential Information, the Receiving Party shall (i) not access or use Confidential Information other than as necessary to exercise its rights or perform its obligations under and in accordance with this Agreement and (ii) except as may be permitted by and subject to its compliance with Section 0, not disclose or permit access to Confidential Information other than to its Representatives who need to know such Confidential Information for purposes of the Receiving Party's exercise of its rights or performance of its obligations under and in accordance with this Agreement and have been informed of the confidential nature of the Confidential Information and the Receiving Party's obligations under this Section 0. The Receiving Party shall safeguard the Confidential Information from unauthorized use, access, or disclosure using at least the degree of care it uses to protect its own sensitive information and in no event less than a reasonable degree of care; and promptly notify the Disclosing Party of any unauthorized use or disclosure of Confidential Information and take all reasonable steps to and to cooperate with Disclosing Party to prevent further unauthorized use or disclosure; and

8.4 Compelled Disclosures. If the Receiving Party or any of its Representatives is compelled by applicable Law to disclose any Confidential Information then, to the extent permitted by applicable Law, the Receiving Party shall: (a) promptly notify the Disclosing Party in writing of such requirement so that the Disclosing Party can seek a protective order or other remedy or waive its rights under Section 0; and (b) provide reasonable assistance to the Disclosing Party in opposing such disclosure or seeking a protective order or other limitations on disclosure. If the Disclosing Party waives compliance or, after providing the notice and assistance required under this Section 0, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose only that portion of the Confidential Information that the Receiving Party is legally required to disclose.

9. INTELLECTUAL PROPERTY RIGHTS

9.1 Provider Materials. All right, title, and interest in and to the Provider Materials, including all Intellectual Property Rights therein, are and will remain with Provider and, with respect to Third-Party Materials, if any, the applicable third-party providers own all right, title, and interest, including all Intellectual Property Rights, in and to the Third-Party Materials. Subscriber has no right, license, or authorization with respect to any of the Provider Materials except as expressly set forth in Section 0 or the applicable third-party license, in each case subject to Section 0. All other rights in and to the Provider Materials are expressly reserved by Provider. In furtherance of the foregoing, Subscriber hereby unconditionally and irrevocably grants to Provider an assignment of all right, title, and interest in and to the Resultant Data, including all Intellectual Property Rights relating thereto.

9.2 Subscriber Data. As between Subscriber and Provider, Subscriber is and will remain the sole and exclusive owner of all right, title, and interest in and to all Subscriber Data, including all Intellectual Property Rights relating thereto, subject to the rights and permissions granted herein. Subscriber hereby grants Provider a non-exclusive, royalty free, worldwide license to reproduce, and otherwise use the Subscriber Data as may be necessary for Provider to provide the Services to Subscriber.

10. REPRESENTATIONS AND WARRANTIES

10.1 Mutual Representations and Warranties. Each party represents and warrants to the other party that it is

- (a) it is duly organized, validly existing, and in good standing as a corporation or other entity under the Laws of the jurisdiction of its incorporation or other organization;
 - (b) it has the full right, power, and authority to enter into and perform its obligations and grant the rights, licenses, consents, and authorizations it grants or is required to grant under this Agreement;
 - (c) the execution of this Agreement by its representative whose signature is set forth at the end of this Agreement has been duly authorized by all necessary corporate or organizational action of such party; and
 - (d) when executed and delivered by both parties, this Agreement will constitute the legal, valid, and binding obligation of such party, enforceable against such party in accordance with its terms.
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10.2 Additional Provider Representations, Warranties, and Covenants. Provider represents, warrants, and covenants to Subscriber that Provider will perform the Services using personnel of required skill, experience, and qualifications and in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services and will devote adequate resources to meet its obligations under this Agreement.

10.3 Additional Subscriber Representations, Warranties, and Covenants. Subscriber represents, warrants, and covenants to Provider that Subscriber owns or otherwise has and will have the necessary rights and consents in and relating to the Subscriber Data so that, as received by Provider and Processed in accordance with this Agreement, they do not and will not infringe, misappropriate, or otherwise violate any Intellectual Property Rights of any third party or violate any applicable Law.

10.4 DISCLAIMER OF WARRANTIES. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN SECTION 0 AND SECTION 0, ALL SERVICES AND PROVIDER MATERIALS ARE PROVIDED "AS IS." PROVIDER SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE. WITHOUT LIMITING THE FOREGOING, PROVIDER MAKES NO WARRANTY OF ANY KIND THAT THE SERVICES OR DEVICE OR PROVIDER MATERIALS, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET SUBSCRIBER'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, NETWORK FAILURES, DELAY, ERROR, OR 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. ALL THIRD-PARTY MATERIALS ARE PROVIDED "AS IS" AND ANY REPRESENTATION OR WARRANTY OF OR CONCERNING ANY THIRD-PARTY MATERIALS IS STRICTLY BETWEEN SUBSCRIBER AND THE THIRD-PARTY OWNER OR DISTRIBUTOR OF THE THIRD-PARTY MATERIALS.

11. INDEMNIFICATION

11.1 Provider Indemnification. Provider shall indemnify, defend, and hold harmless Subscriber from and against any and all Losses incurred by Subscriber resulting from any Action by a third party (other than an Affiliate of Subscriber) that Subscriber's or an Authorized User's use of the Services (excluding Subscriber Data and Third-Party Materials) in accordance with this Agreement (including the specifications) infringes or misappropriates such third party's US Intellectual Property Rights/US patents, copyrights, or trade secrets in the Territory. The foregoing obligation does not apply to the extent that the alleged infringement arises from:

- (a) Third-Party Materials or Subscriber Data;
- (b) access to or use of the Provider Materials in combination with any hardware, system, software, network, or other materials or service not provided by Provider or specified for Subscriber's use in the Documentation, unless otherwise expressly permitted by Provider in writing;
- (c) modification of the Provider Materials other than: (i) by or on behalf of Provider; or (ii) with Provider's written approval in accordance with Provider's written specification; or
- (d) failure to timely implement any modifications, upgrades, replacements, or enhancements made available to Subscriber by or on behalf of Provider.

11.2 Subscriber Indemnification. Subscriber shall indemnify, defend, and hold harmless Provider from and against any and all Losses incurred by Provider resulting from any Action by a third party (other than an Affiliate of Provider) to the extent that such Losses arise out of or result from, or are alleged to arise out of or result from:

- (a) Subscriber Data, including any Processing of Subscriber Data by or on behalf of Provider in accordance with this Agreement and any other materials or information provided by or on behalf of Subscriber;
- (b) negligence or more culpable act or omission (including recklessness or willful misconduct) by Subscriber, any Authorized User, or any third party on behalf of Subscriber or any Authorized User, in connection with this Agreement; or
- (c) from any and all claims, losses, damages, fines, penalties, costs and expenses by or on behalf of Subscriber or any third party or user of the Services, relating to the Services, or the Device.

11.3 Mitigation. If any of the Services or Provider Materials are, or in Provider's opinion are likely to be, claimed to infringe, misappropriate, or otherwise violate any third-party Intellectual Property Right, or if Subscriber's or any Authorized User's use of the Services or Provider Materials is enjoined or threatened to be enjoined, Provider may, at its option and sole cost and expense:

- (a) obtain the right for Subscriber to continue to use the Services and Provider Materials materially as contemplated by this Agreement;
- (b) modify or replace the Services and Provider Materials, in whole or in part, to seek to make the Services and Provider Materials (as so modified or replaced) non-infringing, while providing materially equivalent features and functionality, in which case such modifications or replacements will constitute Services and Provider Materials, as applicable, under this Agreement; or
- (c) by written notice to Subscriber, terminate this Agreement with respect to all or part of the Services and Provider Materials, and require Subscriber to immediately cease any use of the Services and Provider Materials or any specified part or feature thereof. Provided that Subscriber is in compliance with its post-termination obligations set forth in Section 31.4, Provider shall reimburse Subscriber the pro-rata share (applied to both the time factor as well as Service component) of the annual Fee already paid for the then current term.

11.4 Sole Remedy. THIS SECTION 11 SETS FORTH SUBSCRIBER'S SOLE REMEDIES AND PROVIDER'S SOLE LIABILITY AND OBLIGATION FOR ANY ACTUAL, THREATENED, OR ALLEGED CLAIMS THAT THE SERVICES AND PROVIDER MATERIALS OR ANY SUBJECT MATTER OF THIS AGREEMENT INFRINGES, MISAPPROPRIATES, OR OTHERWISE VIOLATES ANY INTELLECTUAL PROPERTY RIGHTS OF ANY THIRD PARTY.

12. LIMITATIONS OF LIABILITY

12.1 Provider disclaims any and all liability for any delay or failure to provide the Services, at any time or from time to time, or any interruption or degradation of voice quality that is caused by any of the following: An act or omission of an underlying carrier, service provider, vendor or other third party; equipment, network or facility failure or shortage; equipment, network or facility upgrade or modification; force majeure events as defined in Section 14.9 of this Agreement; equipment or facility relocation; service. Equipment, network, or facility failure caused by the loss of power to Subscriber; outage of, or blocking of ports by Subscriber's ISP or broadband service provider or other impediment to usage of the Service caused by any third party; any act or omissions by Subscriber or any person using the Services or Device provided to Subscriber; or any other cause that is beyond Provider's control. Including without limitation, a failure or defect in any Device, the failure of an incoming or outgoing communication, the inability of communications to be connected, completed, or forwarded.

12.2 **EXCLUSION OF DAMAGES.** EXCEPT AS OTHERWISE PROVIDED IN SECTION 12.3, IN NO EVENT WILL PROVIDER BE LIABLE UNDER OR IN CONNECTION WITH THIS AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE, FOR ANY: (a) IMPAIRMENT, INABILITY TO USE OR LOSS, INTERRUPTION OR DELAY OF THE SERVICES AND/OR DEVICE; (c) LOSS, DAMAGE, CORRUPTION OR RECOVERY OF DATA, OR BREACH OF DATA OR SYSTEM SECURITY; (d) COST OF REPLACEMENT GOODS OR SERVICES; (e) LOSS OF GOODWILL OR REPUTATION; OR (f) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED, OR PUNITIVE DAMAGES, REGARDLESS OF WHETHER SUCH PERSONS WERE ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE. IN NO EVENT WILL THE AGGREGATE LIABILITY OF PROVIDER ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT OR TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR ANY OTHER LEGAL OR EQUITABLE THEORY, EXCEED 1 TIMES THE TOTAL AMOUNTS PAID TO PROVIDER UNDER THIS AGREEMENT IN THE 12 MONTHS PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM. THE FOREGOING LIMITATIONS APPLY EVEN IF ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE.

12.3 **Exceptions.** The exclusions and limitations in Section 0 and Section 12.2 do not apply to Provider's obligations under Section 11 (Indemnification) or liability for Provider's gross negligence or willful misconduct provided however that the Cap on Monetary Liability under Section 12.2 shall apply.

13. TERM AND TERMINATION

13.1 **Term.** The term of this Agreement commences as of the Effective Date and shall continue for as long as a Subscription Term is in effect (the "Term"). On each anniversary of a Subscription Term, this Agreement and the associated Purchase Order shall renew automatically for successive periods equal to the initial Subscription Term, unless either the Subscriber or the Commend Dealer provides the other with written

notice of termination at least thirty (30) days prior to such anniversary or unless terminated pursuant to Section 13.2 below.

13.2 Termination. In addition to any other express termination right set forth elsewhere in this Agreement:

- a) Provider may terminate this Agreement, effective on written notice to Subscriber, if: (a) Provider is notified by the Commend Dealer of Subscriber's failure to pay amounts due to the Commend Dealer with respect to the subscription to the Service; or (b) the Commend Dealer fails to pay any amounts due to Provider pursuant to the Reseller Agreement with respect to Subscriber's subscription to a Service, or (c) breaches any of its obligations under this Agreement, including but limited to Sections 3.1 and 8. Subscriber acknowledges and consents to these termination rights and acknowledges and agrees that Provider shall have no liability to Subscriber of any kind with respect to any such suspension or termination. Subscriber's sole recourse with respect to any such suspension or termination shall be against the Commend Dealer;
- b) either party may terminate this Agreement, effective on written notice to the other party, if the other party materially breaches this Agreement, and such breach: (i) is incapable of cure; or (ii) being capable of cure, remains uncured 30 days after the non-breaching party provides the breaching party with written notice of such breach; and
- c) either party may terminate this Agreement, effective immediately upon written notice to the other party, if the other party: (i) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due; (ii) files or has filed against it, a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency Law; (iii) makes or seeks to make a general assignment for the benefit of its creditors; or (iv) applies for or has appointed a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

13.2 Effect of Termination or Expiration. Upon any expiration or termination of this Agreement, except as expressly otherwise provided in this Agreement:

- (a) all rights, licenses, consents, and authorizations granted by either party to the other hereunder will immediately terminate, provided however that all rights, title and interest in and to the Resultant Data granted pursuant to Section 9.1 shall remain in effect indefinitely;
- (b) Provider may disable all Subscriber and Authorized User access to the Provider Materials;
- (c) Subscriber shall immediately discontinue use of Provider IP and, without limiting Subscriber's obligations under Section 8, Subscriber shall delete, destroy, or return all copies of the Provider IP and certify in writing to the Provider that the Provider IP has been deleted or destroyed. No expiration or termination will affect Subscriber's obligation to pay all Fees

that may have become due before such expiration or termination, or entitle Subscriber to any refund.

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- 13.3 Surviving Terms. The provisions set forth in the following sections, and any other right or obligation of the parties in this Agreement that, by its nature, should survive termination or expiration of this Agreement, will survive any expiration or termination of this Agreement: Section 0, Section 7, Section 0, Section 10, Section 11, Section 0, this Section 0, and Section **Error! Reference source not found.**
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14. MISCELLANEOUS

- 14.1 Relationship of the Parties. The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.
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- 14.2 Notices. Any notice, request, consent, claim, demand, waiver, or other communications under this Agreement have legal effect only if in writing and addressed to a party as follows (or to such other address or such other person that such party may designate from time to time in accordance with this Section 14.2):

If to Provider: Commend, Inc.
63 Ramapo Valley Road, Suite 201
Mahwah, New Jersey 07430
Email: office@commendusa.com
Attention: Tom Reilly, President

If to Subscriber: Provider may give notice under this Agreement by means of a general notice on the Commend portal for the Services, and notices specific to Subscriber by electronic mail to Subscriber's email address on record in Commends account information or by written communication to Subscriber's address on record in Commend's account information in accordance with the provision below.

Notices sent in accordance with this Section 14.2 will be deemed effectively given: (a) when received, if delivered by hand, with signed confirmation of receipt; (b) when received, if sent by a nationally recognized overnight courier, signature required; (c) when sent, if by facsimile or email, (in each case, with confirmation of transmission), if sent during the addressee's normal business hours, and on the next business day, if sent after the addressee's normal business hours; and (d) on the 4th day after the date mailed by certified or registered mail, return receipt requested, postage prepaid.

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- 14.3 Entire Agreement. This Agreement, together with Provider's Terms and any other documents incorporated herein by reference, constitutes the sole and entire agreement of the parties with respect to the subject matter of this Agreement and supersedes all prior agreements with respect to such subject matter. In the event of any inconsistency between this Agreement, the Terms and the Exhibits hereto, the following order of precedence governs (a) first, this Agreement, (b) second, the
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exhibits, schedules, attachments, and appendices to this Agreement as of the Effective Date; (c) the Terms; and (d) any other documents incorporated herein by reference.

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- 14.4 Assignment. Subscriber shall not assign any of its rights or delegate any of its obligations hereunder, in each case whether voluntarily, involuntarily, by operation of law, or otherwise, without Provider's prior written consent, which consent shall not be unreasonably withheld. Any purported assignment or delegation in violation of this Section will be void. This Agreement is binding upon and inures to the benefit of the parties hereto and their respective successors and permitted assigns.
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- 14.5 Force Majeure. In no event shall either Party be liable to the other Party, or be deemed to have breached this Agreement, for any failure or delay in performing its obligations under this Agreement (except for any obligations to make payments), if and to the extent such failure or delay is caused by any circumstances beyond such Party's reasonable control, including but not limited to acts of God, flood, fire, earthquake, explosion, war, terrorism, invasion, riot or other civil unrest, strikes, labor stoppages or slowdowns or other industrial disturbances, or passage of law or any action taken by a governmental or public authority, including imposing an embargo.
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- 14.6 No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.
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- 14.7 Amendment and Modification; Waiver. No amendment to or modification of or rescission, termination, or discharge of this Agreement is effective unless it is in writing, identified as an amendment to or rescission, termination, or discharge of this Agreement and signed by an authorized representative of each party. 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. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement will 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.
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- 14.8 Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.
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- 14.9 Governing Law; Submission to Jurisdiction. This Agreement is governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the State of New York. Any legal suit, action, or proceeding arising out of or related to this Agreement or the licenses granted hereunder will be instituted exclusively in the federal courts of the United States or the courts of the State of New York in each case located in the city of New York City and County of New York, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding. Service of process, summons, notice, or other document by mail to such party's address set forth herein shall be effective service of process for any suit, action, or other proceeding brought in any such court.
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- 14.10 Waiver of Jury Trial. Each 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 or the transactions contemplated hereby.
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- 14.11 Equitable Relief. Each party acknowledges and agrees that a breach or threatened breach by such party of any of its obligations under Section 8 or, in the case of Subscriber, Section 0, Section 0, or Section 0, would cause the other party irreparable harm for which monetary damages would not be an adequate remedy and that, in the event of such breach or threatened breach, the other party will be entitled to equitable relief, including a restraining order, an injunction, specific performance, and any other relief that may be available from any court, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity, or otherwise.
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- 14.12 Export Regulation. Subscriber shall comply with all applicable federal laws, regulations, and rules, and complete all required undertakings (including obtaining any necessary export license or other governmental approval), that prohibit or restrict the export or re-export of the Services or any Subscriber Data outside the US.
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- 14.13 Electronic Signatures. Counterparts. Each party agrees that the electronic signatures, whether digital or encrypted, of the parties included in this Agreement are intended to authenticate this writing and to have the same force and effect as manual signatures. Electronic signature means any electronic sound, symbol, or process attached to or logically associated with a record and executed and adopted by a party with the intent to sign such record, including facsimile or email electronic signatures. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.
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EXHIBIT A – SUPPLEMENTAL PRODUCT SPECIFIC TERMS

EMERGENCY SERVICES – 911 DIALING FEATURE

This is an exhibit to the *Commend Software as a Service Agreement* (the "Agreement"). This Exhibit C contains additional provisions for Commend's 911 feature which would apply to you if you purchased Commend's 911 emergency services feature.

1. Non-Availability of Traditional 911 or E911 Dialing Service. The Service, as defined in the Agreement, does support traditional 911 or E911 access to emergency services. Provider offers a feature known as "911 Dialing" which is a limited emergency calling service available only on certified Devices or Equipment. The 911 Dialing feature may not work at all when used in conjunction with a [Soft Phone, Virtual Numbers or all provided Subscriber Premise Equipment]. Provider's 911 Dialing feature is not automatic; Subscriber must separately take affirmative steps, as described in the Documentation or on Provider's website, to register and to activate the 911 Dialing feature. Subscriber must do this for each intercom station that will be provided under this Agreement. The 911 Dialing feature of the Service is different in a number of important ways from traditional 911 or E911 service as described in Provider's Documentation or Provider's website page.
2. How Emergency Personnel are contacted. Provider contracts with a third party to use the address of Subscriber's registered location to determine the nearest emergency response center and then forward any emergency placed from the device to call to a general number at that center. When the center receives the emergency call, the operator will not have Subscriber's address and may not have Subscriber's phone number. Subscriber must therefore provide the address and phone number in order to get help. Some local emergency response centers may decide not to have their general numbers answered by live operators 24 hours a day. If Provider learns that this is the case, Provider will send the call instead to a national emergency calling center and a trained agent will contact an emergency center near Subscriber to dispatch help. Subscriber hereby authorizes Provider to disclose Subscriber's name and address to third-party service providers, including, without limitation, call routers, call centers and public service answering points, for the purpose of dispatching emergency services personnel to Subscriber's registered location.
3. Service Outages. Subscriber might experience service outages due to network or power failure, suspensions, or terminations of the Services, including but not limited to late payments or termination of this Agreement. A service outage might also occur if Subscriber's ISP or broadband provider or other third party intentionally or inadvertently blocks the ports over which the Service is provided or otherwise impede the usage of the Service. If there is a Service outage for any reason, including but not limited to the reasons listed above, such outage will prevent all Service, including 911 Dialing, from functioning. Such outages may occur for a variety of reasons, including, but not limited to, those reasons described elsewhere in this Agreement. In that event, the Service, including the 911 Dialing feature, may not function. Subscriber acknowledges that Provider is not responsible for the blocking of ports by its ISP or broadband provider or any other impediment to your usage of the Service, and any loss of service, including 911 Dialing, which may result. In the event Subscriber loses service as a result of blocking of ports or any other impediment to Subscriber's usage of the Service, Subscriber will continue to be responsible for payment of the Service charges unless and until Subscriber terminates the Service in accordance with this Agreement.

ELECTRONIC CONTRACTING

Your use of the Service includes the ability to enter into agreements and/or to make transactions electronically. YOU ACKNOWLEDGE THAT YOUR ELECTRONIC SUBMISSIONS CONSTITUTE YOUR AGREEMENT AND INTENT TO BE BOUND BY AND TO PAY FOR SUCH AGREEMENTS AND TRANSACTIONS. YOUR AGREEMENT AND INTENT TO BE BOUND BY ELECTRONIC SUBMISSIONS APPLIES TO ALL RECORDS RELATING TO ALL TRANSACTIONS YOU ENTER INTO ON THIS SERVICE, INCLUDING NOTICES OF CANCELLATION, POLICIES, CONTRACTS, AND APPLICATIONS. In order to access and retain your electronic records, you may be required to have certain hardware and software, which are your sole responsibility.