



## TERMS OF SERVICE AND LICENCE AGREEMENT

**IMPORTANT—READ CAREFULLY:** These terms and conditions and licence agreement (collectively, “Agreement”) is between you, your end users (hereafter “you”, or “Customer”) and Fonality Pty Ltd ABN 32 112 795 276 (“Fonality”) for the Fonality Connect\* software, products and services identified on the Estimate and Order, which may include one or more of the following: computer software (including HUD\*), 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 if more than one (1) year, (“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 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). 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.

**2.1** In addition to any rights and remedies Customer may have under law, Fonality will provide replacement Equipment during the Term 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 Equipment 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 recklessness or, in Fonality’s sole discretion, unreasonable use. Further, to the extent permitted by law, Fonality may in its discretion reject any request for replacement Equipment where Customer is not acting in good faith, or where 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 and will reimburse Customer for any shipping costs incurred in returning 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 by telephone on 1300-874-928 or (for cancellation/reduction of service only) by email to [escalations@fonality.com](mailto:escalations@fonality.com) to obtain a Return Material Authorization Number (“RMA Number”) and shipment label, if applicable, before taking any return or replacement action. 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. No return of Equipment will be accepted by Fonality without an RMA Number obtained from Fonality. 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** The Equipment comes with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the Equipment repaired or replaced if the Equipment fails to be of acceptable quality and the failure does not amount to a major failure.

**2.3** **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. EMERGENCY SERVICES, SERVICE LIMITATIONS AND CSG

**3.1** **Priority Assistance** - Fonality does not offer priority assistance to Customers with life threatening medical conditions. If Customer requires a service which includes priority assistance for a life threatening medical condition, such a service may be available for Customer to obtain directly from other service providers such as Telstra Corporation Ltd (“Telstra”).

**3.2** **Emergency Calls** - The ability to make an Emergency Call (as defined in the Telecommunications (Emergency Call Service) Determination 2009) is contingent upon the accuracy of the information provided by Customer to Fonality in relation to the physical location of the Service and the availability of a fully functional broadband connection to the Internet. In the event of a power failure or outage or disruption to Customer’s broadband connection, Customer will not be able to use the Service to make an Emergency Call. In the event that the Service is suspended or terminated by Fonality, Customer will not be able to make an Emergency Call. Fonality is not liable to Customer in connection with Customer’s inability to make an Emergency Call if such inability is a result of a matter beyond the control of Fonality such as: (i) power failure or outage; (ii) Customer’s broadband connection being disrupted or unavailable; (iii) a suspension or termination of the Service in accordance with the terms of this Agreement; or (iv) any other service outage.

**3.3 Service Limitations** - Customer understands and acknowledges that it is not technically feasible to provide access to some services, including '1900' premium rate numbers, back to base alarms, EFTPOS systems, or fax services.

**Fonality does not provide any warranties in connection with the matters specified in sections 3.1, 3.2 and 3.3.**

**3.4 Interception** - Fonality may, at any time and in its absolute discretion, monitor and intercept Customer's or any other person's use of the Service if required or authorized to do so by law.

**3.5 Calling Number Display (CND)** - The Number (defined in section 6 herein) from which Customer calls a person will be sent to and will be visible on the screen of the receiving hardware of the called person, unless Customer notifies Fonality that it wishes to deactivate CND or Customer deactivates CND through a function on the Equipment. If a party calling Customer has not deactivated CND, the telephone number of the party calling Customer will be displayed to Customer on the screen of the Equipment of the Number that is called. The Number from which Customer makes an Emergency Call will be displayed to the emergency service provider when Customer makes such a call, regardless of whether it has deactivated CND.

**3.6 Customer Service Guarantee Waiver** - The Telecommunications (Customer Service Guarantee) Standard 2011 (as amended) (hereinafter known as the "CSG") sets out protection and rights a customer can expect from a provider of certain telecommunications services in respect of the supply of such services. Part 5 of the CSG allows for a service provider to propose that a customer (with 5 or less eligible telephone services at one time) waive, in whole or in part, their protection and rights under Part 5 of the Telecommunications (Consumer Protection) and Service Standards) Act 1999. By agreeing to the terms and conditions of this Agreement and the CSG waiver available at <http://www.fonality.com.au/customer-service-guarantee-waiver>, Customer hereby waives its protection and rights (if any) under the CSG. To the extent that the CSG applies to Customer:

**3.6.1** the CSG waiver takes effect the day on which Customer provides written consent to the waiver by signing the declaration contained in the Estimate/Order; and

**3.6.2** if Customer does not provide consent to the waiver, Fonality is under no obligation to provide Customer with the Service.

#### 4. BILLING & PAYMENTS

**4.1 Orders.** Customer's signature (electronic or physical) of an Estimate is a non-cancellable Order by Customer for the Service. **Orders are not binding until accepted by Fonality, in its sole discretion.** Fonality may require Customer to undergo a credit assessment at any time, including prior to Fonality providing Customer with the Service. Fonality may at any time refuse to supply the Service to Customer if Customer fails such credit assessment or Fonality considers Customer represents a credit risk. If Fonality requires Customer to undergo a credit assessment, Customer must provide Fonality or its nominated credit agency with such accurate and up-to-date information as may be requested by Fonality to enable Fonality or its nominated credit agency to make a proper assessment of Customer's credit standing. All Orders and/or shipments shall be Free on Board (FOB) Fonality North Sydney (Incoterms 2010). Except in the case of a breach, as provided in section 8, once an Order is accepted by Fonality, it may be changed or cancelled ONLY with the written consent of Fonality.

**4.2 Payment by Credit Card Only.** All Orders require a valid credit card number ("Credit Card"). Customer authorizes Fonality to charge the Credit Card for all charges arising from Customer's use of the Service. Customer agrees to notify Fonality of any change to the Credit Card information including, but not limited to, changes in account number, expiration date or billing address. Fonality 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 Fonality, we will begin the process of setting up the ordered Service for you. Therefore, once an Order has been placed, and accepted by Fonality, 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** Credit allowances for interruption of Service is not required or warranted and shall be provided at the sole discretion of Fonality.

**4.5** From time to time in its sole discretion, Fonality 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.** Fonality will provide a statement or summary of charges to Customer each month. Subsequently, Fonality will bill all of Customer's charges to the Credit Card. Fonality does not provide itemised billing information, itemised charges or timed call charges in any bills provided to Customer. Customer agrees not to receive or request itemised billing information, itemised charges or timed call charges from Fonality. Unless otherwise agreed by Fonality in the Order, charges will be billed and are payable as follows:

**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.** Any other applicable charges which may include, but are not limited to, 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 licences 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 and remains unpaid for 7 days after Fonality has notified Customer of the non-payment then Fonality 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 15% of the outstanding balance, or the maximum amount allowed by law, whichever is higher. Fonality 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. Please see our Financial Hardship Policy for information regarding our processes to assist Customers who are experiencing difficulties paying their bill. The Financial Hardship Policy is available at [www.fonality.com.au/legal](http://www.fonality.com.au/legal).

**4.8 Taxes.** Amounts contained in the Estimate do not include any customs duties, sales, use, value added, excise, federal, state, local, Goods and Services Tax ("GST"), 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.

**4.9 International rates.** When Customer dials an international 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. You will be charged for all calls to any international destination, excluding inclusive countries, in full-minute increments at Fonality's then-current international rates. 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.

**4.10** Customer must dispute any charges for the Service in writing within thirty (30) days of the date of the charge by Fonality. Fidelity will ensure that sufficient information is readily available to Customer to allow Customer to verify that the charges are correct. After thirty (30) days from the date of the charge, 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 Fidelity, including any disputed amounts.

**4.11 Variation.** Fidelity may, at any time, amend or vary the fees and charges payable for the Service including, but not limited to, monthly service fees, non-recurring charges and equipment charges. If it does so, Fidelity will provide Customer with at least 21 days written notice of the variation and Customer may terminate this Agreement within 42 days of the date of the notice without incurring fees or charges, other than usage or network access charges incurred up to the date the Agreement ends and any outstanding amounts for installation or for equipment compatible with other Fidelity services.

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

**5.1 Reasonable Business Use.** Any of Fidelity's service plans that offer unlimited minutes ("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 Fidelity determines that Customer use of the Service is not within the scope of Reasonable Business Use, Fidelity 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 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 Fidelity or its vendors, whether directly or indirectly, is strictly prohibited and may result in termination of the Service at the sole discretion of Fidelity. Customer understands that neither Fidelity 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 Fidelity. 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 Fidelity, shall bear the risk of loss arising from any unauthorized or fraudulent usage of the Service. Fidelity 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 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. THE INTEGRATED PUBLIC NUMBER DATABASE (IPND) AND TELEPHONE NUMBER(S).

**6.1 IPND.** The IPND was established and is maintained by Telstra (or IPND Manager) under the Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997 or, if the Minister so determines (under subsection 472(1) of the Telecommunications Act 1997), a person other than Telstra who shall provide and maintain an integrated public number database. Fidelity is required by law to supply Customer's name, address, phone number and certain other details to the IPND Manager for inclusion in the IPND. The IPND is maintained by the IPND Manager and, to the extent permitted by law, Fidelity has no liability to Customer in connection with any breach by the IPND Manager of its obligations in relation to the IPND, including any publication or disclosure by the IPND Manager of IPND data in public number directories contrary to any instructions given by Customer to Fidelity.

**6.2 Telephone Numbers.** Fidelity will provide Customer with one direct-in-dial ("DID") number per user extension. Additional DID numbers may be purchased by Customer from Fidelity for an additional charge, as advised by Fidelity from time to time. Any telephone number provided by Fidelity to Customer ("Number") shall be provided and used in compliance with the Telecommunications Numbering Plan 1997 ("Numbering Plan"). The Numbering Plan stipulates that a geographic number must not be used except in connection with the supply of a local service. If Customer is located in an area which is not the charging district for the geographic number issued to Customer, calls to the number may be charged as if Customer was located within the relevant charging district for the geographic number. Further, Customer may not be able to port the number to another service provider and must not do anything which results in Fidelity being in breach of the Numbering Plan. Fidelity will comply with the Numbering Plan and reserves the right to change, cancel or move the Number at its sole discretion as a result of compliance with the Numbering Plan or in order to comply with any direction given by the Australian Communications and Media Authority.

**6.3 Porting Numbers.** Where Customer seeks to port a number to Fidelity, Fidelity will port that number in accordance with the requirements of any applicable Communications Alliance Limited ("Communications Alliance") codes. The time taken to port a number is dependent on factors outside of Fidelity's control. Customer is responsible for the timely termination of all services with its current/previous service provider and the settlement of any charges owed to its current/previous service provider. If, on termination or expiration of this Agreement, Customer requests that Fidelity port the Number used by Customer to another service provider, Fidelity will port that Number in accordance with the requirements of any applicable Communications Alliance codes. If Customer makes such a request, Customer appoints Fidelity as its agent for the purposes of completing any form authorizing the porting of the Number on Customer's behalf. It may not always be technically feasible for Fidelity to port a Number.

**Customer must return all DID numbers to Fidelity upon expiration or termination of this Agreement, unless porting arrangements have been made between the parties.**

## 7. TECHNICAL SUPPORT AND SCHEDULED MAINTENANCE

**7.1 Technical Support.** Fidelity 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 12:00 am to 6:00 am AEST every Thursday and Saturday.** 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.

**7.3 CUSTOMER SERVICE ENQUIRIES.** For customer service enquiries, please contact 02 8484 2601 between 9:00 AM and 6:00 PM EST or email us at [accounts@fonicity.com.au](mailto:accounts@fonicity.com.au). Our customer service hours of operation are 9:00 AM and 6:00 PM EST.

## 8. TERMINATION

**8.1 By Customer.** Customer may terminate this Agreement in accordance with section 1 of this Agreement. Except as described in section 8.4 below, Customer is responsible for 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.** Without limiting or otherwise restricting any other rights or remedies under this Agreement, Fonality reserves the right, at its sole discretion, to:

**8.2.1** suspend the Service upon notice to Customer where (a) Fonality reasonably suspects Customer is misusing the Service in any way; (b) Customer is in breach of this Agreement and Customer fails to remedy such breach within 30 days after Fonality gives Customer notice requiring Customer to do so; (c) Customer fails to pay any sum due under this Agreement (and remains unpaid for 5 business days after Fonality has notified Customer of the non-payment); or (d) Fonality reasonably suspects fraud or other activity by Customer that adversely affects the Service, or Fonality, Fonality's network or other customers' use of the Service;

**8.2.2** terminate the Service upon notice to Customer where (a) Customer has misused the Service in any way; (b) Customer has breached this Agreement which either cannot be remedied or where Customer fails to remedy such breach within 30 days after Fonality gives Customer notice requiring Customer to do so; (c) Customer has failed to pay any sum due under this Agreement (and remains unpaid for 5 business days after Fonality has notified Customer of the non-payment); or (d) there occurs any suspected (in Fonality's reasonable opinion) or actual fraud or other activity by Customer that adversely affects the Service or Fonality, Fonality's network or other customers' use of the Service; or

**8.2.3** change the Service where any activity by Customer adversely affects the Service or Fonality, Fonality's network or other customers' use of the Service.

Fonality reserves the right to determine, at its sole discretion, what constitutes misuse of the Service and Customer agrees that Fonality's determination is final and binding on Customer. **If Fonality terminates the Service in accordance with this section during the Initial Term, Customer shall remain obligated for the payment of all charges for the Service for the Initial Term.** Fonality may charge an activation fee to reactivate a terminated service.

**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 Fonality 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. On and from the effective date of any termination, Fonality shall not be liable to Customer for any obligations under this Agreement, including continued provision of Service. If Fonality terminates or suspends the Service in accordance with the terms of this Agreement, Customer will be liable for the monthly recurring charges in respect of the Service and Customer's acts and omissions in connection with the Service during the relevant notice period (if any).

**8.5 Return of Fonality 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 Fonality 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 Customer shall immediately delete all Fonality 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 Fonality prior to shipment. Any late return of Equipment agreed to by Fonality 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 FONALITY, 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 THE INDEMNIFIED PARTY(IES) FROM AND AGAINST ANY AND ALL THIRD PARTY CLAIM(S) RELATED TO THE FAILURE OR OUTAGE OF THE SERVICE.

**9.2. Fonality.**

**9.2.1** Fonality shall defend Customer, and its officers, directors and employees, against any third party action alleging that any Fonality product (hereinafter, "product") or the Service infringe(s) any valid U.S. or Australian patent or copyright, and Fonality shall pay all settlements entered into, and all costs (including reasonable attorneys' fees) in connection with such action. If any product or Service, or parts thereof, becomes, or in Fonality's opinion may become, the subject of an infringement claim, Fonality may, at its option, (a) procure for Customer the right to continue using such product or Service, (b) modify or replace

such product with substantially equivalent non-infringing products or (c) require the return of such product or cease providing the Service and refund to Customer a pro-rata portion of the fees paid in respect of such product or Service.

**9.2.2** Fonality shall have no obligations under section 9.2.1 with respect to any third party action alleging that the use of any product or Service, or any part thereof, in combination with any products or services not supplied by Fonality infringes any valid US or Australian patent or copyright if (a) the infringement is due solely to the combination and use of such products/services together, if the use of the product or Service independent of any product/service not supplied by Fonality would not have given rise to the claim; or (b) Customer is advised by Fonality either directly or by means of documentation, marketing or other published materials that the use of the product or Service in tandem with such products/services represents a risk of infringement; and (c) Customer combines and uses such products/services with the product or Service in contravention of Fonality's advice to Customer.

**9.2.3** Fonality's obligations pursuant to this section 9 shall be subject to Customer: (a) notifying Fonality promptly in writing of such action, (b) giving Fonality 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 Fonality's prior written consent and (d) providing all reasonable assistance to Fonality (provided that Fonality reimburses Customer for its out-of-pocket expenses incurred in providing such assistance).

## **10. DISCLAIMERS AND LIMITATION OF LIABILITY**

### **10.1 DISCLAIMER OF WARRANTIES.**

**10.1.1** UNDER THE AUSTRALIAN CONSUMER LAW, IF THE AMOUNT PAID FOR THE PRODUCTS OR SERVICES DOES NOT EXCEED \$40,000 OR THE PRODUCTS AND SERVICES PROVIDED TO CUSTOMER ARE OF A KIND ORDINARILY ACQUIRED FOR DOMESTIC, PERSONAL OR HOUSEHOLD USE, CERTAIN GUARANTEES IN RESPECT OF THE PRODUCTS AND SERVICES PROVIDED CANNOT BE EXCLUDED OR LIMITED INCLUDING, IN RESPECT OF PRODUCTS, GUARANTEES AS TO ACCEPTABLE QUALITY, FITNESS FOR ANY DISCLOSED PURPOSE, REPAIRS AND SPARE PARTS, AND EXPRESS WARRANTIES, AND IN RESPECT OF SERVICES, GUARANTEES AS TO DUE CARE AND SKILL, FITNESS FOR A PARTICULAR PURPOSE, AND REASONABLE TIME FOR SUPPLY. WHERE FONALITY IS PERMITTED BY LAW TO LIMIT ITS LIABILITY IN RESPECT OF ANY STATUTORY GUARANTEE UNDER THE AUSTRALIAN CONSUMER LAW, FONALITY DOES SO IN ACCORDANCE WITH SECTION 10.3 OF THIS AGREEMENT.

**10.1.2** SUBJECT TO SECTION 10.1.1, FONALITY PROVIDES THE SERVICE "AS IS" AND WITH ALL FAULTS. TO THE EXTENT PERMITTED BY LAW, 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 LAW, EQUITY, CONTRACT, TORT, UNDER STATUTE, UNDER WARRANTY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO: (A) ANY IMPLIED WARRANTY OR CONDITION ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OR TRADE, (B) 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 (C) 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, TO THE EXTENT PERMITTED BY LAW, FONALITY DOES NOT WARRANT THAT THE SERVICE WILL BE FREE OF BUGS, ERRORS, VIRUSES OR OTHER DEFECTS. NOTHING IN THIS AGREEMENT IS INTENDED TO EXCLUDE, LIMIT OR MODIFY RIGHTS WHICH CUSTOMER MAY HAVE UNDER THE AUSTRALIAN CONSUMER LAW OR ANY OTHER STATUTE WHICH MAY NOT BE EXCLUDED, LIMITED OR MODIFIED BY AGREEMENT.

**10.2 DISCLAIMER OF CERTAIN DAMAGES.** TO THE EXTENT PERMITTED BY LAW, IN NO EVENT WILL FONALITY OR ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, REPRESENTATIVES, VENDORS AND CONTRACTORS BE LIABLE FOR ANY INCIDENTAL, INDIRECT, SPECIAL, AGGRAVATED, PUNITIVE, CONSEQUENTIAL OR SIMILAR DAMAGES OR LIABILITIES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO LOSS OF SOFTWARE OR 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 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, WHERE ANY GUARANTEE IS IMPLIED BY THE AUSTRALIAN CONSUMER LAW AND CANNOT LAWFULLY BE EXCLUDED, FONALITY (INCLUDING ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND REPRESENTATIVES) LIMITS ITS LIABILITY FOR BREACH OF THAT IMPLIED GUARANTEE, SUBJECT TO THE QUALIFICATIONS IN SECTION 64A OF THE AUSTRALIAN CONSUMER LAW OR ANY OTHER LAW IN CONNECTION WITH: (A) THE SUPPLY OF GOODS, TO ANY ONE OR MORE OF THE FOLLOWING (AS FONALITY MAY DETERMINE)- THE REPLACEMENT OF THE GOODS OR THE SUPPLY OF EQUIVALENT GOODS; THE REPAIR OF THE GOODS; THE PAYMENT OF THE COST OF REPLACING THE GOODS OR OF ACQUIRING EQUIVALENT GOODS; OR THE PAYMENT OF THE COST OF HAVING THE GOODS REPAIRED; AND (B) IN CONNECTION WITH THE SUPPLY OF SERVICES, TO ONE OF THE FOLLOWING (AS FONALITY MAY DETERMINE), THE SUPPLYING OF THE SERVICES AGAIN; OR THE PAYMENT OF THE COST OF HAVING THE SERVICES SUPPLIED AGAIN; AND OTHERWISE, TO THE EXTENT PERMITTED BY LAW. FURTHER, TO THE EXTENT PERMITTED BY LAW, CUSTOMER ACKNOWLEDGES AND UNDERSTANDS THAT FONALITY (INCLUDING ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND REPRESENTATIVES) WILL NOT BE LIABLE FOR ANY SERVICE OUTAGE, INCLUDING ANY INABILITY TO DIAL ANY EMERGENCY TELEPHONE NUMBER USING THE SERVICE OR TO ACCESS AN EMERGENCY SERVICE OPERATOR.

**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 Customer or 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 limitations 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 guarantees or 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 will not apply to you. For further Equipment warranty information, you may contact Fonality at Level 6, 56 Berry Street, North Sydney NSW, 2060. Any warranty DOES NOT apply to any beta software, software made available for testing or demonstration purposes, or any temporary software modules. To the extent permitted by law, 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 copyright, moral rights, and all derivative works thereof, (ii) trademark and trade or business 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, licence, 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 licenced under the GNU General Public Licence (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, unless otherwise permitted by law, copied without the prior 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 licence 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 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-sublicenceable licence for the Term to use the Fonality Intellectual Property for the sole purpose of obtaining the benefit of the Service under this Agreement. This licence 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 licence granted. No other licence(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. PRIVACY

**12.1** Fonality's Privacy Policy can be found at [www.fonality.com.au/legal/privacy.html](http://www.fonality.com.au/legal/privacy.html).

**12.2** Without limiting section 12.1, you consent to:

**12.2.1** Fonality and our related bodies corporate collecting, using and disclosing your information to third parties, including but not limited to CreditorWatch Pty Limited ("CreditorWatch"), for the purpose of credit assessment and credit reporting. The information disclosed to such third parties may include, without limitation, any payment defaults and information which identifies the Customer as the defaulting entity;

**12.2.2** information relating to your creditworthiness being used and disclosed by CreditorWatch in accordance with the Privacy Policy of CreditorWatch available at <https://creditorwatch.com.au/page/privacy>; and

**12.2.3** information relating to your creditworthiness being published in CreditorWatch databases available to other customers of CreditorWatch.

**12.3** To the extent permitted by law, Fonality will be under no liability to Customer in respect of any liability, loss, damage or expense which you may suffer or incur or which may arise directly or indirectly in connection with the supply of your information to Fonality, or the subsequent use or disclosure of your information by Fonality or any third parties in accordance with this section 12.

**12.4** Customer warrants that:

**12.4.1** any information it provides is accurate, complete, up to date and not misleading or deceptive; and

**12.4.2** the publication of your information in accordance with this section 12 will not infringe any rights in respect of intellectual property, privacy, confidentiality or otherwise.

**13. 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 and, as applicable, will obtain all required U.S. and local authorizations, permits, or licences. The parties agree to provide to each other information as may be reasonably required by the other in connection with obtaining authorizations or licences.

**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 licences.

## 15. CUSTOMER COMPLAINTS AND OTHER ISSUES.

**15.1** Complaint handling process. Fonality will handle Customer complaints in relation to the provision of the Service in accordance with (a) chapter 8 of the Telecommunications Consumer Protections Code 2012, where it applies; and (b) the applicable Fonality Complaints Handling Policy (found at [www.fonality.com.au/legal](http://www.fonality.com.au/legal)) in all other circumstances.

**15.2** Parties not to commence proceedings. Neither party may institute a claim or a proceeding against the other party in respect of any dispute in connection with the operation or interpretation of this Agreement ("a Dispute"), unless and until the parties have exhausted the process specified in this section. The previous sentence will not limit the rights of (i) Customer to refer a valid dispute to the Telecommunications Industry Ombudsman or other external dispute resolution procedure in accordance with an applicable industry code; or (ii) Fidelity to commence credit management or debt recovery action in connection with a Service provided under this Agreement.

**15.3** Notification of Dispute. Where a Dispute arises, either of the parties may, by written notice, notify the other party of the existence of that Dispute. The parties will use their reasonable endeavours to resolve that Dispute within 10 business days after the notice of Dispute is given.

**15.4** Payments not affected. Customer is not relieved of its obligations to make payments due and owing under this Agreement (other than bona fide disputed amounts) because of the existence of a Dispute.

**15.5** Costs. Each party will bear its own costs of complying with this section.

**15A. GOVERNING LAW & JURISDICTION.** This Agreement and the related Estimate(s), Order(s), and add-on Orders shall be governed by and construed under the laws in force in New South Wales. To the extent permitted by law, the parties disclaim the application of the 1980 U.N. Convention on Contracts for the International Sale of Goods and any successor thereto is disclaimed. You hereby irrevocably submit to the jurisdiction of the courts of New South Wales with respect to any proceeding under this Agreement or relating to the Service. You will not prosecute any action, suit, proceeding or claim arising under or by reason of this Agreement except in such courts.

**16. ATTORNEY FEES.** 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.

**17. 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.

**18. ENTIRE AGREEMENT.** The Agreement and the Estimate or Order set forth the entire agreement of Fidelity 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.

**19. 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.

**20. 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. If to Customer, the address Customer provided to Fidelity in the Order. If to Fidelity, Level 9, 56 Berry Street, North Sydney NSW, 2060. Notice(s) 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. Additionally, and in respect to Customer only, Notice may be sent by email to any email address Customer advises on the Order or otherwise. Notice(s) sent by email will be deemed effective at the time sent, unless Fidelity is notified the email was not successfully sent.

**21. MODIFICATIONS.** FIDELITY RESERVES THE RIGHT, AT FIDELITY'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.FIDELITY.COM.AU/LEGAL](http://WWW.FIDELITY.COM.AU/LEGAL) (THE "WEBSITE") AND CUSTOMER MUST CHECK THE WEBSITE FOR ANY ALTERATIONS TO THESE TERMS AND CONDITIONS ON A REGULAR BASIS. 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 20 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@FIDELITY.COM](mailto:INFO@FIDELITY.COM).

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