



## TERMS OF SERVICE AND LICENSE AGREEMENT

**IMPORTANT—READ CAREFULLY:** These terms and conditions and license agreement (collectively, “Agreement”) is between you, your end users (hereafter “you”, or “Customer”) and Fonality, Inc. (“Fonality”) for the Fonality\* Enterprise or Professional software, products and services identified on the Estimate and Order, which may include one or more of the following: computer software (including HUD\* and HUD Mobile), telephone and other equipment, certain telecommunications services, associated hosted online services and access to same, media, printed materials, and online or electronic documentation (collectively, the “Service”). These terms and conditions all cover any add-on Orders derived from your initial Order. By agreeing to purchase the Service, you acknowledge and represent that you have read, understand, have the legal capacity to, and hereby agree to be legally bound by this Agreement.

### 1. TERM

**1.1** Subject to section 4 herein, Customer agrees to purchase the Service for a period of one (1) year from the date of the Order, or the period of time indicated on the Order (“Initial Term”), payable in accordance with the payment schedule in the Order or Estimate (that certain document to which Customer has agreed and accepted, either by electronic or physical signature, electronic approval (online “click through”) or other means mutually agreed to, and which contains a detailed description of Customer’s ordered Service). The Initial Term may start up to 10 days from date of Order to allow for Service start-up; such date to be given to Customer by Fonality. After the Initial Term, this Agreement shall automatically renew for successive one (1) year periods (“Term(s)”) unless the Customer cancels the Service in accordance with section 1.2 below.

**1.2** Customer may terminate the Service by providing sixty (60) days written notice prior to the end of the Initial Term or next renewal Term to [billing@fonality.com](mailto:billing@fonality.com). The Service is non-cancelable until the end of the Initial Term. Customer’s minimum contractual and financial commitment is for no less than the Initial Term (see also section 8.1).

### 2. EQUIPMENT. In the course of providing the Service, Fonality will provide to Customer certain equipment, including but not limited to telephone handsets, components, cables, manuals and documents, routers and other network equipment (the “Equipment”) for use in Customer’s business sites. Provided Equipment may be new, like-new, or refurbished, and is the property of Fonality.

**2.1** Fonality will provide replacement Equipment during the term of the Agreement on the following basis:

**2.1.1** Any Equipment which is not performing to original manufacturer specifications will be replaced by Fonality with like equivalent that will be in a like new or refurbished condition, subject to the following limitations. Fonality shall have the right to reject any request for replacement Equipment where the returned Equipment has failed due to Customer’s reckless or, in Fonality’s sole discretion, unreasonable use. Further, Fonality may decide in its sole discretion to reject any request for replacement Equipment where Customer is not acting in good faith, or where the Customer has a history of excess failures or requests for replacement. Equipment that is lost or stolen while in the care, custody and control of Customer shall not be replaced by Fonality in the manner described above and Fonality shall have no liability for such Equipment. In such instances, Customer will need to procure replacement Equipment from Fonality at the then current Fonality retail price. The occurrence of lost or stolen Equipment does not extinguish Customer’s obligations in this Agreement.

**2.1.2** Shipping Costs: Fonality will pay for return and replacement shipping for any Equipment failures that are due to manufacturer defects or otherwise through normal business use of the Equipment. Customer will be responsible for the shipping costs to and from Customer site for Equipment which has failures caused through accidental damage or lack of reasonable care. Customer should ship via certified mail or retain tracking information when returning Equipment. Fonality will not assume liability for lost or missing return shipments without a proof of delivery from the carrier used.

**2.1.3** RMA Process: Customer must contact Fonality to obtain a Return Material Authorization Number (“RMA Number”) before taking any return or replacement action. No return of Equipment will be accepted by Fonality without an RMA Number obtained from Fonality. All returned Equipment must be shipped clearly marked with an RMA Number, and be accompanied by a complete description of the nature of the defect. All Equipment must be returned as originally provided by Fonality. Missing Equipment items may incur further charges or, if applicable, less of a refund.

**2.2** **No Use of Uncertified Equipment.** The Service is intended for use with Fonality-provided or Fonality-certified equipment only. Fonality reserves the right to terminate or suspend Service if other equipment is used by Customer without prior written approval by Fonality.

### 3. 911 & SERVICE LIMITATIONS (FOR FULLY HOSTED SERVICE)

**3.1** The Federal Communications Commission requires that Fonality provide e911 service to all customers using the Service within the United States (“U.S.”). The terms in this section apply to all customers regardless of location.

**3.2** The e911 service provided by Fonality works differently than traditional wire line 911 emergency services. These characteristics may make e911 services unsuitable for some customers. Because customer circumstances vary widely, customers should carefully evaluate their own circumstances when deciding whether to rely solely upon the e911 service. Customer acknowledges that it is Customer’s responsibility to determine the technology or combination of technologies best suited to meet Customer’s emergency calling needs, and to make the necessary provisions for access to emergency calling services.

#### **3.3** e911 Considerations:

**3.3.1** **Limited Availability.** Customer acknowledges that the Service, including e911 service, will not function in all conditions, including but not limited to the following:

**Absence of Electrical Power.** If there is a power outage, Customer may be required to reset or reconfigure the Equipment before being able to use the Service and e911 service.

**Internet Access.** The Service and e911 service will not function if there is an interruption of Customer’s broadband or high-speed internet access service.

**Configuration and Availability.** Customer’s e911 service will not function if Customer’s phone fails or is not configured correctly or if the Service is not functioning for any reason, including suspension or disconnection of Service because of billing or other issues.

**Network Issues.** Due to technical factors in network design, and in the event of network congestion on the Fidelity network, there is a possibility that an e911 call will produce a busy signal or will experience unexpected answering wait times and/or take longer to answer than standard 911 calls placed via traditional, legacy, circuit-switched telephone networks.

**Non-Voice Systems.** The Service and e911 service may not function with out-dialing systems including home security systems, medical monitoring equipment, TTY equipment, and entertainment or satellite television systems. Customer has no claim against Fidelity for interruption or disruption of such systems by the Service, including e911 service.

**3.3.2 Cost.** Fidelity passes through to Customer a mandatory e911 service fee of \$25 per use to cover the costs associated with providing this service. This fee will be charged to Customer for each occurrence.

**3.4 Physical Location.** Customers who subscribe to e911 service will be required to register the physical location of their Equipment with Fidelity, and agree to update the location whenever the physical location of their Equipment changes. Administrative options in the Service's online control panel allows you to modify an emergency response address for your main office location, alternate locations, or even down to a specific DID. It is Customer's responsibility to verify each of these emergency response addresses to ensure first responders are able to assist Customer in case of an emergency. Customer acknowledges that the only mechanism for routing e911 calls to the correct emergency call taker is the physical location(s) currently registered for the account. There may be some delay before the automatic number and location information is passed to the local emergency service operator. In the event that the physical location has not been updated or is not complete, Fidelity may attempt to route an e911 call based upon the bill-to or ship-to addresses associated with the customer's account or initial Order.

**3.5 Warning Labels.** Fidelity will provide Customer with warning labels regarding the limitations or unavailability of e911 service. Customer agrees to place a label on and/or near each telephone or other Customer premise equipment on which the services may be utilized.

**911 Acknowledgement: The Service does not support 911 emergency dialing or other emergency functions in the same way that traditional wire line 911 services operate. The differences are detailed in this section and you agree to notify any potential user of the services, who may place calls using your telephone/communication system(s), of the e911 limitations described herein. Customer hereby acknowledges that it has been advised of the circumstances under which e911 service may not be available or may be limited in comparison to traditional 911 emergency dialing.**

#### **CUSTOMER SHOULD MAINTAIN AN ALTERNATIVE MEANS OF ACCESSING TRADITIONAL 911 SERVICES.**

#### **4. BILLING & PAYMENTS**

**4.1 Orders.** Customer's signature (electronic or physical) of an Estimate is a non-cancellable Order by Customer for Service. **Orders are not binding until accepted by Fidelity, in its sole discretion.** All Orders and/or shipments shall be FOB Fidelity. Except in the case of a breach, as provided in section 8, once an Order is accepted by Fidelity, it may be changed or cancelled ONLY with the written consent of Fidelity.

**4.2 Payment.** Payment for the Service shall be made in accordance with the payment schedule described in the Order or Estimate. Additionally, all Orders require a valid credit card number ("Credit Card"). Customer authorizes Fidelity to charge the Credit Card for all fees and charges arising from Customer's use of the Service. Customer authorizes Fidelity to charge the Credit Card for all charges arising from Customer's use of the Service. Customer agrees to notify Fidelity of any change to the Credit Card information including, but not limited to, changes in account number, expiration date or billing address. Fidelity shall not be responsible for any damages resulting from cancellation of Service arising from unreported changes to Credit Card information, credit limitation or other inability to charge the Credit Card.

**4.3** All purchases related to the Service contained in the Order, including but not limited to activation fees, service fees and shipping charges are non-refundable. Upon receipt of an Order from Customer that is accepted by Fidelity, we will begin the process of setting up the ordered Service for you. Therefore, once an Order has been placed, and accepted by Fidelity, no refund will be given of any activation fees, setup charges, or other fees incurred, regardless of whether or not such Service was used.

**4.4 Customer acknowledges and agrees that the Service is provided "AS IS", as described in section 10. Credit allowances for interruption of Service is not required or warranted and shall be provided at the sole discretion of Fidelity.**

**4.5** From time to time in its sole discretion, Fidelity may offer promotions or discounts of activation or other fees. Customer shall not be entitled to a subsequent credit for such promotions or discounts, if not available and/or issued at the time of purchase.

**4.6 Billing.** Fidelity will bill all fees and charges (described below) to Customer's Credit Card on file.

**4.6.1 Monthly Recurring Fees.** Monthly service fees including any associated taxes and fees are paid in advance of each month's service.

**4.6.2 Non-Recurring Charges.** Toll charges (as defined in section 4.9), and any other applicable charges which may include, but may not be limited to, usage charges, fax charges, activation fees, shipping charges, disconnection fees, equipment charges, and any other applicable charges. are billed subsequent to the end of each month's service. The Credit Card will be charged prior to the end of the month if at any time Customer's cumulative Non-Recurring Charges exceed two hundred fifty dollars (\$250.00). The Credit Card will be charged for any additional Non-Recurring Charges at the end of the month.

**4.6.3 Add-on Orders.** Any additional Orders, software or licenses added after the commencement of Service will be billed pro-rata for the initial month.

**4.7 Non-Payment.** If payment cannot be charged to the Credit Card for any reason then, without any notice to Customer, Fidelity reserves the right to either suspend or terminate Customer's access to and/or use of the Service and to terminate this Agreement. Delinquent payments are subject to a late-payment charge of the greater of 1.5% of the outstanding balance, or the maximum amount allowed by law, whichever is higher. Fidelity shall not be responsible for any third party costs incurred by Customer for exceeding credit limit, insufficient funds or other reasons. An activation fee may be imposed prior to reinstatement of any Service.

#### **4.8 Taxes and Fees**

**4.8.1 Taxes.** Amounts contained in the Estimate do not include any customs duties, sales, use, value added, excise, federal, state, local, public utility, universal service or other similar taxes. All such taxes shall be paid by Customer and will be added to any amounts otherwise charged to Customer, and Customer will be liable for and will pay in full all such amounts.

**4.8.2 e911.** All Customers are required to subscribe to Fidelity's e911 service and will be subject to a monthly e911 service charge. The monthly e911 service fee shall be included in the applicable business plan charges for the associated line and Customer shall reimburse Fidelity for the direct costs it incurs in providing e911 service, including state, county and municipal e911 surcharges, e911 automatic location information (ALI) database storage, line information database and caller id (LIDB/CNAM) expenses, and any other taxes or surcharges directly or indirectly associated with the provision

of e911 service. Fonality reserves the right to adjust the level of charges associated with the provision of e911 service to reflect increases or decreases in the costs Fonality incurs. Other fees may apply for usage of e911 service as outlined in section 3 herein.

**4.9 Toll Charges.** Every call to or from Equipment using the Service that originates or terminates in the Public Switched Telephone Network ("PSTN"), including other VoIP networks and inbound toll free number calls to Customer's toll free number (if applicable), is considered a Toll Call. The duration of each call is to be calculated in one-minute increments and rounded up to the nearest one-minute increment for any fraction of minutes used. If the computed charge for a call includes a fraction of a cent, the fraction is rounded up to the nearest whole cent. Subject to section 4.11 and section 5 below, Customers who are on an Unlimited Plan (defined below) shall not be charged for telephone calls to inclusive countries. The current list of inclusive countries (and related exclusions to the types of call covered) can be found at <http://www.fonality.com/legal/international-service.html>. As noted therein, certain types of calls, including but not limited to mobile phones and premium rate phones, will not be included in the unlimited calls program, and will be billed in accordance with section 4.10

**4.10 International rates.** When Customer dials an international PSTN phone number or mobile phone number, charges may apply regardless of whether the party on the other line answers the call. Calls made by a Customer to an international mobile or premium rate international telephone number may result in higher toll charges. International rates vary by destination country, city, and band, and are subject to change by Fonality from time-to-time without prior notice. You will be charged for all calls to any international destination, excluding inclusive countries, in full-minute increments at Fonality's then-current rate as posted at <http://www.fonality.com/legal/rates.html>. Note that certain limitations apply to Customer's ability to place calls to certain international destinations and types of phones, including but not limited to, satellite phones. Contact [billing@fonality.com](mailto:billing@fonality.com) for details or to make arrangements to pre-pay for such services.

**4.11 Price Changes and other Modifications.** Changes to charges, fees or taxes for the Service (other than international calling rates which are updated from time to time at <http://www.fonality.com/legal/rates.html>) are effective after 10 days' notice has been sent Customer via email to the authorized email address for Customer's account. Fonality may decrease prices without providing advance notice.

**4.12** Customer must dispute mistakes in charges, fees or taxes in writing within thirty (30) days of the date of the charge, fee or tax by Fonality. After thirty (30) days from the date of the charge, fee or tax, Customer waives any objection and further recourse. Written statements disputing charges must be sent to: [billing@fonality.com](mailto:billing@fonality.com). The existence of a validly filed dispute shall in no way relieve Customer of its obligation to pay all amounts billed by Fonality, including any disputed amounts.

## 5. REASONABLE USE, PROHIBITED USE, AND FRAUD

**5.1 Reasonable Business Use.** Any of Fonality's service plans that offer unlimited minutes of PSTN calls ("Unlimited Plans") are for reasonable business use of Customer only. Activities such as: autodialing, continuous or extensive call forwarding, use of virtual extensions for regular business use, continuous connectivity, fax broadcast, fax blasting, unlawful or unauthorized telemarketing, junk faxing, fax spamming, calling/faxing any person (through the use of distribution lists or otherwise) who has not given specific permission to be included in such a process, AND where Customer's average outbound minutes per user (defined as the total number of outbound minutes used by Customer divided by the number seats/licenses purchased by Customer) exceed 1500 minutes a month, are NOT Reasonable Business Use as intended for the Service. If Fonality determines that Customer use of the Service is not within the scope of Reasonable Business Use, Fonality reserves the right to invoice Customer for any additional users or usage (including the right to charge Customer's Credit Card) at the then current per-minute rate and/or to terminate or modify the terms of Customer's Service.

**5.2. Prohibited Use.** Any use of the Service or any other action that causes a disruption in the network integrity of Fonality or its vendors, whether directly or indirectly, is strictly prohibited and may result in termination of the Service at the sole discretion of Fonality. Customer understands that neither Fonality nor its vendors are responsible for the content of the transmissions that may pass through the Internet and/or the Service. Customer agrees that it will NOT use the Service in ways that violate any law or regulation (including but not limited to laws prohibiting transmission of unsolicited fax advertisements), infringe the rights of others, or interfere with the users, services, or equipment of the network. Customer agrees and represents that it is purchasing the Service for its own internal use, and shall not resell, transfer or make a charge for the Service without the advance written permission of Fonality. Customer shall not transmit through the Service any unlawful, harassing, libelous, abusive, threatening, harmful, vulgar, obscene or otherwise objectionable material of any kind or nature. Customer further agrees not to transmit any material that encourages conduct that could constitute a criminal offense, give rise to civil liability or otherwise violate any applicable local, state, national or international law or regulation. Any use found to be inconsistent with this restriction will result in termination of the Service.

**5.3. Fraud.** It is the express intention of the parties that Customer, and not Fonality, shall bear the risk of loss arising from any unauthorized or fraudulent usage of the Service. Fonality reserves the right, but is not required, to take any and all action it deems appropriate (including blocking access to particular calling numbers or geographic areas) to prevent or terminate any fraud or abuse in connection with the Service, or any use thereof, provided, however, that any such action shall be consistent with applicable federal and state laws, rules, and regulations and provided further that the failure to take any such action shall not limit Customer's responsibility for all usage of the Service.

## 6. TELEPHONE NUMBER.

**6.1 Ownership.** Any telephone number provided by Fonality to the Customer ("Number") shall be leased and not sold. Fonality reserves the right to change, cancel or move the Number at its sole discretion. Where customer wishes to port in telephone number(s) for use with the Service, Customer should NOT cancel service with the current/previous service provider(s) until Fonality confirms to Customer that the numbers have been successfully ported to Fonality. Customer is responsible for the timely termination of all services with current/previous service provider and the settlement of any charges owed to their current/previous service provider. Additionally, Customer is responsible for the verification that the Number(s) provided to Customer meet the necessary requirements of Customer (i.e., such Number will be considered a local number to Customer in Customer's area or such number is sufficiently different from a customer competitor's number, etc.). Fonality will reasonably accommodate Customer with a particular number selection, prefix or sequence, as available and able to accommodate. Fonality accepts no responsibility or liability in the number ultimately issued or selected for the Service.

**6.2 Listing.** Additionally, Customer's Number will likely NOT be listed in any local or regional telephone book unless Customer has taken independent steps to pay for telephone number or business advertisement. Numbers associated with the Service are not utilized with a traditional wire line/carrier. Fonality makes no warranty and accepts no responsibility or liability for Customer's Number(s) NOT being listed in telephone books or other directories.

**6.3 Porting.** Customer's porting away of a telephone number does not extinguish Customer's obligations and/or limitations under this Agreement, including the notice requirements in sections 1 and 8.

## 7. TECHNICAL SUPPORT AND SCHEDULED MAINTENANCE

**7.1 Technical Support.** Fonality provides technical support to Customer via telephone and e-mail for the Service only and support for other applications and uses is not provided or implied. Items outside the scope of Technical Support include, but are not limited to: your router (if not purchased from Fonality), your cable modem or DSL modem, any other type of modem providing Internet service to your location, any network switches or hubs, electricity, any wall outlets or jacks for power or Internet connectivity, grounding cables not supplied with the Service, and any other environmental variable related to, but not required for, operation of the Service.

**7.2 Scheduled Maintenance.** From time-to-time, Fonality performs maintenance to update servers and software that are part of the Service. **Fonality performs scheduled maintenance between 8:00 pm to 2:00 am PST/PDT every Tuesday and Thursday.** Fonality may, in certain circumstances, need to perform maintenance at other times. At any time that Fonality is required to perform emergency or un-planned maintenance, Fonality will make reasonable efforts to notify the account contact that has been listed by the Customer under the "Options" tab of Customer's online administrative control panel or via email to such Customer email address on file. However, at times, emergency or un-planned maintenance may have to be done before Fonality can give any notice to Customer. In any event, Fonality will not be liable (under this Agreement or any uptime service agreement) for service interruptions where maintenance is prudent to perform.

## **8. TERMINATION**

**8.1 By Customer.** Customer may terminate this Agreement in accordance with section 1 of this Agreement. Customer is responsible for Termination Charges and all Service related charges, including usage, until the termination date. In the event of an unauthorized cancellation or abandonment of service by the customer in the Initial Term, Customer shall remain liable for the Monthly Recurring Fee and any applicable taxes, fees or charges, for the remainder of the Initial Term plus the retail price of the Equipment (if not returned utilizing a valid RMA Number described below).

**8.2 By Fonality.** Fonality reserves the right, at its sole discretion, to suspend, terminate or change the Service without advanced notice for any reason, including without limitation, misuse of the Service in any way, Customer's breach of this Agreement, Customer's failure to pay any sum due hereunder, suspected fraud or other activity by Customer that adversely affects the Service, Fidelity, Fidelity's network or other Customers' use of the Service. Fidelity reserves the right to determine, at its sole discretion, what constitutes misuse of the Service and Customer agrees that Fidelity's determination is final and binding on Customer. **If Fidelity terminates Service per the terms of this section during the Initial Term, Customer shall remain obligated for the payment of Service for the Initial Term.** Fidelity may charge an activation fee to reactivate a terminated service. Additionally, in the event of early termination during the Initial Term due to a Customer breach, Customer shall remain fully obligated for the payment of all taxes, fees, and charges for Service ordered for the remainder of the Initial Term.

**8.3 Termination Charges.** Upon Termination (a timely termination as described in section 1), in addition to any outstanding balance incurred or due on your account, Customer shall pay the full amount of the monthly recurring charges for the terminated Service for the month of the effective termination (regardless of whether the termination date is mid-billing cycle), in addition to any additional charges incurred under this Agreement. You agree that Fidelity may charge such unpaid balance to the Credit Card.

**8.4 Liability after Termination.** Termination or expiration of this Agreement will not extinguish Customer's obligations or liability arising prior to such termination or expiration. Notwithstanding, and after the effective date of any termination, Fidelity shall not be liable to Customer for any obligations under this Agreement, including continued provision of Service.

**8.5 Return of Fidelity Equipment.** Within fourteen (14) business days of termination of the Service for any reason or expiration of Service, Customer shall return the Equipment at Customer's expense utilizing a valid RMA Number, and in accordance with the return and shipping requirements described in section 2.1.3 herein. The Equipment must be returned to Fidelity in good working order. If the Equipment is not received within fourteen (14) business days of termination or expiration of Service and as required herein, Customer's credit card will be charged for the current full list value of such Equipment. Additionally the Customer shall delete all Fidelity software such as, but not limited to, HUD. For return of Equipment after fourteen (14) business days from the RMA Number issue date, please contact Fidelity prior to shipment. Any late return of Equipment agreed to by Fidelity will be subject to a 30% (of Equipment list value) restocking fee.

## **9. INDEMNIFICATION**

**9.1 CUSTOMER.** CUSTOMER AGREES TO RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS FIDELITY, AND ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, REPRESENTATIVES, VENDORS AND CONTRACTORS ("INDEMNIFIED PARTY" OR "INDEMNIFIED PARTIES") FROM AND AGAINST ANY AND ALL LIABILITIES, CLAIMS, DAMAGES, LOSSES, INJURIES AND JUDGMENTS (INCLUDING RELATED COSTS AND EXPENSES AND REASONABLE ATTORNEY'S FEES AND OTHER LITIGATION EXPENSES) ("CLAIM" OR "CLAIMS") INCURRED BY THE INDEMNIFIED PARTY(IES) ARISING OUT OF OR RELATING TO CUSTOMER'S (A) VIOLATION OR BREACH OF ANY TERM OF THIS AGREEMENT, OR (B) MISUSE OF THE SERVICE. FURTHER, CUSTOMER AGREES TO RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS INDEMNIFIED PARTY(IES) FROM AND AGAINST ANY AND ALL THIRD PARTY CLAIM(S) RELATED TO THE FAILURE OR OUTAGE OF THE SERVICE, INCLUDING THOSE RELATED TO E911 SERVICE.

### **9.2. Fidelity.**

**9.2.1** Fidelity shall defend Customer, and its officers, directors and employees, against any third party action alleging that the Service infringe(s) any valid U.S. patent or copyright, and Fidelity shall pay all settlements entered into, and all costs (including reasonable attorneys' fees) in connection with such action. If any Service, or parts thereof, becomes, or in Fidelity's opinion may become, the subject of an infringement claim, Fidelity may, at its option, (a) procure for Customer the right to continue using such Product/Service, (b) modify or replace such Service with substantially equivalent non-infringing products, or (c) require the return of such Service and refund to Customer a pro-rata portion of the purchase price of such Service based on a three-year straight line amortization of the purchase price.

**9.2.2** Fidelity shall have no indemnification obligations with respect to any third party action alleging that the use of any Service, or any part thereof, in combination with products not supplied by Fidelity infringes any third party intellectual property right provided that the infringement is (a) due solely to the combination and use of such products together, if the use of the Service independent of any product not supplied by Fidelity would not have given rise to the claim; or (b) Customer is advised by Fidelity either directly or by means of Documentation, marketing or other published materials that the use of Fidelity Service in tandem with such products represents a risk of infringement; and (c) Customer combines and uses such products with Fidelity's Service in contravention of Fidelity's disclaimer.

**9.2.3** Fidelity's indemnification obligations pursuant to this section 9 shall be subject to the indemnified party (a) notifying the indemnifying party promptly in writing of such action, (b) giving the indemnifying party exclusive control and authority over the defense or settlement of such action, (c) not entering into any settlement or compromise of any such action without the indemnifying party's prior written consent and (d) providing all reasonable assistance to the indemnifying party (provided that the indemnifying party reimburses the indemnified party for its out-of-pocket expenses incurred in providing such assistance).

## 10. DISCLAIMERS AND LIMITATION OF LIABILITY

**10.1 DISCLAIMER OF WARRANTIES.** EXCEPT AS EXPRESSLY SET FORTH HEREIN, FONALITY PROVIDES THE SERVICE "AS IS" AND WITH ALL FAULTS. FONALITY HEREBY EXPRESSLY DISCLAIMS, AND CUSTOMER HEREBY WAIVES, RELEASES AND RENOUNCES ALL OTHER REMEDIES, WARRANTIES, GUARANTEES, OBLIGATIONS, REPRESENTATIONS AND LIABILITIES, EXPRESS OR IMPLIED, ARISING IN FACT, LAW, EQUITY, CONTRACT, TORT, UNDER STATUTE, UNDER WARRANTY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO: (A) ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, (B) ANY IMPLIED WARRANTY OR CONDITION ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OR TRADE, (C) ANY OBLIGATION, LIABILITY RIGHT, CLAIM OR REMEDY IN TORT, WHETHER OR NOT ARISING FROM ACTIVE, PASSIVE OR IMPUTED NEGLIGENCE, CONTRIBUTORY NEGLIGENCE, VICARIOUS LIABILITY OR STRICT PRODUCTS LIABILITY OF FONALITY AND ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND REPRESENTATIVES, AND (D) ANY OBLIGATION, LIABILITY OR RESPONSIBILITY FOR LOSS OF SERVICE OR DAMAGE TO ANY EQUIPMENT OR PART THEREOF, OR ANY SERVICE DELIVERED OR PROVIDED UNDER THIS AGREEMENT OR THE ORDER. FURTHER, FONALITY DOES NOT WARRANT THAT THE SERVICE WILL BE FREE OF BUGS, ERRORS, VIRUSES OR OTHER DEFECTS, OR THAT THE SERVICE WILL BE COMPATIBLE WITH CUSTOMER'S EXISTING INTERNET CONNECTION, NETWORK, OR COMMUNICATIONS INFRASTRUCTURE OR ENVIRONMENT.

**10.2 DISCLAIMER OF CERTAIN DAMAGES.** IN NO EVENT WILL FONALITY OR ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, REPRESENTATIVES, VENDORS AND CONTRACTORS BE LIABLE FOR THE COST OF COVER OR FOR ANY INCIDENTAL, INDIRECT, SPECIAL, AGGRAVATED, PUNITIVE, CONSEQUENTIAL OR SIMILAR DAMAGES OR LIABILITIES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO LOSS OF DATA, INFORMATION, REVENUE, PROFIT OR BUSINESS) ARISING OUT OF OR RELATING TO THE USE OR INABILITY TO USE THE SERVICE OR OTHERWISE UNDER OR IN CONNECTION WITH THIS AGREEMENT, WHETHER ARISING IN FACT, LAW, EQUITY, CONTRACT, TORT (INCLUDING NEGLIGENCE AS DESCRIBED ABOVE), STRICT LIABILITY, UNDER STATUTE, UNDER WARRANTY OR OTHER THEORY EVEN IF FONALITY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

**10.3 LIMITATION OF LIABILITY.** WITHOUT LIMITING THE FOREGOING, FONALITY'S (INCLUDING ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND REPRESENTATIVES) LIABILITY ARISING OUT OF OR RELATING TO THE SERVICE, THIS AGREEMENT IS LIMITED TO THE AMOUNT ACTUALLY PAID BY CUSTOMER FOR THE SERVICE REGARDLESS OF THE AMOUNT OF DAMAGES CUSTOMER MAY INCUR AND WHETHER SUCH DAMAGES ARISE IN FACT, LAW, EQUITY, CONTRACT, TORT (INCLUDING NEGLIGENCE AS DESCRIBED ABOVE), STRICT LIABILITY, UNDER STATUTE, UNDER WARRANTY OR OTHER THEORY. FURTHER, CUSTOMER ACKNOWLEDGES AND UNDERSTANDS THAT FONALITY (INCLUDING ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND REPRESENTATIVES) WILL NOT BE LIABLE FOR ANY SERVICE OUTAGE, INCLUDING E911 SERVICE OUTAGE AND/OR INABILITY TO DIAL 911 OR ANY OTHER EMERGENCY TELEPHONE NUMBER USING THE SERVICE OR TO ACCESS AN EMERGENCY SERVICE OPERATOR DUE TO THE E911 DIALING CHARACTERISTICS, REQUIREMENTS, AND LIMITATIONS SET FORTH IN THIS AGREEMENT.

**10.4 Disclaimer of Third Party Actions and Control (including your selected carrier).** Fonality does not and cannot control the flow or quality of data to or from the network and other portions of the Internet. Such flow depends in large part on the performance of Internet services selected by you and provided or controlled by third parties. At times, the quality of carrier, and/or the actions or inactions caused by third parties can produce occurrences in which Customer's Service and/or connection to the Internet (or portions thereof) may be impaired or disrupted.

**10.5 Security and Fraud Prevention.** Fonality maintains fraud and security monitoring protocols. However, Fonality cannot and does not warrant complete security and fraud prevention of its Service, including any server, equipment or the Fonality network. Accordingly, Fonality disclaims any and all liability resulting from or related to unauthorized intrusions or access and related security events.

**10.6 Disclaimer Regarding Voicemail Transcription.** Fonality is not responsible for external communications received through Fonality's voicemail transcription service. Fonality does not control the content and is therefore not responsible for any errors or omissions in any transcription content provided. Some voicemail messages may be mis-transcribed. This may occur because of poor dictation, noisy environment, poor phone connection or drop-outs, language, or simple transcription error. Accordingly, Fonality disclaims any and all liability resulting from or related to mis-transcription and you agree to hold Fonality harmless in such events.

**10.7 Disclaimer Regarding Call Recording.** The call recording feature of the Service is provided to Customer "as is" with no proscription or restriction(s) of its use by Customer. Customer is responsible and liable for legal compliance of "call recording," such as lawful use and requisite notice to employees, agents or third parties. Fonality shall not be liable to Customer or third party(s) involving "call recording" feature(s) of the Service, as selected by Customer. Accordingly, Fonality disclaims any and all liability, claims, or damages resulting from or related to call recording and you agree to hold Fonality harmless in such events.

The foregoing disclaimers and limitation of liability will apply to the maximum extent permitted by applicable law. The laws of some states/jurisdictions do not allow the exclusion of implied warranties or the exclusion or limitation of certain damages. To the extent that those laws apply to this Agreement, the exclusions and limitations set forth above may not apply to you. For further Equipment warranty information, you may contact Fonality at 5800 Granite Parkway, Suite 550, Plano, Texas 75024. Any warranty DOES NOT apply to any beta software, software made available for testing or demonstration purposes, or any temporary software modules. All such software is provided "AS IS" without any warranty whatsoever.

## 11. INTELLECTUAL PROPERTY

**11.1** For the purpose of this section, the term "Fonality Intellectual Property" shall include but is not limited to any and all tangible and intangible: (i) rights associated with works of authorship throughout the world, including but not limited to copyrights, neighboring rights, moral rights, and mask works, and all derivative works thereof, (ii) trademark and trade name rights and similar rights, (iii) trade secret rights, (iv) patents, designs, algorithms and other industrial property rights, (v) all other intellectual and industrial property rights (of every kind and nature throughout the world and however designated) whether arising by operation of law, contract, license, or otherwise, and (vi) all registrations, initial applications, renewals, extensions, continuations, divisions or reissues thereof now or hereafter in force (including any rights in any of the foregoing), including software or programming delivered hereunder. Any software distributed by Fonality which is licensed under the GNU General Public License (GPL) is specifically excluded from this definition.

**11.2** All Fonality Intellectual Property is solely for use by Customer as shipped, and may not be used as a replication master or otherwise copied without the written consent of Fonality. Use of software delivered in conjunction with the Service or as a separate item shall be subject to this Agreement and a separate license agreement that Customer shall be required to accept prior to delivery/installation. Customer acknowledges that all Fonality Intellectual Property furnished by Fonality hereunder and the contents thereof are the proprietary property of Fonality, and Customer has no right or interest therein except that Customer is granted a perpetual, non-exclusive, worldwide, non-transferable, and non-sublicenseable license to use the Service (including the applicable

Fonality Intellectual Property) for Customer's internal business purposes. This license shall terminate or expire in the same manner this Agreement may expire or be terminated, according to the applicable provisions. All Customer employees may exercise the license granted. No other license(s) are granted by implication, estoppel or otherwise. Customer agrees not to directly or indirectly reproduce, decompile or provide or otherwise make available to any third party any Fonality Intellectual Property. Customer shall be liable for all damages, including loss of anticipatory profits, incurred by Fonality as a result of such unauthorized use, copy or replication. The rights granted hereunder or use of Service (including the Equipment) does not convey any rights or ownership in Fonality patents, copyrights, trademarks, intellectual property or know-how.

12. **EXPORT CONTROLS.** You acknowledge that the Service is subject to export controls under the laws and regulations of the U.S. and any other applicable countries' laws and regulations. . You agree to comply with all applicable laws and regulations that apply to the Service, including without limitation the U.S. Export Administration Regulations and, as applicable, will obtain all required U.S. and local authorizations, permits, or licenses. The parties agree to provide to each other information as may be reasonably required by the other in connection with obtaining authorizations or licenses.
13. **U.S. GOVERNMENT LICENSE RIGHTS.** All Service provided to the U.S. Government is provided with the commercial license rights and restrictions described in this Agreement. The U.S. Government has deemed that by installing, copying or using the Service, the Service is "commercial computer software" or "commercial computer software documentation" within the meaning of DFAR Section 227.7202 and FAR Section 12.212, as applicable. Any use, modification, reproduction release, performance, display or disclosure of the Service by the U.S. Government shall be governed solely by the term of this Agreement and shall be prohibited except to the extent expressly permitted by the terms of this Agreement.
14. **FORCE MAJEURE.** Fonality will not be liable for delay or failure to furnish the Service(s) contemplated by this Agreement when the delay or failure is caused by circumstances that are not reasonably within Fonality's control, including an act of God, strike or lockout or other labor dispute, act of the public enemy, war (declared or undeclared), blockade, revolution, civil commotion, lightning, fire, storm, flood, earthquake, explosion, governmental restraint, embargo, inability to obtain or delay in obtaining governmental approvals, permits, or licenses.
15. **GOVERNING LAW, JURISDICTION, AND FEES.** This Agreement, the related Estimate(s), Order(s), add-on Orders, and the entire relationship of the parties, shall be governed by and construed under the laws of the State of Texas without giving effect to its choice of law principles. The parties disclaim the application of the 1980 U.N. Convention on Contracts for the International Sale of Goods or any successor thereto is disclaimed. Any litigation arising directly or indirectly out of this Agreement, the related Estimate(s), Order(s), add-on Orders, and/or the entire relationship of the parties will be litigated in the Texas State Courts, Dallas County, Texas or, if original jurisdiction can be established, in the United States District Court for the Eastern District of Texas, Plano Division. THE PARTIES VOLUNTARILY, KNOWINGLY AND IRREVOCABLY WAIVE THEIR RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING TO WHICH THEY MAY BE A PARTY INVOLVING ANY THE AGREEMENT, THE RELATED ESTIMATE(S), ORDER(S), ADD-ON ORDERS, AND/OR THE RELATIONSHIP OF THE PARTIES. In any formal action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and reasonable attorney(s)' fees.
16. **ENGLISH LANGUAGE.** It is the express wish of the parties that this Agreement and all related documents are drawn up in English and that the English version of any document will govern.
17. **ENTIRE AGREEMENT.** The Agreement and the Estimate set forth the entire agreement of Fonality and you with respect to the Service, and the subject matter hereof, and supersedes all prior and contemporaneous understandings and agreements, including, without limitation, purchase orders and specifications, whether written or oral. No amendment, modification or waiver of any of the provisions of this Agreement by Customer will be valid unless set forth in a written instrument signed by the parties.
18. **SEVERABILITY.** If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, illegal, void, or unenforceable, the remainder of this Agreement will remain in full force and effect and shall control.
19. **NOTICES.** Any notice required or permitted to be sent under this Agreement shall be delivered by first class mail, return receipt requested, or via an international courier service (e.g. FedEx, DHL, UPS, etc.) to the addresses of the parties: 1) if Customer, the address Customer provided to Fonality in the Order; 2) if to Fonality, 5800 Granite Parkway, Suite 550, Plano, Texas 75024. Notice so sent will be deemed effective three days following deposit in the mail, proper postage prepaid or one day following delivery to an international courier, prepaid for overnight delivery.
20. **MODIFICATIONS. FONALITY RESERVES THE RIGHT, AT FONALITY'S SOLE DISCRETION, TO CHANGE, MODIFY OR OTHERWISE ALTER THESE TERMS AND CONDITIONS AT ANY TIME. YOU CAN FIND THE MOST RECENT VERSION OF THESE TERMS AND CONDITIONS AT [WWW.FONALITY.COM/LEGAL](http://WWW.FONALITY.COM/LEGAL) (THE "WEBSITE"). SUCH MODIFICATIONS SHALL BECOME EFFECTIVE IMMEDIATELY UPON POSTING SUCH TO THE WEBSITE. IF YOU DO NOT AGREE TO THE POSTED, REVISED TERMS AND CONDITIONS, YOUR SOLE RECOURSE IS TO TERMINATE THIS AGREEMENT, SUBJECT TO SECTIONS 1, 8, AND 19 OF THIS AGREEMENT. CONTINUED USE OF THE SERVICE FOLLOWING THE POSTING OF MODIFICATIONS WILL CONSTITUTE YOUR ACCEPTANCE OF THE REVISED TERMS AND CONDITIONS. SHOULD YOU HAVE ANY QUESTIONS, PLEASE CONTACT US AT: [INFO@FONALITY.COM](mailto:INFO@FONALITY.COM).**

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