



## Customer Terms and Conditions

(February 2017)

These Customer Terms and Conditions are incorporated in, and part of, a binding legal agreement (this "Agreement") between you ("you" or "Customer") and Fresh Relevance Inc ("Fresh Relevance") that governs Customer's access to and use of the Fresh Relevance System as an online service and receipt of Services from Fresh Relevance. Capitalized terms used in these Customer Terms and Conditions are defined in Addendum A at the end.

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

- 1.1 **License.** Fresh Relevance hereby grants to Customer a personal, non-exclusive, non-transferable, and non-sublicensable license for Customer and its Users to use the System and the Services solely for the Permitted Purpose in relation to websites authorized in an Order Form during the Term in accordance with the Documentation and this Agreement.
- 1.2 **System and Services.** Fresh Relevance will, subject to these Customer Terms and Conditions, (a) provide Support Services as necessary to set up and implement the System for Customer's online store, (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 marketing 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 <https://www.freshrelevance.com/pricing>.
- 1.4 **System Defects.** 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. Fresh Relevance shall not be liable and Customer shall hold Fresh Relevance harmless should the System be unavailable due to (a) a Force Majeure Event, or (b) the immediate need for Fresh Relevance to temporarily bring down the System and Services to respond to events such as hacking attacks, because of Customer using it in a damaging or malicious way, to install upgrades, or to address any other urgent problem. Fresh Relevance will use commercially reasonable efforts to overcome or reduce the impact of any problem with a Compatible Third-Party System.

### 2. Customer's Access, Use and Restrictions

- 2.1 **Customer's Access and Use.** Customer may access the System and use the Services during the Term as authorized pursuant to Section 1.
- 2.2 **Customer Responsibilities.** Customer will (a) be responsible for its Users' compliance with this Agreement, (b) be responsible for the accuracy, quality and legality of Customer Materials, (c) prevent unauthorized access to or use of the System and notify Fresh Relevance promptly of any unauthorized access or use, (d) 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 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.

2.3 **Usage Restrictions.** Customer 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, libelous, 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 social security numbers, passport numbers, financial account numbers, or credit card information, (e) use the System to store or transmit 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.

2.4 **Export Restrictions.** Customer shall not remove or export from the United States or allow the export or re-export of the Services or anything related thereto, or any direct product thereof, in violation of Applicable Law, including any restrictions, laws or regulations administered by the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States government agency or authority.

### 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's Personal Data resulting from access by Other Services.

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.** Subject to Section 6, 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 Law, (b) infringe any person's Intellectual Property Rights or other

legal rights, or (c) give rise to any cause of action against Fresh Relevance or Customer or any third party.

- 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 on Fresh Relevance's website. 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 Section 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 Section 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 address from accessing the System or Services, contacting Customer's internet service provider to request that they block your access to the System or Service, 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-cancelable, 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 Fresh Relevance may notify Customer from time to time.
- 5.4 Taxes.** Fresh Relevance's fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including value-added, sales, use or withholding taxes, assessable by any tax jurisdiction, and Customer is responsible for paying all taxes associated with its access to and use of the System and Services hereunder.
- 5.5 Late Payments.** Fresh Relevance reserves the right to suspend Customer's access to the System upon Customer's failure to pay any amount due, except where (a) there is a bona fide dispute over the amount due and (b) Customer has paid all undisputed amounts. Amounts not paid when due shall be subject to interest at 1.5% per month in addition to the principle amount owed (such interest shall accrue daily and be compounded quarterly). If any amount is not paid when due, Fresh Relevance shall be

entitled to recover from Customer the costs and expenses incurred in connection with collecting the same (including without limitation costs of investigation and reasonable attorneys' fees).

## 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 owns 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 **License by Customer to Use Feedback.** Customer grants to Fresh Relevance a worldwide, perpetual, irrevocable, royalty-free license to use and incorporate into the Services and/or the System any suggestion, enhancement request, recommendation, correction or other feedback provided by Customer.
- 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 **Roles of Parties with Respect to Personal Data.** With respect to all Personal Data disclosed to Fresh Relevance under this Agreement, or collected or stored by the System in connection with providing the Services to Customer under this Agreement, Customer shall determine the purposes for which and the manner in which any Personal Data are, or are to be, processed, and Fresh Relevance's role is limited to processing such Personal Data on Customer's behalf.
- 7.2 **Customer's Representations and Warranties Regarding Personal Data.** Customer represents and warrants that:
- (a) Customer is and will be in compliance with all Applicable Laws relating to privacy and data security;
  - (b) Customer has obtained and will obtain all necessary consents and made all necessary disclosures; and

- (c) Customer has and will have the legal right to disclose and otherwise make available all Personal Data that it discloses and makes available to Fresh Relevance.

**7.3 Fresh Relevance's Representations and Warranties Regarding Personal Data.** Fresh Relevance warrants that:

- (a) Fresh Relevance will act only in accordance with Customer's instructions regarding the processing of Personal Data performed on behalf of Customer, except that Personal Data relating to activity is extremely voluminous and so is automatically filtered by the System at certain intervals, deleting original activity data and keeping only useful data; and
- (b) Fresh Relevance has in place appropriate security measures against unlawful or unauthorized processing of Personal Data and against loss or corruption of Personal Data.
- (c) Fresh Relevance will maintain commercially reasonable administrative, physical and technical safeguards to protect the security, confidentiality and integrity of Personal Data, including encryption of Personal Data in transmission (using SSL or similar technologies), except for Other Services that do not support encryption to which Customer may link through the System.
- (d) Fresh Relevance collects certain information about Customer and Customer's Shoppers as well as Customer's and their respective devices, computers and use of the Services. Fresh Relevance uses, discloses, and protects this information as described in Fresh Relevance's Privacy Policy, the current version of which is available at <https://www.freshrelevance.com/contact/legal> and is incorporated by reference into this Agreement.
- (e) By utilizing 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 Terms and Fresh Relevance's Privacy Policy, within the United States, the European Economic Area, and in other countries and territories.
- (f) Personal Data provided by Customer is currently hosted by Fresh Relevance or its authorized service partners in data centers located in the United States or the European Economic Area. If Customer's principal location is within the European Economic Area or the United States, Fresh Relevance will use commercially reasonable efforts to notify Customer at least thirty (30) days before Fresh Relevance's election to 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. If Customer is entitled to this notice and does not wish to have such Personal Data hosted in data centers located in such other country or territory, Customer may terminate this Agreement with immediate effect by written notice to Fresh Relevance within thirty (30) days of Customer's receipt of such notice.

**7.4 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 Confidential Information.** "Confidential Information" means all information disclosed by or on behalf of a party (for purposes of this Section 8, the "Disclosing Party") to the other party (the "Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure. Confidential Information includes the terms and conditions of this Agreement (including pricing), as well as business and marketing plans, technology and technical information, product plans and designs, and business processes disclosed by such party. In addition, Customer's Confidential Information includes Customer Materials, and Fresh Relevance's Confidential Information includes the System and Services.

"Confidential Information" does not include any information that (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party, (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party, (iii) is received from a third party without breach of any obligation owed to the Disclosing Party, or (iv) was independently developed by the Receiving Party.

- 8.2 Protection of Confidential Information.** The Receiving Party (a) will not disclose Confidential Information except to its employees, contractors and professional advisors legally bound by written agreement or otherwise to comply with non-disclosure obligations and restrictions of use similar in all material respects to, and at least as stringent as, those of the Receiving Party under this Agreement, and then only to the extent necessary to achieve the purposes contemplated by this Agreement, (b) will not use Confidential Information except in performing this Agreement, and (c) will use at least the same degree of care to safeguard the Disclosing Party's Confidential Information that it uses to protect its own confidential and proprietary information, and in any event not less than a reasonable degree of care. A party may disclose the existence and terms of this Agreement (i) in confidence, to a potential purchaser of or successor to any portion of such party's business, (ii) to its professional advisors, and (iii) if necessary to enforce its rights under this Agreement, provided that it shall use reasonable efforts to limit such disclosure and to obtain confidential treatment of, or a protective order governing, the terms of the Agreement. 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.
- 8.3 Compelled Disclosure.** A Receiving Party may disclose Confidential Information to the extent legally required to do so, provided that such party (a) to the extent practicable and legally permissible, provides the Disclosing Party with prior written notice of the required disclosure so that the Disclosing Party may seek a protective order or other appropriate remedy, and (b) discloses no more Confidential Information than is reasonably necessary in order to respond to the disclosure requirement.
- 8.4 Retention and Disposal.** Upon the request of the Disclosing Party and in the event of termination or expiration of this Agreement, the Receiving Party agrees to promptly return Confidential Information to the Disclosing Party or destroy or permanently erase the Confidential Information from all forms of recordation to the extent reasonably feasible, and, if requested by the Disclosing Party, confirm in writing that it has done so. Notwithstanding the foregoing, a party may retain copies of Confidential Information to the extent required to comply with Applicable Law. Such Confidential Information, as applicable, will remain subject to the disclosure and use restrictions herein.
- 8.5 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, 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 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 **Actions Upon Termination.** Upon termination of this Agreement: (a) Customer shall promptly pay to Fresh Relevance all outstanding amounts due and Fresh Relevance shall promptly refund to Customer any prepaid fees for the remainder of the Term, (b) Customer shall irrevocably delete all Fresh Relevance's Confidential Information from its computer systems within thirty (30) days of termination, (c) Fresh Relevance shall irrevocably delete all Customer Confidential Information from the System within thirty (30) days of termination, (d) all rights granted by Fresh Relevance under this Agreement shall cease and Customer shall immediately cease any use of the System and Services; and (e) notwithstanding the foregoing, Fresh Relevance shall have no obligation to maintain Customer data after termination, except as may be required by law. Customer acknowledges that certain Customer data may remain in storage systems or media that are not easily removed and are subject to reasonable security and agrees that Fresh Relevance shall have no obligation to remove or destroy such Customer data.

## 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:

- (a) 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 correct the defect;
- (b) the purchased Services and Content will not introduce Malicious Code into Customer's systems. For any breach of an above warranty, Customer's exclusive remedies are those described in Sections 9.3 (Termination) and 9.4 (Actions upon Termination);
- (c) Fresh Relevance and the System and Services shall comply with Applicable Law; and
- (d) 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.

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.

- 10.4 **Disclaimer of Warranties.** EXCEPT AS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND EACH PARTY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, AND WARRANTIES ARISING FROM A COURSE OF PERFORMANCE, A COURSE OF DEALING OR TRADE USAGE TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. EXCEPT AS EXPRESSLY PROVIDED HEREIN, FRESH RELEVANCE MAKES NO WARRANTY OR REPRESENTATION THAT

ACCESS TO THE SYSTEM OR THE SERVICES WILL BE UNINTERRUPTED, SECURE, COMPLETE, ACCURATE OR ERROR FREE. EACH PARTY HEREBY ACKNOWLEDGES THAT IT HAS NOT RELIED UPON ANY REPRESENTATIONS OR WARRANTIES MADE BY THE OTHER EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT.

## 11. Indemnification

- 11.1 Indemnification by Fresh Relevance.** Fresh Relevance will defend Customer against any claim, demand, suit or proceeding made or brought against Customer by a third party alleging that the use of the System or Services in accordance with this Agreement infringes or misappropriates such third party's intellectual property rights (a "Claim Against Customer"), and will indemnify Customer from any damages, attorney fees and costs finally awarded against Customer as a result of, or for amounts paid by Customer under a court-approved settlement of, a Claim Against Customer, provided Customer (a) promptly gives Fresh Relevance written notice of the Claim Against Customer, (b) gives Fresh Relevance sole control of the defense and settlement of the Claim Against Customer (except that Fresh Relevance may not settle any Claim Against Customer unless such settlement unconditionally releases Customer of all liability), and (c) gives Fresh Relevance all reasonable assistance, at Fresh Relevance's expense. If Fresh Relevance receives information about an infringement or misappropriation claim related to the System or Services, Fresh Relevance may in Fresh Relevance's discretion and at no cost to Customer (i) modify the System or Services so that they no longer infringe or misappropriate, without breaching Fresh Relevance's warranties under Section 10.3 (Fresh Relevance's Warranties), (ii) obtain a license for Customer's continued use of the System or Services in accordance with this Agreement, or (iii) terminate Customer's subscriptions for the System or Services upon 30 days' written notice and refund Customer any prepaid fees covering the remainder of the term of the terminated subscriptions; upon completion by Fresh Relevance of the actions specified in the foregoing clauses (i), (ii) or (iii), Fresh Relevance's entire obligation to Customer with respect to any Claim Against Customer shall have been satisfied. The above defense and indemnification obligations do not apply to the extent a Claim Against Customer arises from Customer Materials, Customer-generated content, Other Services, Customer's breach of this Agreement, or the use of the System or Services in combination with other software or services if the infringement would not have arisen in the absence of such combination.
- 11.2 Indemnification by Customer.** Customer shall defend, hold harmless and indemnify Fresh Relevance (and any party controlling, controlled by or under common control with Fresh Relevance), and their respective directors, officers, agents and employees (the "Fresh Relevance Indemnified Parties") from and against any losses, damages, costs, liabilities and expenses, including but not limited to any claim, suit or proceeding brought by Customer or a third party or government agency against Fresh Relevance Indemnified Parties to the extent that it is based on or arises out of, Customer Materials, any breach by Customer of this Agreement, Customer's use of the Services or System, or any negligence or misconduct of Customer, except to the extent caused by Fresh Relevance (a "Claim"), provided Fresh Relevance (a) promptly gives Customer written notice of the Claim, (b) gives Customer sole control of the defense and settlement of the Claim (except that Customer may not settle any Claim unless such settlement unconditionally releases Fresh Relevance of all liability), and (c) gives Customer all reasonable assistance, at Customer's expense.

## 12. Limitation of Liability

- 12.1 Limitation of Liability.** THE MAXIMUM AGGREGATE LIABILITY OF EITHER PARTY FOR DAMAGES FOR ANY CAUSE WHATSOEVER (INCLUDING NEGLIGENCE) SHALL BE LIMITED TO THE FEES PAID BY CUSTOMER TO FRESH RELEVANCE IN THE TWELVE MONTHS PRECEDING THE INCIDENT GIVING RISE TO SUCH DAMAGES, OR, IF GREATER, THE AMOUNT ACTUALLY PAID BY FRESH RELEVANCE'S INSURANCE COVERAGE.
- 12.2 Exclusion of Consequential Damages.** EXCEPT FOR A BREACH OF SECTIONS 8 OR TO THE EXTENT RESULTING FROM COMPLIANCE WITH SECTION 11, REGARDLESS OF THE FORM OF ACTION, IN NO EVENT WILL EITHER PARTY (OR ITS OFFICERS, DIRECTORS, EMPLOYEES, MEMBERS, MANAGERS OR AGENTS) BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES (INCLUDING LOST PROFITS, LOST DATA, BUSINESS INTERRUPTION, LOSS OF REPUTATION OR COSTS OF SUBSTITUTE SERVICES) THAT THE OTHER PARTY MAY INCUR



OR EXPERIENCE ARISING OUT OF OR RELATING TO THE SERVICES, THE SYSTEM, THIS AGREEMENT OR ITS TERMINATION, EVEN IF ADVISED OF THE POSSIBILITY THEREOF.

### 13. Dispute Resolution

- 13.1 **Disputes.** Except as limited by Section 13.5, in the event of any controversy, dispute or claim between the parties under, arising out of or related to this Agreement (including but not limited to, claims relating to breach, termination, fraud or misrepresentation, or the invalidity, illegality or voidness of this Agreement), whether based on contract, tort, statute or other legal theory (collectively referred to hereinafter as "disputes"), the parties shall follow the dispute resolution procedures set forth below in this Section 13.
- 13.2 **Negotiation between Executive Officers.** The parties shall first attempt to resolve a dispute through discussions between executive officers of the parties. Upon written request by either party, the executive officers shall promptly commence good faith efforts to resolve the dispute for a 30-day period, including at least one meeting in person or via videoconference or teleconference within 20 days after such request. Each party may by written request extend the time for negotiation for one additional period of 14 days per dispute.
- 13.3 **Non-Binding Mediation.** If a dispute is not resolved by negotiation pursuant to Section 13.2 within 45 days after the written request for negotiation (or such longer period as may result from extensions permitted by Section 13.2), the dispute shall, upon the written request of either party, be submitted to non-binding mediation by a sole mediator selected by the parties from a professional mediation firm such as ADR Associates, JAMS or CPR or, upon the written request of either party, to mediation by a mediator named by JAMS. The mediator shall be independent and disinterested and shall have experience with the advertising technology industry. The parties shall use commercially reasonable best efforts to conduct at least three mediation sessions within 90 days after the request for mediation. Unless the parties mutually agree to another location, the mediation sessions shall be held in a major metropolitan area with direct flights from, and as nearly as possible equidistant from, each party's principal office, and shall be attended by an Executive Officer of each party. The mediator shall confer with the Executive Officers of the parties to design procedures to conclude the mediation within no more than ninety (90) days after initiation. Each party agrees not to use the period or pendency of the mediation to disadvantage the other party procedurally or otherwise. No statements made by either party during the mediation process may be used by the other party or referred to during any subsequent proceedings. Each party has the right to pursue provisional relief from any court, such as preliminary injunction, to avoid irreparable harm, maintain the status quo, or preserve the subject matter of this Agreement, even though mediation has not been commenced or completed.
- 13.4 **Binding Arbitration.** If not resolved pursuant to Sections 13.2 or 13.3 within 90 days of the request for submission to mediation, then upon the written request of either party to the other party and to JAMS, the dispute shall be submitted to arbitration by JAMS pursuant to its Comprehensive Arbitration Rules then in effect (except as expressly modified below). The arbitration hearings shall be held before a single arbitrator in Boston, Massachusetts, if the arbitration is initiated by Customer, or in the major metropolitan area with direct flights from Boston nearest to Customer's principal office if the arbitration is initiated by Fresh Relevance. The arbitrator shall be independent and disinterested and shall have experience with the online advertising technology industry. If the parties have not agreed upon an arbitrator within ten (10) business days after the request for arbitration has been filed with JAMS, either party may request JAMS to name a list of five arbitrator candidates, and the parties shall each then, in successive rounds (with the party demanding the arbitration having the first chance to strike a name), strike one name off the list until only one name remains, which shall be the arbitrator. The arbitrator shall (a) follow the substantive rules of the applicable law, (b) require all testimony to be transcribed, and (c) accompany the award with findings of fact and a statement of reasons for the decision. The arbitrator shall have the authority to permit discovery for no more than ninety (90) days, upon reasonable request of a party, to the extent deemed appropriate by the arbitrator. The arbitrator shall determine issues of arbitrability but shall have no power or authority to (i) add to or detract from the written agreement of the parties set forth in this Agreement, (ii) modify or disregard any provision of this Agreement, or (iii) address or resolve any issue not submitted by the parties. The arbitrator shall hold hearings during a period of not more than 45 calendar days promptly following conclusion of discovery and shall render a final decision within 45 days following conclusion of the hearings. The arbitrator shall have the power to grant injunctive relief (without the necessity of a party posting a bond) in the event a

party has violated the rights granted by, or the confidentiality provisions set forth in, this Agreement, but shall have no power to award punitive and/or exemplary damages. In the event of a conflict between the JAMS Comprehensive Arbitration Rules and the provisions of this Agreement, the provisions of this Agreement shall control. Any award made hereunder shall be made within four (4) months of the appointment of the arbitrator and may be entered in any court of competent jurisdiction.

- 13.5 **Intellectual Property.** Only subsections 13.2 and 13.3 of this Section 13 shall apply to disputes arising out of, resulting from or relating to the intellectual property rights of a party (including but not limited to patents and patent rights, copyrights, trademarks, service marks, trade secrets, and unauthorized disclosure of Confidential Information). Notwithstanding anything to the contrary in this Section 13, in the event of alleged violation of a party's intellectual property rights, that party may seek temporary injunctive relief from any court of competent jurisdiction. The party requesting such relief shall simultaneously file a demand for arbitration of all other issues involved in the dispute, and shall request the arbitrator to proceed under its rules for expedited hearing. In no event shall any such temporary injunctive relief continue for more than 30 days without review by the issuing court.
- 13.6 **Expenses.** The parties shall share equally the costs and fees payable to JAMS in connection with the mediation. The parties shall also share equally the costs and fees payable to JAMS in connection with the arbitration until the arbitral award is rendered, at which point the prevailing party in the arbitration shall be reimbursed by the non-prevailing party for the prevailing party's fees and costs of arbitration (e.g., the costs, fees and expenses of outside experts and attorneys). If one party is not deemed to be the primary prevailing party, then each party will bear its own fees and expenses. If court proceedings to stay litigation or compel arbitration are instituted, the party who unsuccessfully opposes such proceedings shall pay all associated costs, expenses and attorney's fees which are reasonably incurred by the other party.
- 13.7 **Miscellaneous.** The requirement for mediation and arbitration shall not be deemed a waiver of any right of termination under this Agreement, and the arbitrator is not empowered to act or make any award other than based solely on the rights and obligations of the parties prior to any such termination and as a result thereof. Except to the extent required by law, the parties, their representatives, other participants and the mediator and arbitrator shall hold the existence, content and results of mediation and arbitration in confidence.

## 14. General

- 14.1 **Insurance.** Fresh Relevance shall maintain comprehensive commercial general liability insurance with a limit of not less than One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) aggregate coverage to cover claims that may arise under this Agreement.
- 14.2 **Assignment.** This Agreement shall be binding upon each party's successors and permitted assigns. Fresh Relevance reserves the right to transfer, subcontract, or assign its rights and obligations under this Agreement and the Order Form without obtaining notice or consent of Customer. Customer shall not transfer, subcontract, or assign its rights or obligations under this Agreement or the Order Form.
- 14.3 **Governing Law.** This Agreement and the Order Form 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 or the Order Form.
- 14.4 **Force Majeure.** Neither party shall be liable for any failure or delay in the performance of any of its obligations (other than the payment of Fees) if prevented from doing so by a cause beyond its reasonable control (a "Force Majeure Event"). Failures to meet due dates or time schedules resulting from a Force Majeure Event shall extend the due dates or time schedules for reasonable periods of time; provided that if any such delay or excuse shall exceed thirty (30) days, the non-affected party may, at its option, terminate this Agreement upon notice to the affected party. A party who becomes aware of a Force Majeure Event which gives rise to, or is likely to give rise to, any failure or delay in performing its obligations under this Agreement, shall immediately notify the other party of such Force Majeure Event and provide an estimated time period that such failure or delay will continue. The affected party shall take steps mitigate the effects of the Force Majeure Event.

- 14.5 Entire Agreement; Modifications.** This Agreement constitutes the entire Agreement of the parties with respect to the subject matter hereof and supersedes any and all existing agreements relating to the subject matter hereof. No provision of any purchase order or other business form employed by either party will supersede the terms and conditions of this Agreement, and any terms or conditions contained in any such form or document which are different from, inconsistent with or in addition to the terms and conditions of this Agreement shall be void and of no effect. This Agreement may not be modified or amended except by a written instrument signed by both parties. No failure or delay in exercising any right, power or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right under this Agreement preclude any other or further exercise thereof or the exercise of any other right. Fresh Relevance reserves the right to revise these Customer Terms and Conditions from time to time.
- 14.6 Notices.** All notices to be given or otherwise made to a party shall be in writing, delivered by hand in person, or by express overnight courier service, or by facsimile transmission, with copy sent by mail, registered or certified, addressed to Fresh Relevance at 6 Liberty Square, Unit 248, Boston, MA 02109; or to Customer at the address set forth on the Order Form (with return receipt requested or an email confirmation confirming receipt of such notice).
- 14.7 Severability.** If any provision of this Agreement shall be held to be illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall apply only to such provision and shall not in any manner affect or render illegal, invalid or unenforceable any other provision of this Agreement, and this Agreement shall be reformed, construed and enforced to the fullest extent as if any such illegal, invalid or unenforceable provision were not contained herein.
- 14.8 Non-Competition.** Neither party will, without the other party's prior written consent, either during the Term of this Agreement or without six (6) months after the effective date of termination of this 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.
- 14.9 Exclusion of Third Party Rights.** The terms and conditions in this Agreement and the Order Form are not intended to benefit any third party or be enforceable against or by any third party.
- 14.10 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.
- 14.11 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.
- 14.12 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.
- 14.13 Construction and Interpretation.** Section 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. Except where the context otherwise requires, the singular form shall include the plural, the plural form shall include the singular, and the use of any pronoun shall include the corresponding masculine, feminine, and neuter forms. Any reference in this Agreement to "days" (unless specified to be Business Days) shall be interpreted to mean a reference to calendar days. 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. If there is a conflict or inconsistency between an Order Form and these Customer Terms and Conditions, these Customer Terms and Conditions shall control unless the Order Form expressly states that a provision in these Customer Terms and Conditions is modified or does not apply.

- 14.14 Survival.** The obligations under Sections 5.5, 6, 7, 8, 9.4, 10, 11, 12 and 13, and any other provision that by its nature is intended to survive, shall survive the termination or expiration of this Agreement.

## Addendum A

### Definitions

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

- 1.1 **"Affiliate"** means any corporation or other business entity of which Customer owns, directly or indirectly, equity interests representing more than 50% of the voting power.
- 1.2 **"Applicable Law"** means any applicable local, state, national or international law or regulation, including laws regarding online conduct, acceptable content and data privacy.
- 1.3 **"Business Day"** means any day other than a Saturday, Sunday, or a day which is a federal legal holiday in the United States.
- 1.4 **"Business Hours"** means between 9:00 a.m. and 5:30 p.m. Eastern Time on Business Days.
- 1.5 **"Compatible Third-Party System"** means any other system, application, program or software specified as compatible on Fresh Relevance's website.
- 1.6 **"Customer"** means the customer specified in the Order Form or, with respect to an Order Form executed by an Affiliate, that Affiliate; provided that ; provided that Customer shall be responsible for all obligations of its Affiliates.
- 1.7 **"Customer Agreement"** means the Agreement between Fresh Relevance and Customer for Customer's access to and use of the Fresh Relevance System Services, comprised of these Customer Terms and Conditions and the Order Form, and any amendments to this Agreement from time to time. Any reference in this Agreement to a statute includes that statute as modified, consolidated or re-enacted from time to time, and any subordinate regulations made under that statute.
- 1.8 **"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.
- 1.9 **"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.
- 1.10 **"Documentation"** means this Agreement, the Order Form, and documentation produced by Fresh Relevance and made available to Customer as part of the System and/or on Fresh Relevance's website regarding use of the System.
- 1.11 **"Effective Date"** means the date that this Agreement comes into force as specified in the Order Form.
- 1.12 **"Force Majeure Event"** is defined in Section 14.4.
- 1.13 **"Fees"** means the amounts payable by Customer to Fresh Relevance under or in relation to this Agreement (as set out in the Order Form).
- 1.14 **"Initial Term"** is specified in the Order Form.
- 1.15 **"Intellectual Property Rights"** means all intellectual property and similar intangible rights throughout the world, whether or not perfected, filed, registered or recorded, whether now or hereafter existing, filed, issued or acquired, and any application or right of application for such rights, including: (a) patents, patent applications, patent disclosures, patent rights (including any and all continuations, continuations-in-part, divisionals, reissues, reexaminations, utility, model and design patents or any extensions thereof),

(b) rights associated with works of authorship, including copyrights, copyright applications, copyright registrations, and database rights, (c) rights in trademarks, trademark registrations and applications therefor, trade names, service marks, service names, logos, and trade dress, (d) trade secrets, know-how and similar rights, (e) utility models, semi-conductor topography rights, rights in designs, and moral rights, and (f) all other intellectual or proprietary rights anywhere in the world;

- 1.16 **"Malicious Code"** means code, files, scripts, agents or programs intended to do harm, including for example, viruses, worms, time bombs and Trojan horses.
- 1.17 **"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.
- 1.18 **"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 or its Affiliate, that specifies the identity of purchasing entity, the Services being purchased, and other matters relating to this Agreement.
- 1.19 **"Permitted Purpose"** means real-time marketing of Customer's products or services to its Shoppers.
- 1.20 **"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.
- 1.21 **"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.
- 1.22 **"Services"** means all services provided or to be provided by Fresh Relevance to Customer under this Customer Agreement, including System Services, Support Services, and Professional Services.
- 1.23 **"Shopper"** means a person who is using an online shopping cart from, or is sent email by, Customer.
- 1.24 **"Support Services"** means support and maintenance services provided or to be provided by Fresh Relevance to Customer.
- 1.25 **"System"** means the real-time marketing software system and associated infrastructure known as Fresh Relevance that is owned and operated by Fresh Relevance and its parent company Fresh Relevance Ltd.
- 1.26 **"System Services"** means the real-time marketing services provided or to be provided by Fresh Relevance to Customer.
- 1.27 **"Term", "Initial Term" and "Renewal Term"** are defined in Section 9.1.
- 1.28 **"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.

## Addendum B Service Levels

### Technical Support

Fresh Relevance provides a manned telephone line and email support for technical support issues relating to the System during the hours of 8am to 6pm Eastern time Monday to Friday U.S. federal holidays.

### 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 Technical support team can be contacted support@freshrelevance.com and on 1-617-207-0156 (US).

### 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 to the extent practicable and shall schedule planned downtime to the extent practicable between the hours of 9:00 p.m. Friday and 6:00 a.m. Monday Eastern time.

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