



IT SERVICES AGREEMENT

This IT Services Agreement (the "**Agreement**"), is by and between Commend, Inc., a Texas corporation with offices located at 63 Ramapo Valley Road, Suite 201, Mahwah, NJ 07430 Provider and Purchaser of the Commend License. Provider and Customer may be referred to herein collectively as the "**Parties**" or individually as a "**Party**."

WHEREAS, Customer is licensing the Software from Provider under this Software License Agreement (as defined below); and

WHEREAS, Customer desires to obtain IT services from Provider, subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, terms, and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions.

"**Affiliate**" of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term "control" (including the terms "controlled by" and "under common control with") means the direct or indirect power to direct or cause the direction of the management and policies of a Person, whether through [the ownership of voting securities, by contract, or otherwise/ownership of more than 50% of the voting securities of a Person.

"**Action**" means any claim, action, cause of action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation, citation, summons, subpoena, or investigation of any nature, civil, criminal, administrative, regulatory, or other, whether at law, in equity, or otherwise.

"**Deliverables**" means the Maintenance Releases, Remote Access Software, Documentation, Commend Programming Services or Pre-Fabrication of Equipment and any other work product that Provider provides or makes available to Customer in connection with the Services.

"**Documentation**" means Provider's user manuals, handbooks, and installation guides relating to the Software/end user documentation that Provider provides or makes available to Customer which describe the functionality,



components, features, or requirements of the Software, including any aspect of the installation, configuration, integration, operation, or use of the Software.

"Error" means a reproducible failure of the Software to perform in substantial conformity with the specifications set forth in the Documentation, whose origin can be isolated to a single cause.

"First Line Support" means, in connection with the identification, diagnosis, and correction of Errors, the provision of: (a) telephone e-mail chat assistance; (b) Remote Services; and (c) access to technical information on Provider's website for proper use of the Software.

"Incident" means a support request that begins when Customer contacts Provider to report one specific Error and ends when Provider either: (a) Resolves the Error; or (b) determines in its reasonable discretion that the Error cannot be Resolved.

"Intellectual Property Rights" means any and all registered and unregistered rights granted, applied for, or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection, or other intellectual property rights Laws, and all similar or equivalent rights or forms of protection, in any part of the world.

"Law" means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, or other requirement or rule of any federal, state, local, or foreign government or political subdivision thereof, or any arbitrator, court, or tribunal of competent jurisdiction.

"Loss" means all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys' fees and the costs of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers.

"Maintenance Release" means any update, upgrade, release, or other adaptation or modification of the Software, including any updated Documentation, that Provider may provide to Customer from time to time during the Term, which may contain, among other things, error corrections, enhancements, improvements, or other changes to the user interface, functionality, compatibility, capabilities, performance, efficiency, or quality of the Software, but does not include any New Version.

"New Version" means any new version of the Software that Provider may from time to time introduce and market generally as a distinct licensed product (as may be indicated by Provider's designation of a new version number), and which



Provider may make available to Customer at an additional cost under a separate written agreement.

"Normal Business Hours" means 8am to 7pm EST.

"Optional Support Services" means any of the Services set out in **Exhibit A**, and any other services to Customer under this Agreement that Customer and Provider may from time to time agree on in writing.

"Person" means an individual, corporation, partnership, joint venture, limited liability entity, governmental authority, unincorporated organization, trust, association, or other entity.

"Provider Personnel" means all Persons involved in the performance of Services as employees, agents, or independent contractors of Provider or any Subcontractor.

"Remote Services" means the delivery of Services remotely over the internet through the use of Remote Access Software that Provider installs on Customer's network, system, computers.

"Representatives" means, with respect to a Party, that Party's employees, officers, directors, agents, and legal advisors.

"Resolve" means the provision of: (a) Services that, in Provider's reasonable discretion, correct the Error; (b) information to Customer that corrects the Error; (c) information to Customer on how to obtain a software solution that corrects the Error; (d) notice to Customer that the Error is caused by a known, unresolved issue or an incompatibility issue with the Software; (e) information to Customer that identifies the Error as being corrected by upgrading to a newer release of the Software; or (f) notice to Customer that the Error has been identified as arising out of or resulting from a Service Exception.

"Respond" means Provider's initial communication with Customer, whether by telephone, e-mail, or otherwise, acknowledging Customer's request for Services in connection with a specific Error. **"Response"** has a correlative meaning.

"Second Line Support" means, in connection with the identification, diagnosis, and correction of Errors, the provision of on-site technical support at Customer's premises.

"Severity Level One Incident" means an Error that causes the Software not too operate and has a critical impact on Customer's business operations.



"Severity Level Two Incident" means an Error that results in a lack of Software functionality and materially degrades significant aspects of Customer's business operations.

"Severity Level Three Incident" means an Error that impairs the performance of the Software, but does not substantially affect Customer's business operations.

"Software" means the executable, object code version of the Commend software, and any Maintenance Releases provided to Customer, if applicable.

"Software License Agreement" means the separate agreement entered into by and between Provider's Affiliate and Customer, that grants Customer a limited license to access and use the Software pursuant to the terms and conditions set forth therein.

"Territory" means country

2. Services. Subject to the terms and conditions of this Agreement and all exhibits hereto, Provider will provide to Customer support and IT services (the **"Services"**)

2.1 Remote Services. Customer acknowledges and agrees that Provider may provide Remote Services to Customer to assist in analyzing and Resolving any Incident. Customer agrees to provide Provider with access to Customer's network, system and computers to install and use remote access software ("**Remote Access Software**") necessary for Provider to provide the Remote Services to Customer. The Remote Access Software may contain technological measures designed to collect and transmit to Provider certain diagnostic, technical, usage, and related information, including information about Customer's computers, systems, network, and any Third-Party Materials, relating to or derived from Customer's use of Software. Customer acknowledges and agrees that: (a) Provider may collect, maintain, process, and use this information in the course of performing the Services under this Agreement, provided that Provider shall only access, control, and gather such information that it reasonably believes to be necessary to assist in analyzing and Resolving an Incident; and (b) all or portions of the Remote Access Software may remain on Customer's network/system/computers after an Incident is Resolved.

2.2 Optional Support Services. Provider, in its sole discretion, may provide Optional Support Services to Customer on Customer's request, at Provider's standard hourly rates then in effect. The terms and conditions of this Agreement govern the provision of any Optional Support Services.

2.3 Service Changes. Provider may, in its sole discretion, change any aspect of the Services or their performance on 30 days' prior written notice to Customer, provided that no such change materially reduces or otherwise has a material



adverse effect on the: (a) Provider's level of effort in performing the Services; (b) Provider's obligation to provide the Services under this Agreement; or (c) Customer's rights under this Agreement.

3. Limitations.

3.1 Incidents. Provider has the sole right to determine, in its reasonable discretion: (a) what constitutes an Incident; and (b) when an Incident is deemed to be Resolved.

3.2 Response Time and Resolution. Provider will use commercially reasonable efforts to: (a) Respond within the applicable Response time provided in Exhibit C; and (b) Resolve an Incident, but does not guarantee that it will be able to Respond within that specific time period or that any Incident will be Resolved.

3.3 Effect of Customer Failure or Delay. Provider is not responsible or liable for any delay or failure of performance caused in whole or in part by any delay or failure to perform any of Customer's obligations under this Agreement in accordance with the respective exhibits and schedules (each, a "**Customer Failure**").

4. Exceptions. Provider has no obligation to provide Services relating to Errors that, in whole or in part, arise out of or result from any of the following (each a "**Service Exception**"):

(a) Software, or the media on which it is provided, that is modified or damaged by Customer or any third party;

(b) any operation or use of, or other activity relating to, the Software other than as specified in the Documentation, including any incorporation in the Software of, or combination, operation or use of the Software in or with, any technology (including any software, hardware, firmware, system, or network) or service not specified for Customer's use in the Documentation, unless otherwise expressly permitted in writing by Provider;

(c) any negligence, abuse, misapplication, or misuse of the Software other than by Provider Personnel, including any Customer use of the Software other than as specified in the Documentation or expressly authorized in writing by Provider;

(d) any Customer Failure, including Customer's failure to promptly install any Maintenance Release that Provider has previously made available to Customer;

(e) any Force Majeure Event (including abnormal physical or electrical stress).



4. Customer Obligations.

4.1 Notification. Customer shall immediately notify Provider of any Error and provide Provider with reasonable detail of the nature and circumstances of the Error.

4.2 Compliance. Customer shall comply with all terms and conditions of this Agreement.

4.3 Data Back-up. Customer agrees to back up all data, files, and information prior to the performance of any Services and hereby assumes sole responsibility for any lost or altered data, files, or information.

4.4 Information and Support. Customer shall provide Provider with all information reasonably requested by Provider from time to time relating to Customer's use of the Software, Services, or Deliverables, including information on Customer's hardware, network, systems, and any related Third-Party Materials and provide Provider access to its systems and facility and with all necessary authorizations and consents as may be necessary for Provider to provide the Services.

5. Confidentiality.

5.1 Confidential Information. In connection with this Agreement each Party (as the "**Disclosing Party**") may disclose or make available to the other Party (as the "**Receiving Party**") Confidential Information. Subject to Section 6.2, "**Confidential Information**" means information in any form or medium (whether oral, written, electronic, or other) that: (a) if disclosed in writing or other tangible form or medium, is marked "confidential" or "proprietary"; (b) if disclosed orally or in other intangible form or medium, is identified by the Disclosing Party or its Representative as confidential or proprietary when disclosed and summarized and marked "confidential" or "proprietary" in writing by the Disclosing Party or its Representative within 30 days after disclosure; or (c) due to the nature of its subject matter or the circumstances surrounding its disclosure, would reasonably be understood to be confidential or proprietary.

5.2 Exclusions and Exceptions. Confidential Information does not include information that: (a) was rightfully known to the Receiving Party without restriction on use or disclosure prior to such information's being disclosed or made available to the Receiving Party in connection with this Agreement; (b) was or becomes generally known by the public other than by the Receiving Party's or any of its Representatives' noncompliance with this Agreement; (c) was or is received by the Receiving Party on a non-confidential basis from a third party that was not or is not, at the time of such receipt, under any obligation to maintain its confidentiality; or (d) was or is independently developed by the Receiving Party without reference to or use of any Confidential Information.



5.3 Protection of Confidential Information. As a condition to being provided with any disclosure of or access to Confidential Information, the Receiving Party shall not access or use Confidential Information other than as necessary to exercise its rights or perform its obligations under and in accordance with this Agreement; and shall not - except as may be permitted under the terms and conditions of Section 6.4 - disclose or permit access to Confidential Information other than to its Representatives who: (i) need to know such Confidential Information for purposes of the Receiving Party's exercise of its rights or performance of its obligations under and in accordance with this Agreement; (ii) have been informed of the confidential nature of the Confidential Information and the Receiving Party's obligations under this Section and will comply with the obligations under this Section 6. The Receiving Party shall safeguard the Confidential Information from unauthorized use, access, or disclosure using at least the degree of care it uses to protect its own sensitive information and in no event less than a reasonable degree of care; and promptly notify the Disclosing Party of any unauthorized use or disclosure of Confidential Information and take all reasonable steps with Disclosing Party to prevent further unauthorized use or disclosure.

5.4 Compelled Disclosures. If the Receiving Party or any of its Representatives is compelled by applicable Law to disclose any Confidential Information then, to the extent permitted by applicable Law, the Receiving Party shall: (a) promptly, and prior to such disclosure, notify the Disclosing Party in writing of such requirement so that the Disclosing Party can seek a protective order or other remedy or waive its rights under Section 6.3; and (b) provide reasonable assistance to the Disclosing Party in opposing such disclosure or seeking a protective order or other limitations on disclosure. If the Disclosing Party waives compliance or, after providing the notice and assistance required under this Section 6.4, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose only that portion of the Confidential Information that the Receiving Party is legally required to disclose and, on the Disclosing Party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or other presiding authority that such Confidential Information will be afforded confidential treatment.

6. Fees; Payment Terms.

6.1 Fees. The fee for the first year is included in the sale price of the purchased software (the "Initial Term"). Customer will be engaged by Provider for purchase of subsequent years in advance of the end of the Initial Term. Customer can select to engage with subscriber for multiple years after the Initial Term by separate agreement between Provider and Customer

6.2 Taxes. All Fees and other amounts payable by Customer under this Agreement are exclusive of taxes and similar assessments. Without limiting the foregoing, Customer is responsible for all sales, service, use, and excise taxes, and



any other similar taxes, duties, and charges of any kind imposed by any federal, state, or local governmental or regulatory authority on any amounts payable by Customer hereunder, other than any taxes imposed on Provider's income.

6.3 Payment. Customer shall pay all Fees within 30 days after the date of the invoice therefor. Customer shall make all payments hereunder in US dollars as provided for in Provider's invoice or such other address or account as Provider may specify in writing from time to time.

6.4 Late Payment. If Customer fails to make any payment when due then, in addition to all other remedies that may be available to Provider:

(a) Provider may charge interest on the past due amount at the rate of 1.5% per month calculated daily and compounded monthly or, if lower, the highest rate permitted under applicable Law;

(b) Customer shall reimburse Provider for all reasonable costs incurred by Provider in collecting any late payment of amounts due or related interest, including attorneys' fees, court costs, and collection agency fees; and

(c) if such failure continues for [30] days following written notice thereof, Provider may suspend performance of the Services until all past due amounts have been paid, without incurring any obligation or liability to Customer or any other Person by reason of such suspension.

6.5 No Deductions or Setoffs. All amounts payable to Provider under this Agreement shall be paid by Customer to Provider in full without any setoff, deduction or withholding for any reason (other than any deduction or withholding of tax as may be required by applicable Law).

7. Intellectual Property Rights.

7.1 Intellectual Property Ownership. Customer acknowledges and agrees that:

(a) the Software and Deliverables are licensed, not sold, to Customer by Provider and Customer does not and will not have or acquire under or in connection with this Agreement any ownership interest in the Software or Deliverables, or in any related Intellectual Property Rights;

(b) Provider is and will remain the sole and exclusive owner of all right, title, and interest in and to the Software and Deliverables, including all Intellectual Property Rights relating thereto, subject only to the limited license granted to Customer under this Agreement; and



7.2 Customer Cooperation and Notice of Infringement. Customer shall, during the Term:

(a) take all commercially reasonable measures to safeguard the Software and Deliverables (including all copies thereof) from infringement, misappropriation, theft, misuse, or unauthorized access;

(b) at Provider's expense, take all such steps as Provider may reasonably require to assist Provider in maintaining the validity, enforceability, and Provider's ownership of the Intellectual Property Rights in the Software and Deliverables;

(c) promptly notify Provider in writing if Customer becomes aware of:

(i) any actual or suspected infringement, misappropriation, or other violation of Provider's Intellectual Property Rights in or relating to the Software or Deliverables; or

(ii) any claim that the Software or Deliverables, including any production, use, marketing, sale, or other disposition of the Software or Deliverables, in whole or in part, infringes, misappropriates, or otherwise violates the Intellectual Property Rights or other rights of any Person; and

(d) fully cooperate with and assist Provider in all reasonable ways in the conduct of any claim, suit, action, or proceeding by Provider to prevent or abate any actual or threatened infringement, misappropriation, or violation of Provider's rights in, and to attempt to resolve any claims relating to, the Software or Deliverables.

8. Term and Termination.

8.1 Initial Term. The initial term of this Agreement commences as of the delivery of license details and will continue in effect for 1 year from such date unless terminated earlier pursuant any of the Agreement's express provisions (the "Initial Term")

8.2 Expiration and Renewal Term. This Agreement will automatically expire after the Initial Term. However, Provider will approach Customer 120 days in advance of completion of initial term and present Customer various renewal options.

8.3 Termination. This Agreement may be terminated at any time:

(a) by Provider, effective on written notice to Customer, if Customer fails to pay any amount when due under this Agreement or any of the Exhibits or Schedules hereto, where such failure continues more than 30 days after Provider's delivery of written notice thereof ("**Payment Failure**");



(b) by Provider, immediately on written notice to Customer if any 3 or more Payment Failures occur annually;

(c) by either Party, effective on written notice to the other Party, if the other Party materially breaches this Agreement or any of the Exhibits or Schedules hereto, and such breach: (i) is incapable of cure; or (ii) being capable of cure, remains uncured [30] days after the non-breaching Party provides the breaching Party with written notice of such breach;

(d) by Provider, effective immediately, if the Customer: (i) is dissolved or liquidated or takes any corporate action for such purpose; (ii) becomes insolvent or is generally unable to pay its debts as they become due; (iii) becomes the subject of any voluntary or involuntary bankruptcy proceeding under any domestic or foreign bankruptcy or insolvency Law; (iv) makes or seeks to make a general assignment for the benefit of its creditors; or (v) applies for, or consents to, the appointment of a trustee, receiver, or custodian for a substantial part of its property.

8.4 Effect of Termination or Expiration.

On the expiration or earlier termination of this Agreement:

(a) all rights, licenses, and authorizations granted to Customer hereunder will immediately terminate and Customer shall:

(i) immediately cease all use of and other activities with respect to the Provider's Confidential Information relating to the Services and, if this Agreement is terminated automatically pursuant to Section 9.3(d) or by Provider pursuant to Section 9.3, the Software and Deliverables, other than those described in Section 9.4(a)(ii); and

(ii) within 14 days deliver to Provider, or at Provider's written request destroy, and permanently erase from all devices and systems Customer directly or indirectly controls, the Software, Deliverables, and Provider's Confidential Information, and

(iii) certify to Provider if so requested by Provider in a signed and notarized written instrument that it has complied with the requirements of this Section 9.4.

(b) all amounts payable by Customer to Provider under this Agreement are immediately payable and due no later than 7 Business Days after the effective date of the expiration or Provider's termination of this Agreement under Section 9.3.



8.5 Surviving Terms. The provisions set forth in the following sections, and any other right, obligation, or provision under this Agreement that, by its nature, should survive termination or expiration of this Agreement, will survive any expiration or termination of this Agreement: this Section 9.5, Section 1 (Definitions), Section 6 (Confidentiality), Section 8 (Intellectual Property Rights), Section 9.4 (Effect of Termination or Expiration), Section 10.2 (Disclaimer), Section 11 (Indemnification), Section 12 (Limitations of Liability), Section 13 (Export Regulation), and Section 15 (Miscellaneous).

9. Representations and Warranties.

9.1 Provider Representations and Warranties. Provider represents, warrants, and covenants to Customer that during the Term Provider will perform the Services using personnel of required skill, experience, and qualifications and in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services and will devote adequate resources to meet its obligations under this Agreement.

9.2 DISCLAIMER OF WARRANTIES. EXCEPT FOR THE EXPRESS LIMITED WARRANTIES SET FORTH IN THIS SECTION 10, THE LICENSED SOFTWARE, THE SERVICES, AND THE DELIVERABLES ARE PROVIDED "AS IS." PROVIDER HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHER (INCLUDING ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE), AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT. WITHOUT LIMITING THE FOREGOING, PROVIDER MAKES NO WARRANTY OF ANY KIND THAT THE LICENSED SOFTWARE, THE SERVICES, THE DELIVERABLES, OR ANY OTHER GOODS, SERVICES, TECHNOLOGIES, INFORMATION, OR MATERIALS, OR ANY PRODUCTS OR RESULTS OF THE USE OF ANY OF THEM, WILL MEET CUSTOMER'S OR OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY OTHER GOODS, SERVICES, TECHNOLOGIES, INFORMATION, OR MATERIALS[EXCEPT IF AND TO THE EXTENT EXPRESSLY SET FORTH IN THE DOCUMENTATION], OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR FREE. THIS AGREEMENT DOES NOT AMEND, AUGMENT, OR OTHERWISE MODIFY THE PROVIDER'S WARRANTIES UNDER ANY SOFTWARE LICENSE AGREEMENT OR ANY CONDITIONS, LIMITATIONS, OR RESTRICTIONS THEREOF.

10. Indemnification.

10.1 Provider Indemnification. Provider shall indemnify, defend, and hold harmless Customer from and against any and all Losses incurred by Customer arising out of or relating to any Action by a third party (other than an Affiliate of Customer) to the extent that such Losses arise from any allegation in such Action that any of the Services or Deliverables infringes any U.S. Intellectual Property Right [in the Territory].



The foregoing obligation does not apply to the extent that such Action or Losses arise from any allegation of or relating to any:

- (a) Third-Party Materials;
- (b) patent issued on a patent application published [Click or tap here to enter text.](#) after the Effective Date;
- (c) negligence, abuse, misapplication, or misuse of the Software or any Deliverables other than by Provider Personnel;
- (d) events or circumstances outside of Provider's commercially reasonable control (including any bugs, defects, or malfunctions of any third-party software, hardware, firmware, system, or network).

10.2 Customer Indemnification. Customer shall indemnify, defend, and hold harmless Provider from and against any and all Losses incurred by the Provider Indemnitee in connection with any Action by a third party (other than an Affiliate of Provider) to the extent that such Losses arise from any allegation in such Action:

- (a) that any Intellectual Property Right or other right of any Person, or any Law, is or will be infringed, misappropriated, or otherwise violated by any:
 - (i) modification of the Software or any Deliverables by Customer other than: (A) by Provider Personnel in connection with this Agreement; or (B) with Provider's express written authorization and in strict accordance with Provider's written directions and specifications;
 - (ii) incorporation, combination, operation, or use of the Software, Services, or any Deliverables by Customer with any good, service, technology, or other matter whatsoever (including any software, hardware, firmware, system, or network) that is neither provided by Provider Personnel nor expressly authorized by Provider in this Agreement, any of the Exhibits or Schedules hereto, or the Documentation, unless otherwise expressly permitted by Provider in writing;
 - (iii) good, service, technology, or other matter whatsoever (including any software, hardware, firmware, system, or network) directly or indirectly provided by Customer or directed by Customer to be installed, combined, integrated, or used with, as part of, or in connection with the Software or any Deliverables;
 - (iv) use of the Software or any Deliverables by Customer after Provider's notice to Customer of such activity's alleged or actual



infringement, misappropriation, or other violation of a third party's rights;
or

(v) failure by Customer to timely implement any Maintenance Release, modification, update, or replacement of the Software or any Deliverables made available to Customer by or on behalf of Provider;

(b) of or relating to facts that, if true, would constitute a breach by Customer of any representation, warranty, covenant, or obligation under the License Agreement or this Agreement;

(c) of or relating to negligence, abuse, misapplication, misuse, or more culpable act or omission (including recklessness or willful misconduct) by or on behalf of Customer or any of its Representatives with respect to the Software, the Services, the Deliverables, or otherwise in connection with this Agreement; or

(d) of or relating to use of or other act relating to the Software, the Services, or the Deliverables by or on behalf of Customer that is: (i) outside the scope of Customer's license under the Software License Agreement, if applicable, or the purpose, scope, or manner of use authorized by the Software License Agreement, if applicable, this Agreement or the Documentation; or (ii) in any manner contrary to Provider's instructions.

10.3 Mitigation. If the Services or Deliverables, or any part of thereof, are, or in Provider's opinion are likely to be, claimed to infringe, misappropriate, or otherwise violate any third-party Intellectual Property Right, or if Customer's use of any of the Services or Deliverables is enjoined or threatened to be enjoined, Provider may, at its option and sole cost and expense:

(a) obtain the right for Customer to continue to use such Services and/or Deliverables, as applicable, materially as contemplated by this Agreement;

(b) modify or replace such Services and/or Deliverables, as applicable, in whole or in part, to seek to make these non-infringing, while providing materially equivalent features and functionality, and such Services and Deliverables as so modified or replaced will constitute Services and Deliverables under this Agreement; or

(c) by written notice to Customer, terminate this Agreement with respect to all or part of the Services and/or Deliverables, as applicable, and require Customer to immediately cease any use of the Services and/or Deliverables or any specified part or feature thereof.



(d) THIS SECTION 11 SETS FORTH CUSTOMER'S SOLE REMEDIES AND PROVIDER'S SOLE LIABILITY AND OBLIGATION FOR ANY ACTUAL, THREATENED, OR ALLEGED CLAIMS THAT THIS AGREEMENT OR ANY SUBJECT MATTER HEREOF (INCLUDING THE SERVICES AND DELIVERABLES) INFRINGES, MISAPPROPRIATES, OR OTHERWISE VIOLATES ANY THIRD-PARTY INTELLECTUAL PROPERTY RIGHT.

11. Limitations of Liability.

11.1 Exclusion of Damages. EXCEPT AS EXPRESSLY OTHERWISE PROVIDED IN SECTION 12.3, IN NO EVENT WILL PROVIDER OR PROVIDER PERSONNEL BE LIABLE UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE, FOR ANY: (a) LOSS OF USE, DATA, BUSINESS, REVENUE, PROFIT, GOODWILL, OR REPUTATION, (b) BUSINESS INTERRUPTION, INCREASED COSTS, OR DIMINUTION IN VALUE, OR (c) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED, OR PUNITIVE DAMAGES, IN EACH CASE REGARDLESS OF WHETHER SUCH PERSONS WERE ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

11.2 CAP ON MONETARY LIABILITY. IN NO EVENT WILL THE COLLECTIVE AGGREGATE LIABILITY OF PROVIDER AND PROVIDER PERSONNEL, ARISING OUT OF OR RELATED TO THIS AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE, EXCEED 2 TIMES THE TOTAL OF THE AMOUNTS PAID AND AMOUNTS ACCRUED BUT NOT YET PAID TO SELLER UNDER THIS AGREEMENT IN THE 1 YEAR PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM. THE FOREGOING LIMITATIONS SHALL APPLY EVEN IF THE CUSTOMER'S REMEDIES UNDER THIS AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE.

11.3 Exceptions. The exclusions in Section 12.1 do not apply to Provider's obligations under Section 11 (Indemnification) or liability for Provider's gross negligence or willful misconduct, provided however that the Cap on Monetary Liability under Section 12.2 shall apply.

12. Export Regulation. The Software may be subject to US export control laws, including the Export Control Reform Act and its associated regulations. Customer will not directly or indirectly, export, re-export, or release the Software to, or make the Software accessible from, any country, jurisdiction or Person to which export, re-export, or release is prohibited by applicable Law. Licensee will comply with all applicable Laws.

13. Force Majeure. In no event will either Party be liable or responsible to the other Party, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, (except for any



payment obligation), when and to the extent such failure or delay is caused by any circumstances beyond such Party's reasonable control (a "**Force Majeure Event**"), including acts of God, flood, fire, earthquake or explosion, war, terrorism, invasion, riot or other civil unrest, embargoes or blockades in effect on or after the date of this Agreement, national or regional emergency, a global health emergency, , such as a pandemic, strikes, labor stoppages or slowdowns or other industrial disturbances, passage of Law or any action taken by a governmental or public authority, including imposing an embargo, export or import restriction, quota or other restriction or prohibition or any complete or partial government shutdown, or national or regional shortage of adequate power, telecommunications, or transportation. Either Party may terminate this Agreement if a Force Majeure Event affecting the other Party continues substantially uninterrupted for a period of 60 days or more.

14. Miscellaneous.

14.1 Relationship of the Parties. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever.

14.2 Notices. Any notice, request, consent, claim, demand, waiver, or other communication under this Agreement will have legal effect only if in writing and addressed to a Party as follows (or to such other address or such other person that such addressee Party may designate from time to time in accordance with this Section 15.2):

If to Provider: Commend, Inc.
 63 Ramapo Valley Road,
 Mahwah, New Jersey 07430
Facsimile: 1-201-529-0008

E-mail: office@commendusa.com

Attention: Tom Reilly, President

If to Customer: Based on Information collected in Commend Americas at time
 of purchase



Notices sent in accordance with this Section 15.2 will be deemed effectively given: (a) when received, if delivered by hand, with signed confirmation of receipt; (b) when received, if sent by a nationally recognized overnight courier, signature required; (c) when sent, if by facsimile or e-mail, (in each case, with confirmation of transmission), if sent during the addressee's normal business hours, and on the next business day, if sent after the addressee's normal business hours; and (d) on the 4th day after the date mailed by certified or registered mail, return receipt requested, postage prepaid.

14.3 Entire Agreement. This Agreement, together with all exhibits and schedules hereto and Provider's Standard terms and condition for the Sale and Services and any other documents incorporated herein by reference, constitute the sole and entire agreement of the Parties with respect to the subject matter contained herein and therein and supersede all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter. In the event of any inconsistency between the statements made in this Agreement, the related exhibits and schedules and any other documents incorporated herein by reference, the following order of precedence governs: (a) first, this Agreement, excluding its exhibits, schedules, attachments, and appendices; (b) second, the exhibits as of the Effective Date as defined herein; and (c) third, any other documents incorporated herein by reference.

14.4 Assignment. Customer shall not assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance, under this Agreement, in each case whether voluntarily, involuntarily, by operation of law, or otherwise, without Provider's prior written consent, which consent Provider shall not unreasonably withhold. Any purported assignment, delegation, or transfer in violation of this Section 15.4 is void. This Agreement is binding upon and inures to the benefit of the Parties and their respective permitted successors and assigns.

14.5 No Third-Party Beneficiaries. This Agreement is for the sole benefit of the Parties and their respective permitted successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer on any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

14.6 Amendment and Modification; Waiver. No amendment to or modification of or termination of this Agreement is effective unless it is in writing and signed by an authorized representative of each Party. No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, any right, remedy or privilege arising from this Agreement shall be construed as a waiver thereof.



14.7 Severability. If any provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement. On such determination that any term or other provision is invalid, illegal, or unenforceable, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

14.8 Governing Law; Submission to Jurisdiction. This Agreement is governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the State of New York. Any legal suit, action, or proceeding arising out of or related to this Agreement or the Services, Deliverables, or other subject matter hereof, or any transactions contemplated hereby, shall be instituted [exclusively] in the federal courts of the United States or the courts of the State of New York in each case located in the city of New York and County of New York, and each Party irrevocably submits to the [exclusive] jurisdiction of such courts in any such suit, action, or proceeding. Service of process, summons, notice, or other document by mail to such Party's address set forth herein will be effective service of process for any suit, action, or other proceeding brought in any such court.

14.9 Waiver of Jury Trial. Each Party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal suit, action, or proceeding arising out of or relating to this Agreement or the Services, Deliverables, or other subject matter hereof, or any transactions contemplated hereby.

14.10 Equitable Remedies. Each Party acknowledges and agrees that a breach or threatened breach by such Party of any of its obligations under Section 7 (Confidentiality) or Section 11 (Indemnification) or, in the case of Customer, Section 5 (Customer Obligations) or Section 8 (Intellectual Property Rights), of this Agreement would cause the other Party irreparable harm for which monetary damages would not be an adequate remedy and that, in the event of such breach or threatened breach, the other Party will be entitled to equitable relief, including in a restraining order, an injunction, specific performance, and any other relief that may be available from any court of competent jurisdiction, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity, or otherwise.

14.11 Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-



mail, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.



commend

EXHIBIT A – SERVICES

To be included here either alone or as a combination of the following exhibits, as the case may be:

A.1 – Software Maintenance Exhibit

EXHIBIT A

A.1 Software Maintenance Agreement

1. Definitions: Capitalized terms used and not defined in this Exhibit have the respective meanings assigned to them in the IT Support Services Agreement.
2. Maintenance Releases and Updates. During the Term, Provider will provide Customer with all Maintenance Releases and Updates of the current version. A description of the current Software version is attached hereto as Schedule 1. Customer does not have any right under or in connection with this Agreement to receive any New Versions of the Software that Provider may, in its sole discretion, release from time to time.