

MK Partners Professional Services Agreement

This MK Partners Professional Services Agreement (the "AGREEMENT") is entered into by and between MK Partners Inc., a California corporation, with offices at 2600 W. Olive Ave., Suite 500, Burbank, CA 91505 ("MKP") and the entity agreeing to these terms ("CUSTOMER"). This Agreement is effective the earlier of either i. the date the MK Partners Statement of Work to which it is attached is signed by the CUSTOMER or ii. the date the CUSTOMER makes payment for any portion of Professional Services pursuant to said MK Partners Statement of Work (the "EFFECTIVE DATE"). If you are accepting on behalf of your employer or another entity, you represent and warrant that: (i) you have full legal authority to bind your employer, or the applicable entity, to these terms and conditions; (ii) you have read and understand this AGREEMENT; and (iii) you agree, on behalf of the party that you represent, to this AGREEMENT. If you don't have the legal authority to bind your employer or the applicable entity, please do not sign the Statement of Work or make any payments for it. This AGREEMENT governs CUSTOMER's access to and use of the Services.

1. **Definitions**

"**PROFESSIONAL SERVICES**" shall mean work performed by MKP for CUSTOMER pursuant to a Statement of Work under this AGREEMENT.

"**STATEMENT OF WORK**" shall mean MKP's standard form for ordering PROFESSIONAL SERVICES (entitled "Statement of Work"), which has been completed and executed by both parties, and which specifies the scope and schedule of PROFESSIONAL SERVICES to be performed by MKP for CUSTOMER and the applicable fees. Each STATEMENT OF WORK hereunder shall be governed by the terms of this AGREEMENT.

2. **Ordering, Charges, Payment, Taxes**

- 2.1. **Who May Order.** CUSTOMER or a wholly owned subsidiary of CUSTOMER (each a "CUSTOMER ENTITY") may obtain PROFESSIONAL SERVICES from MKP under this Agreement. By signing a Statement of Work, a CUSTOMER ENTITY agrees that any PROFESSIONAL SERVICES obtained pursuant to the STATEMENT OF WORK are subject solely to the provisions of this AGREEMENT and the STATEMENT OF WORK. CUSTOMER represents and warrants that any CUSTOMER ENTITY who purchases PROFESSIONAL SERVICES shall perform its obligations in accordance with the terms and conditions of this AGREEMENT and the relevant STATEMENT OF WORK.
- 2.2. **Fees for Professional Services.** Unless otherwise expressly stated in the applicable STATEMENT OF WORK, PROFESSIONAL SERVICES shall be provided on a time and materials ("T&M") basis at MKP's then current T&M rates at the time the PROFESSIONAL SERVICES are performed unless otherwise agreed to in a defined STATEMENT OF WORK. If a dollar amount is stated in the applicable STATEMENT OF WORK for T&M Professional Services, that amount shall be deemed solely an estimate for CUSTOMER's budgeting and MKP's resource scheduling purposes. In the event that the estimated amount is expended, MKP will continue to provide PROFESSIONAL SERVICES on a T&M basis under the terms of the applicable STATEMENT OF WORK.
- 2.3. **Incidental Expenses.** All travel and other incidental expenses (including travel time at MKP's standard rate), if applicable, are additional and will be billed as incurred. All incidental expenses shall be agreed upon by CUSTOMER and MKP prior to purchase/spending. CUSTOMER shall reimburse MKP for material(s) and reasonable travel, administrative, and out-of-pocket expenses incurred in conjunction with the PROFESSIONAL SERVICES.
- 2.4. **Change Order.** In order to make a change to the Description of Professional Services in the STATEMENT OF WORK, CUSTOMER must submit a written request to MKP specifying the proposed changes in detail. MKP will submit to CUSTOMER an estimate of the charges and the anticipated changes in the delivery schedule that will result from the proposed change in the PROFESSIONAL SERVICES ("Change Order"). MKP will continue performing the Professional Services in accordance

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with the STATEMENT OF WORK until the parties agree in writing on the change in scope of work, scheduling, and fees therefore. For effort beyond the scope of the Statement of Work that is reflected in a change order, MKP will charge a flat rate of \$225.00 an hour. Any Change Order shall be agreed to by the parties in writing prior to implementation of the Change Order (email shall suffice).

- 2.5. Invoicing and Payment. MKP shall invoice CUSTOMER semi-monthly, unless otherwise expressly stated in the applicable STATEMENT OF WORK. Charges shall be due and payable thirty (30) days from the date of the invoice and shall be deemed overdue if unpaid thereafter, unless otherwise expressly stated in the applicable STATEMENT OF WORK. Except for charges being disputed reasonably and in good faith, amounts remaining unpaid after the due date shall be subject to interest at 1.5% per month, or the highest rate allowed by law if lower, from the due date until the amounts are paid. CUSTOMER shall issue a purchase order, or alternative document acceptable to MKP, on or before commencement of PROFESSIONAL SERVICES under the applicable STATEMENT OF WORK. CUSTOMER agrees to pay any and all Merchant processing fees for Credit Card payments, not to exceed 3.0% of payment amount.
- 2.6. Taxes. Charges for PROFESSIONAL SERVICES hereunder do not include any federal, state, local or foreign taxes, duties or levies of any nature ("Taxes"). Any Taxes required to be paid by MKP as a result of the PROFESSIONAL SERVICES rendered hereunder (other than Taxes based on MKP's income) shall be billed to and paid by CUSTOMER.

3. Contract Property

- 3.1. Contract Property. All work product produced by MKP in the course of providing the Professional Services shall be owned solely by MKP. MKP hereby grants CUSTOMER a worldwide, perpetual, irrevocable, non-exclusive, non-transferable (except to a successor by way of merger, reorganization or sale of assets), royalty-free license to use and modify such work product solely for its internal business purposes.
- 3.2. Relationship to Online Service The PROFESSIONAL SERVICES provided under this Agreement may be in support of CUSTOMER's license, under a separate agreement, to use MKP's on-demand service. Such separate agreement shall govern all use by CUSTOMER of such on-demand service. Neither this Agreement nor any STATEMENT OF WORK hereunder grants CUSTOMER any license or rights to use such on-demand service. In addition, except for the Professional Services described in Statements of Work hereunder, CUSTOMER agrees that its purchase of PROFESSIONAL SERVICES under this Agreement is not contingent upon the delivery of any future functionality or features in MKP's on-demand service, nor is it dependent upon any oral or written public comments made by MKP with respect to future functionality or features.

4. Term and Termination

- 4.1. Term. This Agreement shall commence on the EFFECTIVE DATE and shall remain in effect until terminated in accordance with this Section 4.
- 4.2. Termination for Convenience
- 4.2.1. CUSTOMER may terminate this Agreement and/or any Statement of Work hereunder at any time for convenience by providing MKP five (5) business days prior written notice, except for Statements of Work that are billed in advance or that otherwise expressly do not permit cancellation or termination for convenience. If CUSTOMER terminates a STATEMENT OF WORK for convenience prior to its completion, then (i) MKP will stop work under the Statement of Work promptly upon notification; and (ii) CUSTOMER will be billed for (A) in the case of a T&M STATEMENT OF WORK, the worked hours under that STATEMENT OF WORK during such notice period; or (B) in the case of a fixed fee STATEMENT OF WORK, a prorated amount corresponding to the planned work during such notice period. Because MKP cannot guarantee continuity of resources should

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CUSTOMER desire to restart work under a STATEMENT OF WORK after having given notice of termination for convenience thereof, such restarting of work may involve additional billable hours and effort for information transfer, project re-planning, and other reasonable restart activities.

4.2.2. MKP may terminate this Agreement at any time for convenience by providing CUSTOMER five (5) business days prior written notice; provided, however, that any work invoiced or uninvoiced at the time of such a termination by MKP shall continue to be governed by this Agreement as if it had not been terminated. In addition, MKP may terminate a Statement of Work for convenience with five (5) business days prior written notice if CUSTOMER has not authorized work to begin under such Statement of Work within thirty (30) calendar days of its effective date.

4.3. Termination for Material Breach. Either party may terminate this Agreement and/or any Statement of Work hereunder if the other party is in material breach of this Agreement or such STATEMENT OF WORK and has not cured such breach within thirty (30) days of written notice specifying the breach. Consent to extend the cure period shall not be unreasonably withheld, so long as the breaching party has commenced cure during the thirty (30) day period and is pursuing such cure diligently and in good faith.

4.4. Failure to Make Payment. Notwithstanding anything in this Section 4 to the contrary, if CUSTOMER fails to make payment on any due date, MKP shall have the right to immediately cease all PROFESSIONAL SERVICES hereunder and, if such failure to make payment has not been cured within thirty (30) days of the due date, immediately upon written notice terminate this Agreement and any or all outstanding Statements of Work hereunder.

4.5. Termination for Insolvency Either party may terminate this Agreement immediately upon written notice if the other party enters into insolvency or bankruptcy proceedings of any sort.

4.6. Effect of Termination Termination of this Agreement and/or any STATEMENT OF WORK hereunder shall not limit either party from pursuing any other remedies available to it, including injunctive relief, nor shall termination relieve CUSTOMER of its obligation to pay all charges and expenses accruing prior to such termination. The parties' rights and obligations under Sections 3, 4, 5 and 6 (to the extent appropriate) shall survive termination of this Agreement and/or any STATEMENT OF WORK hereunder.

5. Indemnity, Warranty, Remedy, Limitation of Liability

5.1. Indemnity

5.1.1. Each party ("Provider") shall defend, the other party ("Recipient") against any claim that any information, design, specification, instruction, software, code, scripts, data, any deliverable or material furnished by the Provider hereunder ("Material") infringes a copyright or patent or misappropriates a trade secret of a third party, and will indemnify and hold harmless the Recipient from and against any loss, damage or costs (including reasonable attorneys' fees) incurred in connection with such a claim, provided that: (a) Recipient notifies Provider via a detailed written notice promptly after learning of the claim, and the Provider shall not be obligated to indemnify to the extent it is materially prejudiced by any delay in such notice; (b) Provider has sole control of the defense and all related settlement negotiations; and (c) Recipient provides Provider with the assistance, information and authority reasonably necessary to perform the above. Provider shall reimburse Recipient for its reasonable out-of-pocket expenses incurred in providing such assistance.

5.1.2. Provider shall have no liability for any claim of infringement or misappropriation to the extent that (a) the Material is based on specifications provided by Recipient, or (b) such claim is based upon Recipient's use of a superseded or altered version of some or all of the Material if infringement or misappropriation would have been avoided by the use of a subsequent or unaltered release of the Material which was provided to Recipient.

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- 5.1.3. In the event that some or all of the Material is held or is reasonably believed by Provider to infringe or misappropriate the intellectual property rights of a third party, Provider shall have the option, at its expense, to (a) modify the Material so it no longer infringes or misappropriates; (b) obtain for Recipient a license to continue using the Material; or (c) require return of the affected Material and all rights thereto from Recipient. If Provider is MKP, then CUSTOMER may, upon thirty (30) days prior written notice to MKP, terminate the relevant STATEMENT OF WORK, in which case CUSTOMER shall be entitled to recover the fees paid for that portion of the Material. If CUSTOMER is the Provider and such return materially affects MKP's ability to meet its obligations under the relevant STATEMENT OF WORK, then MKP may, upon thirty (30) days prior written notice to CUSTOMER, terminate such STATEMENT OF WORK, in which case CUSTOMER shall pay MKP for PROFESSIONAL SERVICES rendered through the date of termination on a T&M or percent of completion basis as appropriate.
- 5.2. Warranty and Disclaimers
- 5.2.1. **MKP represents and warrants that the PROFESSIONAL SERVICES will be performed in a professional and workmanlike manner, in accordance with generally accepted industry standards by experienced, qualified personnel. MKP further represents and warrants that it shall comply with all applicable laws, rules, and regulations, and that the PROFESSIONAL SERVICES shall not infringe or constitute infringement of misappropriation of any third party intellectual property right.**
- 5.2.2. **CUSTOMER must report any deficiencies in the PROFESSIONAL SERVICES to MKP in writing within ninety (90) days of performance of such services in order to receive warranty remedies.**
- 5.2.3. **This warranty is exclusive and in lieu of all other warranties, whether express or implied, including any implied warranties of merchantability or fitness for a particular purpose.**
- 5.3. Warranty Remedy For any breach of the warranty in Section 5(ii), CUSTOMER's exclusive remedy, and MKP's entire liability, shall be the re-performance of the Professional Services. If MKP is unable to re-perform the PROFESSIONAL SERVICES as warranted, CUSTOMER shall be entitled to recover the fees paid to MKP for the deficient PROFESSIONAL SERVICES.
- 5.4. Limitation of Liability **In no event shall either party be liable for any indirect, incidental, special, consequential, reliance or cover damages, or damages for loss of profits, revenue, data or use, incurred by either party or any third party, whether in action in contract or tort, even if the other party or any other person has been advised of the possibility of such damages. Except for the indemnification obligations herein, neither party's aggregate liability for damages hereunder shall exceed the total amount of fees paid and/or due by CUSTOMER under the applicable STATEMENT OF WORK.**
- 5.5. Anti-Social Forces Representations (Pursuant to The Japanese Act on Prevention of Unjust Acts by Organized Crime Group Members (Act No. 77 of 1991, as amended)) MKP and CUSTOMER both represent and warrant to the other that its employees, directors or officers do not, and will not (i) belong to, or be otherwise involved in, mafia organizations, mafia related corporations, racketeers or any other organized crime group ("Anti-Social Forces"); (ii) provide funds, or knowingly provide services, to any Anti-Social Forces; (iii) knowingly have any other relationship with any Anti-Social Forces; or (iv) use, or have any Anti-Social Forces use, threatening behavior or violence in business transactions, disseminate false information, employ fraudulent means or methods that obstruct the business operations of the other party, or use, or have any Anti-Social Forces use, any other behavior that is similar to these actions. Either party may terminate this Agreement immediately if the other party breaches this Section.

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6. **General**

- 6.1. **Non-Solicitation** During the term of this Agreement and for a period of twenty-four (24) months following termination of this Agreement or the expiration of all SOWs entered into under this Agreement, whichever is later, neither Party shall, or offer to or promise to, directly or indirectly, solicit, hire, retain, employ or engage (hereafter "Act") any person who is, at the time of the Act, an employee of the other Party currently or had been an employee of the other Party within twenty-four (24) months of the Act; provided that an engagement or hiring arising solely from a general media posting of an open position shall not be a violation of this Section 6.1 of the Agreement. Neither Party shall invite, induce or encourage any of the other Party's personnel to leave the employ of the other Party. If either Party violates this Section 6.1 of the Agreement, as the sole and exclusive remedy for such breach, the breaching party will pay to the other party, as liquidated damages, an amount equal to two hundred percent (200%) of the individual's annual base compensation to be paid by the breaching party.
- 6.2. **Cooperation; Delays**
- 6.2.1. Each party agrees to cooperate reasonably and in good faith with the other in the performance of the Professional Services and acknowledges that delays may otherwise result. CUSTOMER acknowledges that the timely provision of, and MKP's access to, office accommodations, facilities, equipment, assistance, cooperation, complete and accurate information from its officers, agents and employees, suitably configured computer equipment, and continuous administrative access to its salesforce.com account may be essential to the satisfactory and timely performance of the Professional Services purchased. MKP is not responsible for any delays due to changes in scope, scheduling or relevant requirements requested by CUSTOMER unless CUSTOMER and MKP specifically consent to such changes in writing. In addition, both parties agree that their respective employees and agents will reasonably cooperate with each other in a professional and courteous manner in the performance of their duties under this Agreement. Either party may suspend performance hereunder immediately upon written notice should the other party's employees or agents fail to act accordingly.
- 6.2.2. CUSTOMER is also responsible for the following: (i) assigning a dedicated internal project manager for each Statement of Work to serve as a single point of contact for MKP; (ii) defining and maintaining its business objectives and requirements that will guide its use of the salesforce.com application; (iii) reviewing customizations made to the salesforce.com application for conformance with relevant requirements; (iv) training its users generally in the use of the salesforce.com application; and (v) administering the salesforce.com application generally for its own internal business purposes.
- 6.2.3. Each party agrees its respective employees and agents will reasonably and in good faith cooperate with each other in a professional and courteous manner in the performance of their duties under this Agreement. Either party may suspend performance hereunder immediately upon written notice should the other party's employees or agents fail to act accordingly.
- 6.2.4. Except where the relevant STATEMENT OF WORK provides otherwise, scheduling of MKP's resources must be agreed to no later than ten (10) business days prior to the date work is scheduled to begin. Scheduling changes requested by CUSTOMER within 1 hour of previously scheduled time will result in the billing of 15 minutes' worth of work. Delays caused by CUSTOMER under a Statement of Work to which MKP has dedicated resources and begun work will be billed to CUSTOMER as follows: (i) offsite planned resources will be billed at 50% of the planned hours during the period of the delay; and (ii) onsite planned resources will be billed at 100% of the planned hours during the period of the delay (maximum of 8 hours per business day per resource); provided, however, that such delays are promptly communicated in a detailed writing to

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CUSTOMER and CUSTOMER does not dispute its responsibility for such delays. Delays caused by CUSTOMER that exceed thirty (30) business days shall entitle MKP to terminate the relevant STATEMENT OF WORK for cause immediately upon written notice.

- 6.3. Confidentiality "Confidential Information" shall mean all confidential or proprietary information disclosed orally or in writing by one party to the other that is identified as confidential or whose confidential nature is reasonably apparent. Confidential Information shall not include information which: (a) is or becomes a part of the public domain through no fault of the receiving party; (b) was in the receiving party's lawful possession prior to the disclosure; (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure or any breach of confidence; (d) is independently developed by the receiving party without use of or reference to the other party's Confidential Information; or (e) is required to be disclosed by law. Each party agrees to hold the other's Confidential Information in confidence, and not to use or disclose such Confidential Information other than in connection with performance of obligations hereunder. MKP acknowledges that any data provided to MKP by CUSTOMER constitutes CUSTOMER's valuable property information and trade secrets. MKP will not sell, rent or lease CUSTOMER's data to third parties. Neither party shall use the other party's Confidential Information except as necessary to exercise its rights or perform its obligations under this AGREEMENT or any STATEMENT OF WORK. Except as otherwise expressly permitted by this Agreement, each party shall not disclose the other party's Confidential Information to any third party except to those of its employees and contractors that need to know such Confidential Information for the purposes of this AGREEMENT or any STATEMENT OF WORK, provided that each such employee and contractor is subject to a written agreement that includes binding use and disclosure restrictions that are at least as protective of Confidential Information as those set forth herein. Each party will use all reasonable efforts to maintain the confidentiality of all Confidential Information of the other party in its possession or control, but in no event less than the efforts that party ordinarily uses with respect to its own proprietary information of similar nature and importance. Each party shall have the right to obtain an injunction (without having to post a bond) to prevent any breach or continued breach of this section. Each receiving party agrees to promptly report any breaches of this section to the disclosing party.
- 6.4. Acceptance
- 6.4.1. Upon completion of each deliverable under a STATEMENT OF WORK, MKP will provide a complete copy thereof to CUSTOMER and, upon request, demonstrate to CUSTOMER its functionality in conformance with the relevant specifications. CUSTOMER is responsible for conducting any additional review or testing of such deliverable pursuant to any applicable acceptance criteria or test suites agreed upon by the parties for such deliverable.
- 6.4.2. If CUSTOMER, in its reasonable and good faith judgment, determines that any submitted deliverable does not meet the applicable functional requirements set forth for such deliverable in the relevant STATEMENT OF WORK, CUSTOMER must notify MKP within fifteen (15) business days after MKP's submission of the deliverable to give written notice to MKP specifying any deficiencies in detail. MKP shall use commercially reasonable efforts to promptly cure any such deficiencies within fifteen (15) business days of such notice and then resubmit the deliverable for further review and acceptance testing in the same manner. Should any deliverable fail to satisfy the applicable functional requirements after the second resubmission of such deliverable to CUSTOMER, CUSTOMER may (i) again reject the deliverable and return it to MKP for further cure and resubmission; or (ii) terminate the relevant Statement of Work for cause immediately upon written notice and recover all Professional Services fees associated with such deficient deliverable. Notwithstanding the foregoing, in the event the applicable functional requirements as stated in the STATEMENT OF WORK are subsequently determined by the parties to be inappropriate or to

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require modification due to changed circumstances, incorrect assumptions or other reasons at the time of actual delivery and testing of a deliverable, the parties shall cooperate in good faith to appropriately modify such requirements.

- 6.4.3. CUSTOMER shall provide MKP a written acceptance of each deliverable promptly upon acceptance. Failure to reject a deliverable within the applicable acceptance period shall be deemed acceptance of such deliverable.
- 6.5. Independent Contractor MKP is an independent contractor; nothing in this Agreement shall be construed to create a partnership, joint venture, employment or agency relationship between the parties. Each party shall be solely responsible for payment of all compensation owed to its employees, as well as all employment-related taxes. Each party shall maintain appropriate worker's compensation and general liability insurance for its employees. MKP may, in its reasonable discretion, use third party contractors inside or outside the United States to perform any of its obligations hereunder.
- 6.6. Governing Law; Venue This Agreement shall be governed by the internal laws of the State of California. Any legal action or proceeding relating to this Agreement shall be instituted in a state or federal court in Los Angeles County, California. MKP and CUSTOMER agree to submit to the jurisdiction of, and agree that venue is proper in, said courts.
- 6.7. Notice All notices hereunder shall be in writing and shall be delivered to the other party's project manager or to the first address listed in the applicable Statement of Work (if to CUSTOMER) or to MKP's address on the STATEMENT OF WORK (if to MKP). Notice shall be effective upon receipt.
- 6.8. Severability In the event any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.
- 6.9. Waiver The waiver by either party of any default or breach of this Agreement shall not constitute a waiver of any other or subsequent default or breach. Except for actions for nonpayment or breach of either party's intellectual property rights, no action, regardless of form, arising out of this Agreement may be brought by either party more than one (1) year after the cause of action has accrued.
- 6.10. Entire Agreement This Agreement constitutes the complete agreement between the parties and supersedes all previous and contemporaneous agreements, proposals or representations, written or oral, concerning the subject matter thereof. Neither this Agreement nor any STATEMENT OF WORK hereunder may be modified or amended except in a writing signed by a duly authorized representative of each party. It is expressly agreed that any terms and conditions that may be attached to CUSTOMER's purchase order, whenever received by MKP, shall be null and void and superseded in full by the terms of this Agreement and the applicable STATEMENT OF WORK.
- 6.11. Subcontractors MKP may, in its reasonable discretion, use third party contractors inside or outside the United States to perform any of its obligations hereunder, including but not limited to migration of CUSTOMER data. MKP will notify CUSTOMER in advance of any use of third party contractors.