

# Terms and Conditions of Purchase by Customer

The following provisions constitute the Terms and Conditions of Purchase by Customer of Products from Accinity Incorporated ("Manufacturer"). Manufacturer and Customer are sometimes referred to herein collectively as the "Parties" and individually as a "Party".

## Section 1. DEFINITIONS

As used in these Terms and Conditions with initial letters capitalized, these terms shall have the following definitions:

**1.1. "Documentation"** means any manuals, user guides, Product descriptions and specifications, brochures, technical manuals, license agreements, supporting materials and other printed information generally made available and delivered by the Manufacturer with a Product, whether provided in print, electronic or video format.

**1.2. "End User"** means the ultimate purchaser and end user of a Product sold by Manufacturer or through any of its authorized sales resellers.

**1.3. "Hardware Product"** means any Hardware Product offered for sale by Manufacturer and identified in Manufacturer's Product List together with any software, documentation and updates thereto.

**1.4. "Product"** means any Product or service offered for sale by Manufacturer and identified in the most current version of the Manufacturer Product List in effect from time to time, including any Hardware Product, software or documentation and any updates thereto. Manufacturer may at any time make changes in any Product [whether in design, material, the addition or deletion of functionality or otherwise] and may discontinue the manufacture or sale of any Product without incurring any obligation of any kind as a result thereof.

**1.5. "Software"** means any software that is an integral part of a Hardware Product or any software product offered for sale by Manufacturer, including any updates thereto.

**1.6. "Trademarks"** means the trademarks, trade names, service marks and logos of Manufacturer set forth on Manufacturer's web site from time to time.

**1.7. "Update"** means any modification, upgrade or enhancement of a Product that Manufacturer elects to make generally commercially available without additional charge to current subscribers. Manufacturer is not obligated to make or release any update.

## Section 2. INTELLECTUAL PROPERTY

**2.1. Reservation of Rights.** All Software is licensed, not sold, to Customer. All rights in and to the Products not expressly granted to Customer in the purchase agreement with the Manufacturer are hereby expressly reserved to Manufacturer without restriction. Without limiting the foregoing, Customer will not, directly or through others:

a) Sell the Products in any form other than in the Product's same condition and original packaging as received from Manufacturer.

b) Modify the Products or translate or port the software into any other computer or human language.

c) Disassemble, reverse engineer, decompile or repackage all or any component of the Products or otherwise attempt to discover any portion of the Source Code or trade secrets related to the Products.

d) Sell, lend, rent, give, assign, manage or otherwise transfer or dispose of the Products except in accordance with the purchase agreement with the Manufacturer.

f) Remove, alter, distort, cover or modify any notice of proprietary rights present in or on the Products or the Product packaging as delivered to Customer.

g) Register, attempt to register or assist anyone else to register, directly or indirectly, the Trademarks, or any copyright or other proprietary rights associated with the Products, without Manufacturer's prior written consent.

h) buy Products solely for resale, unless otherwise permitted by Manufacturer.

**2.2. Use of Trademarks.** Manufacturer reserves all rights in and to the Trademarks and all other trademarks, trade names, service marks and logos used by Manufacturer in connection with the Products. Manufacturer, however, grants to Customer the non-exclusive right to use and display the Trademarks during the usage of the Product. Customer will comply with the trademark guidelines and procedures established by Manufacturer from time to time including, but not limited to, those set forth on Manufacturer's website. Customer hereby acknowledges that the goodwill associated with its use of the Trademarks inures solely and exclusively to Manufacturer, as the case may be, and that it shall have no claim or right in such Trademarks and shall not make any claim to acquire any rights in the Trademarks. Customer will not use the Trademarks or any confusingly similar name, marks, logos, designs or artwork as part of Customer's name, trade name, trademark, domain name or artwork

without Manufacturer's prior written consent.

**2.3. Ownership.** Manufacturer's Products involve valuable patent, copyright, trade secret, trade name, trademark and other proprietary rights of Manufacturer. No title to or ownership of such proprietary rights is transferred to Customer as part of the sale of Product or by use of any trademark, copyright or other proprietary right. Manufacturer reserve all of its copyright, trade secret and other proprietary rights in the Products. Customer will not infringe, violate or contest and will take appropriate steps and precautions for the protection of such proprietary rights.

## Section 3. WARRANTY AND PRODUCT RETURNS

**3.1. Express Warranty.** Manufacturer warrants that for a period of twelve (12) months from the date of delivery to Customer the Products shall be free from defects in workmanship and materials. Subject to the provisions under 3.2. and 3.3, the sole and exclusive remedy of the Customer in the case of a breach of the express warranty is the Manufacturer's obligation to repair or replace, at its option and expense, the Product. Notwithstanding the above, Manufacturer will not be under any obligation to repair, replace or otherwise warrant any Product which is defective as a result of any damage caused during shipment to Customer, any tampering or non-authorized alterations or modifications to the Product, or the result of the use of the Product in a manner other than its intended use in accordance with the Documentation. Furthermore, the Customer waives any remedy under any express warranty if the Customer continues to use the Product longer than 5 days after discovery of breach of warranty.

**3.2. Warranty Returns.** The Manufacturer or its authorized handling representative, as the case may be, serves as the Manufacturer's warranty handling agent. Hence, warranty returns are processed through the Manufacturer or its authorized handling representative. Manufacturer will permit Customer to return any defective Product, provided Customer has complied with the applicable warranty terms and conditions. In order to receive the remedy provided for hereunder, Customer shall request a Return Material Authorization ["RMA"] from Manufacturer prior to delivering to Manufacturer a sample of the Product which Customer finds to be defective. Under no circumstances will Manufacturer accept any Product returns by Customer without first issuing to Customer a written RMA pursuant to this Section.

Manufacturer will be responsible for all transportation charges [shipping and other] to return such Product to Manufacturer's facilities pursuant to this Section. Provided that Manufacturer is able to verify the presence of the reported defect in such units, all transportation charges [shipping and other], via a mode of transportation chosen by Manufacturer, shall be borne by Manufacturer to return the Product units from Manufacturer's location to Customer's location. Upon verification of a defect in one or more Products returned in accordance with the foregoing, or upon Customer certification that it has destroyed any defective Product in compliance with Manufacturer's instructions, Manufacturer will, at its option, either issue a credit to Customer in the amount of the purchase price paid or payable for such Product by Customer or replace the defective Product with an equivalent [non-defective] Product. Such remedy will be exclusive and in full satisfaction of Customer's claims hereunder. Manufacturer does not warrant that the Products are free from all bugs, errors, defects, design flaws or omissions.

**3.3. Product Returns.** Manufacturer will not accept the return of any Products by Customer for credit, other than pursuant to an RMA issued by Manufacturer pursuant to Section 3.2., unless otherwise agreed to by Manufacturer, in its sole discretion, in the form of a written RMA issued to Customer [RMAs may be provided to Customer by means of an email containing an authorized RMA number]. In the event Manufacturer issues an RMA to Customer in accordance with this Section, Customer shall be responsible for all transportation charges [shipping and other] to transport the Product for return to Manufacturer. Upon receipt of any Product returned by Customer pursuant to this Section, Manufacturer shall, in its sole discretion, issue a refund or credit to Customer, or require an offsetting purchase order for such Product returned by Customer.

## Section 4. MISCELLANEOUS

**4.1 Disclaimer and Release.** THE WARRANTIES OF THE MANUFACTURER AND THE REMEDIES OF CUSTOMER SET FORTH IN THESE TERMS AND CONDITIONS ARE EXCLUSIVE AND IN SUBSTITUTION FOR, AND CUSTOMER HEREBY WAIVES, RELEASES AND DISCLAIMS, ALL OTHER WARRANTIES, OBLIGATIONS AND LIABILITIES OF MANUFACTURER AND ALL OTHER RIGHTS, REMEDIES AND CLAIMS OF CUSTOMER, EXPRESS OR IMPLIED, ARISING BY LAW OR OTHERWISE, WITH RESPECT TO ANY DEFECT, DEFICIENCY OR NONCONFORMITY IN ANY PRODUCT OR OTHER ITEM FURNISHED BY OR ON BEHALF OF MANUFACTURER, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE; IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE,

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COURSE OF DEALING OR USAGE OF TRADE; ANY OBLIGATION, LIABILITY, RIGHT, REMEDY OR CLAIM IN TORT [INCLUDING NEGLIGENCE, WHETHER ACTIVE, PASSIVE OR IMPUTED], PRODUCT LIABILITY, STRICT LIABILITY OR OTHER THEORY; ANY OBLIGATION, LIABILITY, RIGHT, CLAIM OR REMEDY FOR LOSS OR DAMAGE TO OR CAUSED BY OR CONTRIBUTED TO BY, ANY PRODUCT OR OTHER ITEM FURNISHED BY OR ON BEHALF OF MANUFACTURER; AND CLAIM OF INFRINGEMENT.

**4.2. Limitations of Liability.** EXCEPT AS PROVIDED IN THESE TERMS AND CONDITIONS, AND EXCEPT FOR ANY INFRINGEMENT, MISAPPROPRIATION OR VIOLATION OF MANUFACTURER'S INTELLECTUAL PROPERTY RIGHTS, NEITHER PARTY'S LIABILITY [WHETHER IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE WHETHER ACTIVE, PASSIVE, IMPUTED), PRODUCT LIABILITY, STRICT LIABILITY OR OTHER THEORY] WITH REGARD TO ANY PRODUCT OR OTHER ITEMS FURNISHED WILL IN ANY EVENT EXCEED THE GREATER OF \$25,000 OR THE COMPENSATION PAID TO MANUFACTURER BY CUSTOMER DURING THE PRECEDING SIX [6] MONTHS.

**4.3. Consequential Damages.** EXCEPT FOR ANY BREACH OF SECTION 2 OR ANY INFRINGEMENT, MISAPPROPRIATION OR VIOLATION OF MANUFACTURER'S INTELLECTUAL PROPERTY RIGHTS, IN NO EVENT WILL EITHER PARTY BE LIABLE, WHETHER IN CONTRACT, WARRANTY, TORT [INCLUDING NEGLIGENCE (WHETHER ACTIVE, PASSIVE OR IMPUTED), PRODUCT LIABILITY, STRICT LIABILITY OR OTHER THEORY], TO THE CUSTOMER OR OTHER THIRD PARTY FOR COST OF COVER OR FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES [INCLUDING WITHOUT LIMITATION DAMAGES FOR LOSS OF PROFIT, BUSINESS OR DATA] ARISING OUT OF ITS PERFORMANCE OR NONPERFORMANCE OF THIS AGREEMENT OR THE USE OF, INABILITY TO USE OR RESULTS OF USE OF THE PRODUCT EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

**4.4. Export.** UNITED STATES LAW RESTRICTS THE EXPORT OR RE-EXPORT OF PRODUCTS TO CERTAIN PEOPLE, COUNTRIES AND END USERS. CUSTOMER AGREES TO COMPLY WITH THESE LAWS AND WILL NOT SELL OR OTHERWISE PROVIDE PURCHASED PRODUCTS TO ANYONE EITHER IN THE UNITED STATES OR ABROAD IN VIOLATION OF THESE EXPORT RESTRICTIONS. CUSTOMER ALSO AGREES NOT TO SELL OR OTHERWISE PROVIDE PRODUCTS TO ANYONE WHO DOES NOT AGREE TO COMPLY WITH THE EXPORT LAWS OF THE UNITED STATES.

**4.5. Governing Law; Venue.** These Terms and Conditions will be governed by and interpreted in accordance with the local laws of the State of Florida, U.S.A., without regard to its conflicts of law provisions and not including the provisions of the 1980 U.N. Convention in Contracts for the International Sale of Goods. Manufacturer and Customer irrevocably consent and submit to the jurisdiction of the Federal and State courts of and located in Miami-Dade County, in the State of Florida, U.S.A. In the event of litigation, the prevailing party shall be entitled to its reasonable attorneys' fees and costs.