

These Customer Terms and Conditions (“**Customer Terms**”) describe the Customer’s rights and responsibilities when using Fresh Relevance Services (defined below). These Customer Terms, any Order Form(s) (defined below), and any other documents referenced in these Customer Terms, as applicable, form a legally binding “Agreement” between Customer and the relevant Fresh Relevance entity (each as set out below). If any additional terms in the Order Form have been agreed between Fresh Relevance and the Customer to apply to the Customer, those terms are also incorporated herein by reference and form part of the Agreement.

## Meaning of Customer and Fresh Relevance

For the purposes of the Agreement, including these Customer Terms, the “**Customer**” is the organisation the individual agreeing to the Agreement represents, as stated on the Order Form. If you purchase Fresh Relevance Services and/or submit an Order Form for Fresh Relevance Services, invite Users (as defined at the end of these Customer Terms) to access the Fresh Relevance Services, or use or allow the use of the Fresh Relevance Services following notification of these Customer Terms, you acknowledge your understanding of the then-current Agreement and agree to the Agreement on behalf of Customer. You represent and warrant that you have the authority to bind the Customer to this Agreement. For the purposes of the Agreement, including these Customer Terms, the Fresh Relevance entity that is a party to this Agreement shall be the Fresh Relevance entity which issues and executed the Order Form.

## Customer Terms

### **1. The System and Services; Fresh Relevance Responsibilities**

- 1.1. License.** Fresh Relevance hereby grants to Customer and authorised Affiliates of the Customer (if applicable as noted on the Order Form) a personal, non-exclusive, non-transferable, and non-sublicensable license for Customer and Users to use the System and the Services solely for the Permitted Purpose, during the Term in accordance with the Documentation and this Agreement.
- 1.2. System and Services.** Fresh Relevance will, subject to these Customer Terms (a) provide Support Services as necessary to set up and implement the System for the online store(s) specified on the Order Form, (b) make the System and System Services available to Customer in accordance with the Order Form and the Documentation and in a manner consistent with generally accepted **industry** standards, (c) provide Support Services to Customer and apply upgrades to the System as Fresh Relevance may deem advisable, and (d) provide a contact for Customer's technical and support questions relating to the System.
- 1.3. Service Levels.** Fresh Relevance will use commercially reasonable efforts to make the Services available as described in the Fresh Relevance Service Levels Description at Addendum A.
- 1.4. System Defects.** Without limiting the generality of Clause 10.5, Fresh Relevance will use commercially reasonable efforts to resolve any defect in the System identified by Customer or otherwise brought to Fresh Relevance’s attention.

### **2. Customer’s Use of the Services and Restrictions**

**1.1 Customer’s Access and Use.** Customer may access the System and use the Services during the Term as authorized pursuant to Clause 1.

- 2.1. Customer Responsibilities.** Customer will (a) be responsible for Customer and Users’ use of the Services in accordance with the terms of the Agreement; any act or omission or breach of this Agreement by User shall be deemed to a breach by the Customer (b) be responsible for the accuracy, quality and legality of Customer Materials, (c) prevent and will ensure Users prevent unauthorized access to or use of the System and notify Fresh Relevance promptly of any unauthorized access or use, (d) use and ensure Users use the System and Services only in accordance with the usage and access restrictions set forth below, the Documentation, and Applicable Law, and (e) comply with and ensure Users comply with the terms of service of any Other Services. If Fresh Relevance provides Customer with credentials to enable access to the System, or if Customer accesses the System using third-party credentials, Customer shall ensure that the credentials are kept confidential, shall use all reasonable efforts to ensure that no unauthorized person could access the System using such credentials, and shall immediately inform Fresh Relevance if it has any reason to believe that the confidentiality of such credentials has been compromised.
- 2.2. Usage Restrictions.** Customer and Users shall not (a) attempt to access the object code or source code of the System or its related systems or networks, (b) sell, resell, license, sublicense, distribute, rent or lease any Service, or include any Service in a service bureau or outsourcing offering, or otherwise make the System or Services available to, or use the System or Services for the benefit of, anyone other than Customer or its Shoppers, (c) use the System to store or transmit infringing, libellous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use the System to store or transmit any passwords, social security numbers, passport numbers, financial account numbers, or credit card information, (e) use the System to store or transmit Viruses or malicious code, (f) interfere with or disrupt the integrity or performance of the System or third-party data contained therein, (g) copy, frame or mirror the System or any part, feature, function or user interface thereof, (h) access the System or Services in order to build competitive software or services, (i) attempt to recompile, reverse engineer or disassemble the System or otherwise create or enable the creation of derivative works, modifications, or adaptations of the System, (j) interfere with the functionality or operation of the System or the use of the

System by third parties, or (k) use the System or Services in connection with any fraudulent or harmful purpose or activity, or otherwise in a manner that violates any Applicable Law.

**2.3. Export Restrictions.** Each party will comply with all laws and regulations applicable to it, including U.S. export control laws. Neither party will have any liability to the other for any non-performance of their obligations under this Agreement to the extent that the non-performance is mandated by Applicable Law. Each party represents and warrants to the other that neither it nor its Affiliates, nor any of its or their users, officers or directors, are persons, entities or organisations with whom the other party is prohibited from dealing (including provision of software, products or services) by virtue of any Applicable Law, regulation, or executive order, including US export control laws, and names appearing on the U.S. Department of the Treasury's Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List.

### 3. Other Services

**3.1. Acquisition of Other Services.** Fresh Relevance or third parties may make Other Services available to Customer. Any acquisition by Customer of Other Services, and any exchange of data between Customer and any Other Services, is solely between Customer and the applicable Other Services. Fresh Relevance does not warrant or support Other Services or other non-Fresh Relevance products or services, whether or not they are designated by Fresh Relevance as "certified" or otherwise, except as specified in an Order Form.

**3.2. Other Services and Customer's Data.** If Customer installs or enables any Other Services for use with the Services, Customer grants Fresh Relevance permission to allow the provider of such Other Services to access Personal Data provided by Customer as required for the interoperation of such Other Services with the Service. Fresh Relevance is not responsible for any disclosure, modification or deletion of Customer Personal Data resulting from access by Other Services. For the avoidance of doubt the choice to purchase, install, enable or otherwise use the Other Services is solely decided by the Customer. Fresh Relevance's System Services, Support Services, and Professional Services are not contingent on the Other Services. Accordingly, Fresh Relevance does not independently elect to supply Other Services and does not decide or control the Customer Personal Data which is transferred or otherwise processed (as defined in the GDPR) by the Other Services. If the Other Services process Customer Personal Data, the Other Services are not sub-processors (as defined in the GDPR) of Fresh Relevance but are instead processors (or sub-processors, as applicable) of the Customer or the Customer Affiliate that is the Data Controller in respect of that Customer Personal Data.

**3.3. Integration with Other Services.** The Services may contain features designed to interoperate with Other Services. To use such features, Customer may be required to obtain access to Other Services from their providers and may be required to grant Fresh Relevance access to Customer's account(s) on such Other Services. If a provider of Other Services ceases to make the Other Services available for interoperation with the corresponding Service features on reasonable terms, Fresh Relevance may cease providing those Service features without entitling Customer to any refund, credit or other compensation.

### 4. Customer Materials

**4.1. Ownership.** All Intellectual Property Rights in Customer Materials will remain, as between the parties, the property of Customer.

**4.2. License.** Customer grants to Fresh Relevance a non-exclusive license to copy, store, modify, reproduce, distribute, display, disclose and otherwise use the Customer Materials on the System solely for the purposes of operating the System, providing the Services, fulfilling its obligations under this Agreement, and exercising its rights under this Agreement.

**4.3. Representation and Warranty.** Customer represents and warrants to Fresh Relevance that the Customer Materials, and their use by Fresh Relevance in accordance with the terms of this Agreement, will not: (a) breach any Applicable Laws (b) infringe any person's Intellectual Property Rights or other legal rights, or (c) give rise to any cause of action against Fresh Relevance, its Affiliates or any other third party engaged by or on behalf of Fresh Relevance.

**4.4. Customer Generated Content.** Customer grants to Fresh Relevance, solely to the extent necessary to provide the Services hereunder, a worldwide, irrevocable, non-exclusive, royalty-free license to use, reproduce, adapt, publish, translate and distribute Customer's content in any existing or future media, including but not limited to, any Customer Materials, text, images, audio material, video material, and audio-visual material that is submitted to or made available to Fresh Relevance, and to sublicense these rights. Customer will not submit any Customer Material to the System that is illegal or unlawful, or that is or has been the subject of any threatened or actual legal proceedings. Customer shall not infringe on any third party's legal rights and shall hold Fresh Relevance harmless for any damages or proceedings related to any future infringement. Fresh Relevance reserves the right to edit or remove any Customer Materials or Customer generated content that is submitted to the System, stored on Fresh Relevance's servers, or hosted or published by the Fresh Relevance System. Notwithstanding the foregoing, Fresh Relevance does not assume any responsibility for monitoring Customer Materials or Customer generated content submitted or published on the Fresh Relevance System or website.

**4.5. Removal of Content and Other Services.** If Fresh Relevance is required by a licensor to remove content or receives information that content provided to Customer may violate Applicable Law or third-party rights, Fresh Relevance may so notify Customer and in such event, Customer will promptly disable or modify such Other Services to resolve the potential violation. If Customer

does not take required action in accordance with this Clause 4.5, Fresh Relevance may disable the System or Services until the potential violation is resolved.

**4.6. Breach.** In accordance with the above terms in this Clause 4, Fresh Relevance reserves the right to disable Customer's credentials, Customer's use of the System or Services, or to restrict access to all or part of the System at its discretion, to block computers using Customer's IP addresses from accessing the System or Services, and bring legal action against Customer, if it reasonably believes that there has been a violation or breach of any of such terms and conditions, for which no notice shall be required to be given by Fresh Relevance.

## 5. Fees, Payments and Taxes

**5.1. Fees.** Customer will pay the Fees specified in the Order Form or, if different, the Fresh Relevance commercial list prices in effect at the start of each Renewal Term. Payment obligations are non-cancellable, fees paid are non-refundable, and quantities purchased cannot be decreased during the relevant subscription term. Fresh Relevance may change its Fees schedules charged generally to its customers by posting new Fees schedules on its website, but such changed Fees schedules shall only apply to Customer at the beginning of the next Renewal Term.

**5.2. Invoicing and Payment.** Customer will provide Fresh Relevance with valid and current credit card information or banking particulars sufficient to process ACH charges, will notify Fresh Relevance of any changes to such information, and hereby authorizes Fresh Relevance to charge such credit card or process such ACH charges for all Fees specified in all Order Forms, for the Initial Term and any Renewal Terms.

**5.3. Form of Payment.** Customer shall pay Fresh Relevance using such payment details as are set out on the Order Form or as Fresh Relevance may notify Customer from time to time.

**5.4. Taxes.** Customer will be responsible for any applicable sales, value-added, use and similar taxes, together with all customs and import duties, and similar levies and impositions ("**Taxes**") payable with respect to its acquisition of Services, or otherwise arising out of or in connection with this Agreement, other than taxes based upon Fresh Relevance's personal property ownership or net income. Unless expressly specified otherwise in Order Form, all Fees, rates and estimates exclude Taxes. If Customer has tax-exempt status, Customer will provide written evidence of such status with its purchase orders or upon request by Fresh Relevance.

**5.5. Late Payments.** Any undisputed amount not paid when due will be subject to interest payable equal to an annual percentage rate of 1.5% on the unpaid balance per month or the highest rate permitted by Applicable Law, whichever is less, determined and compounded monthly from the date due until the date paid. Customer will reimburse any costs or expenses (including, but not limited to, collection agency fees, reasonable legal' fees and court costs) incurred by Fresh Relevance to collect any amount that is not paid when due. In the event of default in the payment of any undisputed invoices, installments or interest for a period in excess of sixty (60) days past their due date, Fresh Relevance may, without notice or demand, declare the entire principal sum payable during the Term under all outstanding Order Forms subject to this Agreement immediately due and payable. Amounts due from Customer under the Agreement may not be withheld or offset by Customer for any reason.

## 6. Proprietary Rights

**6.1. Fresh Relevance's Intellectual Property.** Subject to the limited rights expressly granted in this Agreement, Fresh Relevance reserves all rights, title and interest, including all Intellectual Property Rights, in and to the System and Services, and Fresh Relevance shall own all rights, title and interest, including all Intellectual Property Rights, in and to any improvements to the System or Services, including those relating to any new programs, upgrades, modifications, refinements or enhancements developed by or for Fresh Relevance in connection with providing the System or Services to Customer, even if such improvements result from Customer's request or suggestion. To the extent, if any, that ownership in such improvements does not automatically vest in Fresh Relevance by virtue of this Agreement or otherwise, Customer hereby transfers and assigns to Fresh Relevance all rights, title, and interest that Customer may have in and to such improvements.

**6.2. Customer's Intellectual Property.** As between Fresh Relevance and Customer, Customer exclusively own all rights, title and interest in and to all Customer Materials, and all content created by Customer, or by Fresh Relevance for Customer, during performance of the Services, including email templates, newsletters, distribution lists, links, images, graphs and photos ("**Work Product**"), shall be the owned exclusively by Customer Fresh Relevance will not use the same Work Product created for Customer under this Agreement for another customer; provided, however, that Fresh Relevance shall not be restricted from using the same functionality, format, code, design, concepts, workflows, integrations or other ideas represented in the Work Product.

**6.3. Feedback.** If Customer provides any feedback to Fresh Relevance concerning the functionality and performance of the System or Services (including identifying issues, errors, potential issues or errors and improvements) (the "**Feedback**"). Customer hereby assigns to Fresh Relevance all right, title, and interest in and to such Feedback, and Fresh Relevance is free to use that Feedback without payment or restriction and it shall be deemed to be a derivative work of the System or Services. Feedback expressly excludes Customer Materials.

**6.4. Federal Government End Use Provisions.** Fresh Relevance provides the Services, including access to the System, solely for the end use of the Customer named in an Order Form. This customary commercial license is provided in accordance with FAR 12.211 (Technical Data) and FAR 12.212 (Software) and, for Department of Defense transactions, DFAR 252.227-7015 (Technical Data – Commercial Items) and DFAR 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation). If a government agency has a need for rights not granted under these terms, it must negotiate with Fresh Relevance to determine

if there are acceptable terms for granting those rights, and any use modification, reproduction, release, performance, display or disclosure of such commercial software or commercial software documentation by the U.S. Government will be governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the terms of this Agreement.

## 7. Data Privacy and Security

**7.1.** Customer represents and warrants that its use of the Services (including Users' use) will comply with Applicable Laws, the rules of the Federal Trade Commission, HIPAA, the Children Online Privacy Protection Act.

**7.2.** The Customer is responsible for deciding what information and data is to be collected from individuals in connection with the provision and use of the System. Fresh Relevance's role is limited to collecting and using that information and data on the Customer's behalf. The Agreement, the Documentation and the Customer and Users' use of the functionality and features constitute the Customer's instructions to Fresh Relevance regarding collection and use by Fresh Relevance of the information and data.

**7.3.** If the Customer processes any personal data of anyone located in the European Economic Area, the United Kingdom, or Switzerland (collectively, the "EEA"), Customer agrees, represents and warrants (as applicable) to Fresh Relevance that it will comply at all times with EU Data Protection Law and that:

**7.3.1.** Customer will clearly post, maintain, and abide by a publicly accessible privacy notice and any other information required on the digital properties from which the underlying data is collected that (a) satisfies the requirements of applicable data protection laws, and (b) describes your use of the Services. Customer will provide and obtain all notices and obtain all necessary consents required by applicable data protection laws to enable Fresh Relevance to deploy cookies and similar tracking technologies (like web beacons or pixels) lawfully collect data from the devices of the individuals from whom the data is to be collected through use of the Services;

**7.3.2.** Customer will obtain and maintain all necessary permissions and valid consents required to lawfully transfer data to Fresh Relevance and to enable such data to be lawfully collected, processed, and shared by Fresh Relevance for the purposes of providing the Services or as otherwise directed by you.

**7.3.3.** Customer is subject to Fresh Relevance's Data Processing Addendum ("DPA") available here [https://www.freshrelevance.com/images/uploads/blog/GDPR\\_Data\\_Processing\\_Addendum\\_\(1\).pdf](https://www.freshrelevance.com/images/uploads/blog/GDPR_Data_Processing_Addendum_(1).pdf) which will apply when and to the extent Fresh Relevance processes Customer Personal Data protected by EU Data Protection Law. The DPA sets out Fresh Relevance's obligations with respect to data protection and security when processing such Customer Personal Data in connection with the Service and forms part of the Agreement.

## 7.4. Location of Processing

**7.4.1.** By utilising the Services, Customer consents, on behalf of Customer and Customer's Shoppers (and represents that Customer has the authority to consent on behalf of Customer's Shoppers) to the Processing of Personal Data, pursuant to these Customer Terms within the United States, the European Economic Area, and in other countries and territories.

**7.4.2.** Personal Data provided by Customer is currently hosted by Fresh Relevance or its authorized service partners in data centres located in the United States and the European Economic Area Fresh Relevance may (subject to any additional terms in the DPA to the extent applicable and always subject to Fresh Relevance's compliance with Applicable Data Protection Law), may host Personal Data provided to Fresh Relevance in connection with use of the Service in data centers located outside the European Economic Area or the United States.

**7.5. Fresh Relevance Rights to Retain Aggregate Data.** Fresh Relevance may use de-identified, anonymized, aggregated data derived from Customer's use of the System or the Services hereunder ("**Aggregate Data**") to derive anonymous statistical information, usage data, and data about the functionality of the System and Services, and for any other lawful business purpose, provided such data cannot be used to identify Customer, or any Shoppers. Fresh Relevance will be the owner of all right, title and interest in and to Aggregate Data.

## 8. Confidentiality

**8.1.** In these Customer Terms, "**Confidential Information**" means all confidential information disclosed by or otherwise obtained from a party ("**Disclosing Party**") to or by the other party ("**Receiving Party**"), whether orally, visually 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. Customer's Confidential Information includes Customer Materials. Fresh Relevance's Confidential Information includes the System and Services and the product of all Services and Fresh Relevance's financial, security, architectural, and similar information. "Confidential Information" of each party shall include the terms and conditions of the Agreement as well as business and marketing plans, technology and technical information, product plans and designs, and business processes disclosed by or on behalf of such party.

**8.2.** Each party agrees to maintain Confidential Information in confidence and not to disclose it or any portion of it, except to its and its Affiliates' employees, consultants and professional advisors who have a need to know such Confidential Information and are bound by obligations of confidentiality similar to those herein, for a period of five (5) years after the expiration or termination

of the Agreement, using the same care and discretion to avoid disclosure, publication, or dissemination of the Confidential Information as it uses with its own confidential or proprietary information, but in no event less than reasonable care.

**8.3.** Notwithstanding the foregoing, neither party shall have liability to the other with regard to any Confidential Information that is required to be disclosed by law or court order, provided, that the Receiving Party shall provide reasonable advance notice to enable the Disclosing Party to seek a protective order or otherwise prevent such disclosure. If the Receiving Party is compelled by law to disclose the Disclosing Party's Confidential Information as part of a civil proceeding to which the Disclosing Party is a party, and the Disclosing Party is not contesting the disclosure, the Disclosing Party will reimburse the Receiving Party for its reasonable cost of compiling and providing secure access to such Confidential Information. Fresh Relevance may also access or disclose information about Customer or Customer's Shoppers, including Personal Data, in order to (i) comply with Applicable Law or respond to lawful requests or legal process, (ii) protect Fresh Relevance's or its customers' or partners' rights or property, including enforcement of this Agreement, or (iii) act on a good faith belief that such disclosure is necessary to protect personal safety.

**8.4.** Injunctive Relief. In the event of a breach or threatened or attempted breach of the Receiving Party's obligations with respect to Confidential Information, the Disclosing Party may have no adequate remedy in money or damages and therefore may immediately seek an injunction against such breach.

## **9. Term; Termination; Default; Remedies.**

**9.1. Term.** This Agreement shall commence on the Effective Date, shall continue in full force and effect for the Initial Term (as specified on the Order Form) and shall automatically renew at the end of the Initial Term and each Renewal Term for an additional one-year period (each a "**Renewal Term**"), unless either party gives the other party a written termination notice at least thirty (30) days before expiration of the then current Initial Term or Renewal Term.

**9.2. Default.** Each of the following shall constitute a default: (a) Customer's failure to pay any sum due in accordance with the terms in this Agreement, (b) either party's failure to perform any of its material obligations in this Agreement, or (c) a representation or warranty of a party is materially false or misleading when made.

**9.3. Termination.** Either party may terminate this Agreement immediately by giving written notice to the other party if (a) the other party commits any material breach of any term of the this Agreement, and (i) the breach is not remediable, or (ii) the breach is remediable, but the other party fails to remedy the breach within thirty (30) days of receipt of a written notice requiring it to do so, (b) the other party (i) is dissolved, (ii) ceases to conduct all (or substantially all) of its business, (iii) fails to make timely payments or fails to pay the full amount when due, (iv) is or becomes insolvent or is declared insolvent, or (v) convenes a meeting or makes or proposes to make any arrangement or composition with its creditors, or (c) the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

**9.4. Consequences Termination.** Upon termination of this Agreement:

**9.4.1.** Customer will pay to Fresh Relevance any fees or other amounts that have accrued prior to the effective date of the termination pursuant to each such Order Form, including, without limitation, any unpaid fees for the unused portion of the Services.

**9.4.2.** Each Party agrees to promptly delete Confidential Information of the other Party from its systems subject to each party's customary backup and archival processes. Without limiting the foregoing, a party may retain copies of Confidential Information to the extent required to comply with Applicable Laws. Such Confidential Information, as applicable, will remain subject to the disclosure and use restrictions herein but provided that Fresh Relevance shall have no obligation to maintain Customer Materials after termination, except as may be required by law.

**9.4.3.** All licences and rights granted to the Customer and Users under this licence, including the right to use the Services, shall immediately cease.

**9.4.4.** except as expressly set forth in these Customer Terms, any and all liabilities accrued prior to the effective date of the termination will survive,

**9.4.5.** The obligations under Clauses 5.5, 6, 7, 8, 9.4, 10, 11, 12, 13,14,16.6, 16.8, 16.10 and any other provision that by its nature is intended to survive, shall survive the termination or expiration of this Agreement.

## **10. Representations and Warranties**

**10.1. Mutual Representations and Warranties.** Each party represents that it has the legal power to enter into this Agreement, and that, when executed and delivered, this Agreement will constitute the legal, valid and binding obligation of such party, enforceable in accordance with its terms and conditions.

**10.2. Customer Representations and Warranties.** In addition to warranties that Customer has made elsewhere in this Agreement, Customer represents and warrants that it owns all Customer Materials or otherwise has the legal right to have them uploaded onto and maintained on the System, that the Customer Materials do not and will not infringe Intellectual Property Rights of any other party, and that the Customer Materials do not and will not violate Applicable Law.

**10.3. Fresh Relevance Representations and Warranties.** In addition to warranties that Customer has made elsewhere in this Agreement, Fresh Relevance represents and warrants that:

**10.3.1.** the System and Services will perform materially in accordance with the applicable Documentation, provided, however, that Fresh Relevance's only liability, and Customer's exclusive remedy, for any breach of the foregoing

warranty is that, if reported to Fresh Relevance in writing, Fresh Relevance will use commercially reasonable efforts to correct the defect;

**10.3.2.** Fresh Relevance and the System and Services shall comply with Applicable Law; and

**10.3.3.** Professional Services, if any, purchased by Customer shall be performed in a competent and professional manner by employees or independent contractors of Fresh Relevance having a level of skill in the relevant area commensurate with the requirements of the Project.

**10.4. Updates to the System.** Customer acknowledges that the System is an on-line, subscription-based platform for providing Services to multiple customers and that, in order to increase and improve the capabilities of the System and to provide expanded and improved benefits to its customers, Fresh Relevance expects that it will make changes to the System from time to time.

**10.5. Disclaimer of Warranties.** Except as expressly and specifically provided in this Agreement all warranties, representation, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from this Agreement and from Fresh Relevance's Services, including the System. All Fresh Relevance Services are provided "as is" and Fresh Relevance makes no warranty of any kind that the Fresh Relevance Services, including the System will meet Customer or other persons' requirements or that they will operate without interruption, achieve any intended result, be compatible or work with any software, system or other services, or be secure, accurate, complete, free of harmful code or error free. All Third-Party Materials are provided "as is" and any representation or warranty of or concerning any Third-Party Materials is strictly between Customer and the third-party owner or distributor of the Third-Party Materials.

## 11. Indemnification

**11.1.** Fresh Relevance shall defend Customer against any claim, demand, suit, or proceeding ("IPR Claim") made or brought against Customer by a third party alleging that the use of the Services, as permitted under the terms of this Agreement infringes or misappropriates the intellectual property rights of a third party, and shall indemnify Customer for any damages finally awarded against Customer and for reasonable legal fees incurred by Customer in connection with any such IPR Claim, provided, that Customer (a) promptly gives Fresh Relevance written notice of the IPR Claim, (b) gives Fresh Relevance sole control of the defense and settlement of the Claim (provided that Fresh Relevance may not settle any IPR Claim unless the settlement releases Customer of all liability), and (c) provides to Fresh Relevance all reasonable assistance, at Fresh Relevance's expense.

**11.2.** Fresh Relevance will have no liability, responsibility or obligations under the indemnity at Clause 11.1 to the extent the IPR Claim is based on or arises from (a) Customer or Users' use of the System and Services in breach of the terms of this Agreement if the infringement would not have arisen in the absence of such breach (b) Customer or Users' use of the System and Services outside of the scope of the licences granted under this Agreement if the infringement would not have arisen in the absence of such out of scope use, (c) Customer Materials or any other Customer or User or third party generated content or Other Services, (d) any modification of the System or Services not authorised by Fresh Relevance in writing, and/ (e) use of System and Services in combination with Other Services or other third party products or services, if the infringement would not have arisen in the absence of such combination.

**11.3.** If the System and Services are, or are in Fresh Relevance's opinion likely to be, claimed to infringe, misappropriate or otherwise violate any third-party rights including Intellectual Property Rights, Fresh Relevance may, at its option and sole cost and expense (i) seek to make the System or Services (as so modified or replaced) non-infringing while providing materially equivalent features and functionality, in which case such modifications or replacements will constitute the updated System and/or Services under this Agreement, and/or (ii) by written notice to Customer, terminate this Agreement, and require Customer and all Users to immediately cease all access to and use of the System and/or Services.

**11.4.** Customer shall defend, hold harmless and indemnify Fresh Relevance and its Affiliates together with their respective directors, officers, agents and employees from and against any losses, damages, costs, liabilities and expenses (including reasonable legal fees) arising out of or in connection with the use by Fresh Relevance of the Customer Materials and/or any breach by Customer or Users of Clause 2 (a "Claim"), provided Fresh Relevance promptly gives Customer written notice of the Claim.

## 12. Limitation of Liability

**12.1.** Nothing in this Agreement excludes or limits either Party's liability for death or personal injury caused by either Party's negligence, either Party's fraud or fraudulent misrepresentation, liability arising out of Customer's breaches of Clause 5 (Payment and Fees), either Party's indemnity obligations, or any other liability which cannot be excluded or limited under the governing law of the Agreement.

**12.2.** Subject to Clause 12.1, in no event shall either party be liable in contract, tort (including negligence for breach of statutory duty) or otherwise howsoever for any (a) loss of profit; or (b) loss of business; or (c) loss of goodwill or depletion in goodwill; or (d) loss of contracts; or (e) loss of revenues; or (f) loss or corruption of data or information; or (g) loss of anticipated savings; or (h) pure economic loss, irrespective of whether the losses at (a) through to (g) are direct or indirect, and/or for any special, indirect or consequential loss

or damage of any nature whatsoever, whatever the cause thereof arising out of or in connection with the Agreement even if the other has been advised of the possibility of such damages.

**12.3.** Subject to Clause 12.1, in no event shall either party's aggregate, cumulative liability arising out of or related to this Agreement, whether in contract, tort, or under any other theory of liability exceed the total amount paid by Customer to Fresh Relevance in the twelve (12) months preceding the event giving rise to the claim.

**12.4.** The parties acknowledge that the prices have been set, and the Agreement is entered into in reliance upon the limitations of liability, remedies, damages, and the disclaimers of warranties and damages set forth herein, and that all such limitations and exclusions form an essential basis of the bargain between the parties.

### 13. Governing Law and Jurisdiction

This Agreement will be governed by and interpreted in accordance with the internal laws of the states or countries specified below, without regard to conflicts of laws principles. In the event of any controversy or claim arising out of or relating to this Agreement, or its breach or interpretation, the parties will submit to the exclusive jurisdiction of and venue in the applicable courts set out below. Each party waives all defences of lack of personal jurisdiction and inconvenient forum:

- If the Fresh Relevance entity that is a party to this Agreement is Fresh Relevance, Inc, this Agreement (including these Customer Terms) shall be governed by and construed in accordance with the laws of Massachusetts, and the courts of Massachusetts shall have exclusive jurisdiction in connection with any dispute arising from this Agreement.
- If the Fresh Relevance entity that is a party to this Agreement is Fresh Relevance Limited, this Agreement (including these Customer Terms) shall be governed by and construed in accordance with the laws of England, and the courts of England shall have exclusive jurisdiction in connection with any dispute arising from this Agreement.

### 14. Notices

**14.1.** All notices, requests, consents, claims, demands, waivers and other communication under this Agreement will have legal effect only if in writing in English and addressed to a party as set out below (or to such other address or such other person that such addressee party may designate from time to time). Notices sent in accordance with this Clause 14 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) one day after being sent, if by facsimile or e-mail, (in each case, with confirmation of transmission), and (d) on the fifth (5<sup>th</sup>) day after the date mailed by certified or registered mail, return receipt requested, postage prepaid.

#### Notices to Fresh Relevance:

- To Fresh Relevance, Inc:
  - For the attention of Mike Austin: Fresh Relevance Inc, 6 Liberty Square, Unit 248, Boston, MA 02109 / Email: [mike.austin@freshrelevance.com](mailto:mike.austin@freshrelevance.com)
- To Fresh Relevance Limited:
  - For the attention of Eddy Swindell: 5 Benham Road, Southampton Science Park, Southampton, SO16 7QJ / Email: [eddy.swindell@freshrelevance.com](mailto:eddy.swindell@freshrelevance.com)

#### Notices to Customer:

As stated on the Order Form or to the postal or email address of Customer's primary contact with Fresh Relevance.

### 15. Force Majeure

**15.1.** No Breach or Default. In no event will either party be liable or responsible to the other party, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, (except for any obligations to make payments), when and to the extent such failure or delay is caused by any circumstances beyond such party's reasonable control (a "Force Majeure Event"), including strikes, riots, fires, acts of God, war, terrorism, and governmental action and/or any other cause beyond the reasonable control of the party whose performance is affected (including mechanical, electronic, hosting, internet service provider or communications failure by the Party or its suppliers). In the event of any failure or delay caused by a Force Majeure Event, the affected party shall give prompt written notice to the other party stating the period of time the occurrence is expected to continue and use diligent efforts to end the failure or delay and minimize the effects of such Force Majeure Event. Provided it has complied with the foregoing obligations, either party may terminate this Agreement if a Force Majeure Event affecting the other party continues substantially uninterrupted for a period of thirty (30) days or more.

### 16. General

**16.1. Anti-Corruption.** Each party agrees and acknowledges that it has not received or been offered any illegal or improper bribe, kickback, payment, gift, or thing of value from any of the other party's employees, contractors or agents in connection with the

Agreement. Reasonable gifts and entertainment provided in the ordinary course of business do not violate the above restriction. If either party learns of any violation of the above restriction, such party will use reasonable efforts to promptly notify the other party.

**16.2. Assignment.** Customer shall not assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance, under this Agreement, in each case whether voluntarily, involuntarily, by operation of law or otherwise, without Fresh Relevance's prior written consent, which consent Fresh Relevance shall give or withhold in its sole discretion. For purposes of the preceding sentence, and without limiting its generality, any merger, consolidation or reorganization involving Customer (regardless of whether Customer is a surviving or disappearing entity) will be deemed to be a transfer of rights, obligations or performance under this Agreement for which Fresh Relevance's prior written consent is required. No delegation or other transfer will relieve Customer of any of its obligations or performance under this Agreement. Any purported assignment, delegation or transfer in violation of this Clause 16.2 is void. This Agreement is binding upon and inures to the benefit of the parties hereto and their respective permitted successors and assigns. Fresh Relevance may engage subcontractors or other third parties to perform certain duties under the Agreement, in accordance with the terms of this Agreement, provided that Fresh Relevance remains responsible for all of its obligations under the Agreement.

**16.3. Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but together shall constitute one and the same instrument.

**16.4. Construction and Interpretation.** Clause and paragraph headings are used solely for convenience of reference and shall not affect the interpretation of this Agreement. Use of the word "including" shall be interpreted to mean "including without limitation" and "including but not limited to" unless expressly stated otherwise. A "person" shall mean a natural person or any corporate or other entity, whether or not having separate legal personality. A reference to a party shall include that Party's personal representatives, successors and permitted assigns. In interpreting any provision of this Agreement, no weight shall be given to, nor shall any construction or interpretation be influenced by, the fact that one of the parties drafted this Agreement, each Party recognizing that it has had an opportunity to review this Agreement and accept or reject it or request changes to it.

**16.5. Entire Agreement; Modifications.** These Agreement together with any documents expressly referred to in this Agreement contain the entire agreement between Fresh Relevance and the Customer and supersede and replace any prior written or oral agreements, representations or understandings between the Parties relating to subject matter of this Agreement. In the event of a conflict between the terms and conditions of the Agreement and any Order Form the terms and conditions of the Agreement shall prevail except to the extent the conflict pertains to product or service description (e.g., type, quantity, usage volume) or pricing information, in which case the terms of the Order Form, as applicable, shall prevail. No usage of trade or other regular practice or method of dealing between the parties will be used to modify, interpret, supplement, or alter the terms of the Agreement.

**16.6. Exclusion of Third-Party Rights.** This Agreement is not intended to benefit any third party and shall not be enforceable against or by any third party.

**16.7. Independent Contractors.** This Agreement shall create an independent contractor relationship between Fresh Relevance and Customer. Neither party shall have any authority to act in any way as a representative of the other, or to bind the other to any third party, except as specifically set forth herein, and the parties shall not be deemed to be partners, joint ventures or the like by virtue of the provisions hereof.

**16.8. Non-Competition.** Neither party will, without the other party's prior written consent, either during the Term of the Agreement or without six (6) months after the effective date of termination of the Agreement, engage, employ, or otherwise solicit for employment any employee, agent or contractor of the other party who has been involved in the performance of this Agreement.

**16.9. Publicity.** Neither party may issue press releases or other public announcements of any kind relating to the Agreement without the other party's prior written consent, and neither party may use the names, trademarks or logos (collectively the "Marks") of the other party without its prior written consent. Notwithstanding the foregoing, during the Term either party may include the Marks of the other party in presentations, marketing materials, customer, supplier or partner lists, financial reports, and website information about customers, suppliers or partners, provided that the other party follows the licensing party's standard logo/trademark usage guidelines if these have been supplied.

**16.10. Severability.** Should any term and condition of the Agreement be declared illegal or otherwise unenforceable, it shall be severed from the remainder of this Agreement, or the relevant portion of the Agreement, without affecting the legality or enforceability of the remaining portions of the Agreement.

## 17. Definitions

As used in this Agreement, the definitions below shall apply.

**17.1. "Affiliate"** of either Party, means any person or entity that controls, is controlled by, or is under common control with a Party to this Agreement. The term "control" as used in the immediately preceding sentence means the right to exercise, directly or indirectly,

more than fifty percent of the voting rights attributable to the shares, partnership interests, membership shares, or similar evidences of ownership of an entity.

**17.2. “Applicable Law”** means any applicable local, state, national or international law or regulation;

**17.3. “EU Data Protection Law”** means all Applicable Laws and binding regulations of the European Union, the European Economic Area and their member states, Switzerland and the United Kingdom, applicable to the Processing of Personal Data (each as defined in the GDPR) under the Agreement including the GDPR; **“GDPR”** means the EU’s General Data Protection Regulation (2016/679);

**17.4. “Business Day”** means, (i) if Fresh Relevance, Inc is the Fresh Relevance entity that is a Party to the Agreement, any day other than a Saturday, Sunday, or a day which is a federal legal holiday in the United States, or (i) if Fresh Relevance Limited is the Fresh Relevance entity that is a Party to the Agreement, any day other than a Saturday, Sunday, or a day which is a public holiday in England.

**17.5. “Business Hours”** means (i) if Fresh Relevance, Inc is the Fresh Relevance entity that is a Party to the Agreement, between 9:00 a.m. and 5:30 p.m. Eastern Time on Business Days, or (ii) if Fresh Relevance Limited is the Fresh Relevance entity that is a Party to the Agreement, between 9:00 a.m. and 5:30 p.m. GMT on Business Days;

**17.6. “Compatible Third-Party System”** means any other system, application, program or software specified as compatible on Fresh Relevance’s website.

**17.7. “Customer Materials”** means all works and materials (a) uploaded to, stored on, processed using or transmitted via the System, by or on behalf of Customer or by any person or application or automated system using Customer’s account; or (b) otherwise provided by Customer to Fresh Relevance in connection with this Agreement.

**17.8. “Customer Personal Data”** means any Personal Data (i) sent by or on behalf of the Customer to, or which is otherwise Processed by, Fresh Relevance under the Agreement, or (ii) which is created or generated under the Agreement, to the extent that such information is protected as personal data under applicable Data Protection Laws.

**17.9. “Defect”** means a defect, error or bug having a major adverse effect on the appearance, operation or functionality of the System, but excluding any defect, error or bug caused by or arising as a result of (a) an act or omission of Customer or of one of Customer’s employees, officers, agents, suppliers or sub-contractors; (b) an incompatibility between the System any other system, application, program or software that is not a Compatible Third-Party System; or (c) an incompatibility between the System and a Compatible Third-Party System, caused in the sole opinion of Fresh Relevance by a problem or change in that system.

**17.10. “Documentation”** means user documentation that describes the principles of the operation, support, maintenance and functionality of the applicable System and/or Services and/or that are embedded with the System (e.g., on-line guides).

**17.11. “Intellectual Property Rights”** means all patents, rights to inventions, utility models, copyright and related rights, trademarks, service marks, trade, business and domain names, rights in trade dress or get-up, rights in goodwill or to sue for passing off, unfair competition rights, design rights, database rights in computer software, topography rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications for and renewals or extensions of such rights, and all similar or equivalent rights or forms of protection in any part of the world.

**17.12. “Other Services”** means third party products, applications, services, software, products, networks, systems, directories, websites, databases or information to which the System links, or which Customer may connect to or enable in conjunction with the Services, including any of the foregoing which may be integrated directly into Customer’s systems.

**17.13. “Order Form”** means the part of this Agreement comprised of the online document made available by Fresh Relevance to Customer during the order process and executed by Customer, that specifies the identity of purchasing entity, the Services being purchased, and other matters relating to this Agreement.

**17.14. Personal Data** means data which relate to a living individual who can be identified (a) from such data, or (b) from such data and other information which is in the possession of, or is likely to come into the possession of, Customer.

**17.15. “Permitted Purpose”** means real-time marketing of Customer’s products or services to its Shoppers.

**17.16. “Professional Services”** means Services listed as Professional Services in an Order Form, which may include setup of email designs, HTML, email triggering sequences, and/or consulting or other services.

**17.17. “Processing”** means any operation or set of operations which is performed upon Personal Data, whether or not by automatic means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;

**17.18. “Services”** means the System Services, Support Services, and Professional Services and any other services supplied by Fresh Relevance to the Customer.

**17.19. “Shopper”** means a person who is using an online shopping cart from, or is sent email by, Customer.

**17.20. “Support Services”** means support and maintenance services provided or to be provided by Fresh Relevance to Customer.

**17.21. “System”** means the real-time marketing software-as-a-service platform identified as the Fresh Relevance products and services at [www.freshrelevance.com](http://www.freshrelevance.com) (as may be updated from time to time by Fresh Relevance in its sole discretion) and associated infrastructure that is owned and operated by Fresh Relevance and its parent company Fresh Relevance Ltd;

**17.22. “System Services”** means the real-time marketing services to be supplied by Fresh Relevance to the **Customer** as set out in the applicable Order Form and/or as approved by Fresh Relevance in writing from time to time;

**17.23. “User”** means an individual who is authorized by Customer to access the System and to whom Customer (or Fresh Relevance at Customer’s request) has supplied a user identification and password. Users may include only Customer’s employees, officers, partners (where Customer is a partnership), members (where Customer is a limited liability company), and (provided they are legally bound by

written agreements or are otherwise legally bound to comply with Customer's obligations pursuant to this Agreement) Customer's consultants, contractors and agents.

**17.24.** "Virus" means any computer code, files, scripts, agents, programming instruction or set of instructions that is intentionally and specifically constructed with the ability to damage, corrupt, destroy, steal data from, interfere with or otherwise adversely affect computer programs, data files or hardware without the consent or intent of the computer user and whether its operation is immediate or delayed including willfully, negligently or without knowledge of its existence. This definition includes, but is not limited to, self-propagating programming instructions commonly called viruses, trojans or worms.

## Addendum A

### Service Levels

#### Technical Support

Fresh Relevance provides a manned telephone line and email support for technical support issues relating to the System during Business Hours (as defined in the Customer Terms)

#### Technical Support – What does it cover?

The support desk provides help and guidance to our clients with their use of the System. The responsibilities of the support desk include:

- Answer general questions on how to use the System
- Provide help articles on how to use the System
- Explore any technical issues with the System raised by Customers and where possible resolve
- Escalate any critical bugs on the System to the development team to fix and resolve

#### Technical Support Response Times

Fresh Relevance will send an automated email with a dedicated ticket number immediately and a support agent will respond within eight business hours. Phone calls will be prioritized. During busy periods phone calls may be diverted to voicemail. Any messages will be responded to within eight business hours.

The Fresh Relevance Technical Support Team can be contacted at:

- For Customers domiciled in the US: support@freshrelevance.com and on 1-617-207-0156 (US).
- For Customers domiciled outside of the UK: support@freshrelevance.com and on +44 (0)2031 676767 (UK).

#### Account Management – What does it cover?

An account manager is there to provide help in using the System including:

- provide advice and guidance on how best to use the System
- provide insight into where improvements on your campaigns can be made
- Inform customers of new functionality available to them

#### Account Management Response Times

An account manager will respond to a telephone message or an email within eight business hours. If they are unavailable any requests will be handled by the support team as described above.

#### System Uptime

Fresh Relevance will use commercially reasonable efforts to have the System available on a 24/7/365 basis with a minimum availability of 95% excluding system maintenance (in 30-day months, this is 684 hours uptime, 36 hours downtime) but strive for 99% or higher (in 30-day months, this is 712.8 hours of uptime, 7.2 hours downtime).

#### System Monitoring

The System is designed to be highly resilient, but it is also monitored on a 24/7/365 basis, using both internal and external systems from multiple locations around the world, to pick up and respond to any issues quickly and accurately. On call staff are always available on a 24/7/365 basis ready to respond if any issues are detected.

#### System Backups

All parts of the System which store Customer data are designed to be highly available. Fresh Relevance also takes regular backups of the System which are held encrypted, offsite and stored in multiple locations around the world. Access is restricted to authorized staff only and controlled by the Technical Operations Manager.

#### System Throughput of Emails

The System is designed to deliver emails in real time but utilizes external email service providers (typically the Customer's own email service provider (ESP)) to deliver personalized emails to recipients. Fresh Relevance has no control over throughput, performance and uptime of external systems and therefore cannot be held responsible for any delays that may result from the ESP.

#### Planned Downtime/Unplanned Downtime

Fresh Relevance shall give at least 8 hours electronic notice of planned downtime.

If Fresh Relevance experiences prolonged unplanned downtime, the Fresh Relevance support team will endeavour to contact all affected Customers to advise of the impact to the Customer.