

**TERMS AND CONDITIONS**

These are the terms and conditions under which Zephyr Networks, Inc. ("Zephyr") and Customer agree that Zephyr will provide services ("Services") and/or products ("Products") to Customer (hereinafter referred to as the "Agreement"). Customer itself and on behalf of Customer's agents, contractors, employees and third party users of Customer's computers, servers or networks ("Customer") agrees to be bound by this Agreement.

1. Amendment. The parties agree that this Agreement may be subsequently amended, but only in writing to include additional Services that Zephyr agrees to undertake at Customer's request if feasible in light of other commitments, or other Products that Customer may request that Zephyr provide. Any additional Services or Products shall be provided at Zephyr's customary rates and Customer agrees to pay therefore immediately upon receipt of an invoice thereof.
2. Fees and Costs on Breach. The parties agree that a prevailing party to any collection action of any kind shall be entitled to recover its costs, including but not limited to its reasonable attorney's fees. Customer agrees that all amounts unpaid thirty days after Zephyr provides a Service or Product shall accrue a finance charge of 1.5% per month until paid.
3. Indemnity and Hold Harmless. Customer expressly agrees to indemnify and hold harmless Zephyr and its officers, agents and employees, from and against any suits, losses, claims, demands, liabilities, costs, and expenses (including attorney fees) that they may sustain or incur as a result of any claim, including claims of subrogation, against them based upon negligence, breach of warranty, strict liability in tort, contract, or any other theory of law brought by Customer or third parties arising out of, directly or indirectly, the use of any Services or Products that Zephyr may provide, including claims based in whole or part on a claim of negligence by Zephyr, its officers, agents or employees.
4. DISCLAIMERS OF WARRANTIES. CUSTOMER EXPRESSLY AGREES THAT:
  - A. USE OF ANY SERVICE IS AT CUSTOMER'S SOLE RISK. THE SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. ZEPHYR EXPRESSLY DISCLAIMS ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT WITH RESPECT TO SERVICES OR PRODUCTS MANUFACTURED OR PROVIDED BY THIRD PARTIES. SUCH SERVICES AND PRODUCTS ARE WARRANTED BY THE THIRD PARTIES PROVIDING THEM – NOT BY ZEPHYR.
  - B. ZEPHYR ALSO MAKES NO WARRANTY THAT (i) ANY SERVICE WILL MEET CUSTOMER'S OR ANY USER'S REQUIREMENTS, (ii) ANY SERVICE WILL BE UNINTERRUPTED, TIMELY, SECURE, OR ERROR-FREE, (iii) THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF ANY SERVICE WILL BE ACCURATE OR RELIABLE, (iv) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION, OR OTHER MATERIAL PURCHASED OR OBTAINED BY CUSTOMER THROUGH THE SERVICE WILL MEET THE CUSTOMER'S EXPECTATIONS, AND (v) ANY ERRORS IN ANY SERVICE WILL BE CORRECTED.
  - C. ANY MATERIAL DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE USE OF A SERVICE OR PRODUCT IS DONE AT CUSTOMER'S OWN DISCRETION AND RISK AND CUSTOMER WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO CUSTOMER'S COMPUTERS, SERVERS OR NETWORK OR LOSS OF DATA, BUSINESS OR PROFITS THAT MAY RESULT FROM THE DOWNLOAD OF ANY SUCH MATERIAL.
  - D. ANY SECURITY MECHANISMS IMPLEMENTED BY ZEPHYR OR ANY THIRD-PARTIES AT CUSTOMER'S REQUEST MAY HAVE INHERENT LIMITATIONS, AND CUSTOMER MUST DETERMINE FOR ITSELF WHETHER THE SECURITY AND PERFORMANCE OF ANY SUCH SERVICE OR PRODUCT SUFFICIENTLY MEETS CUSTOMER'S REQUIREMENTS. ZEPHYR AND ANY THIRD PARTIES THAT PROVIDE SECURITY SERVICES OR PRODUCTS ARE NOT RESPONSIBLE FOR CUSTOMER INFORMATION OR DATA, REVENUE OR PROFITS WHETHER RESIDING ON ZEPHYR, CUSTOMER OR THIRD-PARTY SERVERS.
  - E. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY CUSTOMER FROM ZEPHYR OR THROUGH OR FROM A THIRD PARTY PRODUCT OR SERVICE PROVIDER SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THIS AGREEMENT.
5. Limitations of Liability. CUSTOMER EXPRESSLY UNDERSTANDS AND AGREES THAT ZEPHYR AND ITS OFFICERS, AGENTS AND EMPLOYEES SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY, PUNITIVE OR OTHER DAMAGES, INCLUDING BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, DATA, BUSINESS INTERRUPTION OR OTHER INTANGIBLE LOSSES (EVEN IF THEY HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR RESULT IN WHOLE OR IN PART FROM THE NEGLIGENCE OF ZEPHYR OR ITS OFFICERS, AGENTS OR EMPLOYEES) ARISING OR RELATING IN ANY WAY TO ANY SERVICES OR PRODUCTS THAT ZEPHYR MAY PROVIDE. EVEN IF ALL OTHER RELEASES AND WAIVERS CONTAINED IN THIS AGREEMENT ARE DEEMED INAPPLICABLE OR UNENFORCEABLE. CUSTOMER AGREES ITS SOLE REMEDY FOR ANY CLAIM OR DAMAGE OF ANY KIND AGAINST ZEPHYR AND/OR ITS OFFICERS, AGENTS OR EMPLOYEES ARISING OUT OF OR RELATING TO ANY SERVICE OR PRODUCT ZEPHYR MAY PROVIDE SHALL NOT EXCEED THE GREATER OF \$1,000 OR THE AMOUNT THE CUSTOMER HAS PAID TO ZEPHYR WITHIN THE MONTH PRECEDING THE OCCURRENCE OF THE CLAIM OR CAUSE OF ACTION FOR THE SERVICE OR PRODUCT THAT ALLEGEDLY CAUSED DAMAGE TO CUSTOMER.
6. Arbitration. Except with respect to actions to collect amounts dues and owing under this Agreement, the parties expressly agree that any controversy or claim arising out of or relating to this Agreement in any way, or the breach thereof, shall be settled in Orange County, California by binding arbitration, in accordance with the procedures then obtaining, of the American Arbitration Association ("AAA") under California law. Discovery shall be allowed as provided under the California Civil Discovery Act in force at the inception of the arbitration. This Agreement shall be enforceable and judgment upon any award rendered by the arbitrator(s) may be entered in any court having jurisdiction. The losing party has right of appeal to all courts of competent jurisdiction as to all arbitral decisions on the ground that the arbitral award disregarded the relevant substantive and/or evidentiary law or facts.
7. Warranty of Authority/Parties to Agreement. Each party signing this Agreement warrants that he, she or it has the authority to bind the parties on whose behalf he, she or it is executing this Agreement, including those acting as agents or assignees of a party to the Agreement. Customer agrees that all rights and obligations under this Agreement shall be binding upon Customer's heirs, successors, assigns, insurers, principals, agents, employees, guests and family members. This Agreement shall inure to the benefit of and be enforceable by Zephyr and its respective successors and assigns.
8. Integration Clause. This Agreement constitutes the entire agreement and understanding between the parties concerning the subject matter hereof, and it supersedes and replaces any and all prior negotiations and agreements of any kind or nature whatsoever, written or oral.

I HAVE READ, UNDERSTOOD AND AGREE TO THE TERMS AND CONDITIONS THAT APPEAR ON THE NEXT PAGE OF THIS APPLICATION, INCLUDING BUT NOT LIMITED TO PARAGRAPHS 3- 6.

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CUSTOMER SIGNATURE

\_\_\_\_\_  
DATE

