

## OVERTONE TERMS AND CONDITIONS

1. **DEFINITIONS.** As used herein, the following terms shall have the meanings ascribed to them as set forth below:

“**Customer**” means the Overtone customer that is a party to a Transaction Document. “**Customer Data**” means: (i) any and all electronic data that is provided by visitors to the Customer Website as feedback to the Customer and collected through the use of the Services; and (ii) any and all other sources of feedback information provided by Customer as electronic data to Overtone to allow Overtone to provide the Services. “**Customer Website**” means the website owned or controlled by Customer or its affiliates for which Customer uses the Services. “**End User**” means one of Customer’s customers, subscribers, members, or end-users. “**Intellectual Property Rights**” means unpatented inventions, patent applications, patents, design rights, copyrights, trademarks, service marks, trade names, domain name rights, mask work rights, know-how and other trade secret rights, and all other intellectual property rights, derivatives thereof, and forms of protection of a similar nature anywhere in the world. “**Overtone**” means Overtone, Inc., a Delaware corporation, its affiliates, or entities authorized by Overtone to provide a Service. “**Overtone Technology**” includes, without limitation, the Software, the Services, and all of Overtone’s proprietary technology (including software, hardware, products, processes, algorithms, user interfaces, know-how, techniques, designs, and other tangible or intangible technical material or information), as such may be modified, upgraded, or enhanced from time to time. “**Parties**” means, collectively, Overtone and Customer and “**Party**” means either of Overtone or Customer. “**Service**” or “**Services**” means those services that Overtone provides to Customer pursuant to a Transaction Document. A Service may include such software (e.g., scripts or other code) that is provided solely to enable Customer’s use of the Services. “**Software**” means the computer source code and/or object code, as may be modified, upgraded, substituted, and/or replaced from time to time, that is licensed by Overtone to Customer pursuant to a Transaction Document. “**Terms and Conditions**” means these Terms and Conditions, which are incorporated by reference into and made a part of each Transaction Document. “**Transaction Document**” means an order form, statement of work, or other document that set forth the description of Services being purchased from Overtone and any additional terms related thereto, which become effective and binding on the Parties only when executed by both Parties. “**User**” means Customer’s employees, consultants, contractors, representatives or agents who are authorized to use the Service and have been supplied user identifications and passwords by Customer (or by Overtone at Customer’s request). Other capitalized terms used here have the definitions set forth below or in the Transaction Document(s).

### 2. PROVISION AND USE OF THE SERVICES

2.1 **Overtone Responsibilities.** Overtone shall: (i) abide by all laws, rules, and regulations that apply to its provision of the Software and Services as set forth in the applicable Transaction Document; and (ii) have no right, title, or interest in or to the Customer Data, except that Overtone may: (a) capture and maintain the Customer Data in connection with its provision of Services to Customer and enforcement of its rights as described in the applicable Transaction Document; (b) compile and use for any purpose the Transactional Data (defined below); provided that no such use shall include any information that can identify Customer or its customers; and (c) disclose any Customer Data if required by law or valid order of a court or other governmental authority (provided that Overtone will deliver reasonable notice to Customer and use commercially reasonable efforts to cooperate with Customer’s attempt to obtain a protective order).

2.2 **Customer Responsibilities; Use of the Service.** Customer shall abide by all laws, rules, and regulations that apply to its use of the Software and Services. Customer shall post on the Customer Website a privacy policy that addresses the Services as described in the applicable Transaction Document(s). Customer represents and warrants that the collection, storage, and processing of the Customer Data as provided in the applicable Transaction Document(s) will at all times comply with Customer’s own policies regarding privacy and protection of user information and all applicable laws, rules, and regulations.

3. **TERM.** The term of each Transaction Document will commence as of the date such Transaction Document has been signed by both Parties, i.e., the date of the signature of the second Party to sign (the “Effective Date”) and shall continue for the number of months specified in such Transaction Document (the “Initial Term”). If the Transaction Document specifies an “Annual Term,” then the term of such Transaction Document will commence as of the Effective Date, continue for a twelve (12) month period from the Effective Date, and automatically renew for subsequent twelve (12) month periods (each, a “Renewal Term”) until it is terminated by either Party not less than thirty (30) days prior to the end of the then-current twelve (12) month period.

The Initial Term and any Renewal Term(s) (if any) shall be the “Term” of a Transaction Document.

### 4. TERMINATION; SUSPENSION

4.1 **Termination by Either Party.** Either Party may terminate a Transaction Document if the other party materially breaches any of the provisions of such Transaction Document (including without limitation these Terms and Conditions) and such breach is not cured within thirty (30) days after the other Party’s receipt of notice from the non-breaching Party. Termination of a Transaction Document shall not relieve Customer of its responsibilities under such Transaction Document, including without limitation its obligation to pay such fees accruing under or with respect to such Transaction Document for periods prior to or following such termination, *provided, however*, that if Customer terminates a Transaction Document as a result of a breach by Overtone: (i) Customer shall only be responsible for payment of fees for Services rendered to the effective date of termination, and (ii) Overtone shall refund Customer fees prepaid for Services not then rendered at the effective date of termination, if any.

4.2 **Suspension.** In addition to its rights under Section 4.1 above, Overtone may upon no less than five (5) days prior, written notice to Customer suspend the Services described in a Transaction Document if Customer fails to pay any fees or charges when due. Termination for non-payment shall not relieve Customer of its responsibilities under such Transaction Document including, but not limited to, its obligation to pay fees accruing under such Transaction Document for periods prior to such termination. In the event of a suspension of the Services, Customer’s account shall not be reactivated until such time as all past due amounts shall have been paid by Customer.

5. **PRICING.** Customer shall pay the fees set forth in the applicable Transaction Document.

6. **PAYMENT TERMS.** Unless otherwise expressly set forth in a Transaction Document, Overtone shall invoice Customer for the Service quarterly in advance during the Initial Term and annually in advance during any Renewal Term. Implementation Services, if applicable, will be invoiced on or after the effective date of the applicable Transaction Document. All payments shall be made within thirty (30) days from the date of invoice. If any fee is not paid when due, in addition to any other rights and remedies that Overtone may have hereunder, Overtone reserves the right to charge interest at lower of one and one-half percent (1½%) per month or the highest rate allowed by applicable law.

### 7. PROPRIETARY RIGHTS

7.1 **Grant of License.** Overtone hereby grants to Customer, during the term of the applicable Transaction Document, a non-exclusive, non-transferable right to use the Overtone Technology described in such Transaction Document and/or resulting from Overtone’s provision of the Services, solely for Customer’s own internal business purposes, subject to the terms and conditions of such Transaction Document (including without limitation those of this Agreement). Upon termination of the applicable Transaction Document for any reason, all licensed rights granted to Customer pursuant to such Transaction Document shall terminate immediately, and Customer shall promptly discontinue all further use of, and Overtone may suspend access to, the applicable Overtone Technology.

7.2 **Restrictions.** Customer will not: (i) copy, modify, port, adapt, translate, localize, reverse engineer, de-compile, disassemble, create derivative works, or, or otherwise attempt to discover the source code of any Overtone Technology; (ii) remove, obscure, or alter any proprietary notices or labels on the Overtone Technology; (iii) transfer, lease, sublicense, rent, share, or encumber the Overtone Technology; (iv) disclose the results of any performance, functional or other evaluation or benchmarking of any Overtone Technology; provided that Customer may distribute the reports and other data generated by the Services (excluding any Overtone intellectual property or Confidential Information included therein); (v) create Internet “links” to or from the Service, or “frame” or “mirror” any content forming part of the Service, other than on Customer’s own intranets or otherwise for its own internal business purposes; or (vi) permit access to the Software, the Service or any portion thereof by any third party other than Customer’s Users.

7.3 **Reservation of Rights.** Other than as expressly set forth in a Transaction Document, no license or other rights in or to the Overtone Technology or Intellectual Property Rights therein are granted to Customer, and all such licenses and rights are hereby expressly reserved. Overtone owns all right, title, and interest in and to the Overtone Technology, including without limitation any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by Customer, a User or an End User, relating to the Service. Overtone retains all right, title, and interest in and to benchmarking data, abstracted derivative data, transactional, performance data and metadata (but not to Customer Data) related to use of the Service or the Software and the Service which Overtone may aggregate,

benchmark and collect in such a way as to not allow identification of Customer, or any Customer employee, suppliers, or service providers (collectively, the "Transactional Data").

**7.4 Services.** Without limiting the generality of the foregoing, all Intellectual Property Rights that result from Overtone's provision of the Services shall vest in Overtone, excluding Customer's pre-existing proprietary business information, the results of any compilation thereof that are used in or resulting from Overtone's performance of the Services, and the Customer Data, which shall remain the sole property of Customer.

**8. CONFIDENTIAL INFORMATION.** As used herein, "Confidential Information" means all confidential and proprietary information of a party ("Disclosing Party") disclosed to the other party ("Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure, including the terms and conditions of each Transaction Document, the Customer Data, the Service, the Overtone Technology and Intellectual Property Rights therein, business and marketing plans, technology and technical information, product designs, reports and business processes. Confidential Information (except for Customer Data) shall not include any information that: (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (ii) is known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party; (iii) was independently developed by the Receiving Party without breach of any obligation owed to the Disclosing Party; or (iv) is received from a third party without breach of any obligation owed to the Disclosing Party. The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of the applicable Transaction Document. Each Receiving Party will use the same degree of care that it uses with respect to its own Confidential Information (but in no event less than reasonable care) maintain in confidence the Disclosing Party's Confidential Information. Each Receiving Party's obligations hereunder with respect to the Disclosing Party's Confidential Information shall continue for a period of three (3) years following its receipt of such Confidential Information, regardless of whether the applicable Transaction Document has terminated for any reason. If the Receiving Party discloses or uses (or threatens to disclose or use) any Confidential Information of the Disclosing Party in breach of this Section 8, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.

#### **9. WARRANTIES & DISCLAIMERS**

**9.1 Overtone.** Overtone represents and warrants that (i) it has the legal power to enter into each Transaction Document, (ii) it will provide the Service in a manner consistent with general industry standards reasonably applicable to the provision thereof, and (iii) it will maintain commercially reasonable environmental, safety, facility and data security procedures to protect against the destruction, loss, or alteration of Customer Data in the possession of Overtone which are no less rigorous than those maintained by Overtone for its own information of similar nature; and (iv) it will provide the Services set forth in a Transaction Document, except for: (a) planned downtime as therein set forth or (b) any unavailability caused by circumstances beyond Overtone's reasonable control, including without limitation, acts of God, government, and terror; flood; fire; earthquakes; civil unrest; strikes or other labor problems; computer, telecommunications, Internet service provider or hosting facility failures or delays involving hardware, software or power systems not within Overtone's possession or reasonable control, and network intrusions or denial of service attacks. The warranties provided in this Section 9.1 are solely for the benefit of Customer and Customer has no authority to extend these warranties to any third party. Overtone is not liable for failures to meet its obligations hereunder to the extent caused by hardware and software not owned or operated by Overtone (including Customer's own systems and professional services), or Customer's, User's or an End User's misuse of the Services. While Overtone employs robust security measures, because Overtone does not control the Internet: (a) viruses, worms, Trojan horses, or other undesirable data or software; or (b) unauthorized users (e.g., "hackers") may attempt to obtain access to Customer's data, Website, computers, or networks. Overtone exercises no control over, and has no responsibility for, any content or data transmitted or maintained using the Services nor the information or material accessible upon, or actions taken on, the Internet, and Overtone expressly disclaims any liability arising therefrom. EXCEPT AS EXPRESSLY PROVIDED HEREIN, OVERTONE MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. OVERTONE HEREBY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

**9.2 Customer.** Customer represents and warrants that it has the legal

power to enter into each Transaction Document. By purchasing the Service, Customer authorizes Overtone to collect, store, and process Customer Data subject to the terms of the applicable Transaction Document. Customer is solely responsible for all activities that occur under Customer's account. Customer acknowledges that Overtone shall have no responsibility for the accuracy, quality, integrity, and legality of the Customer Data provided by Customer to Overtone. Customer shall: (i) use the Service solely for its internal business purposes to analyze Customer Data, and shall not license, sublicense, sell, rent, lease, transfer, assign, distribute, time share or otherwise exploit or make the Service available to any third party; (ii) provide the Customer Data in a form and format as reasonably required by Overtone to perform or render the Services; (iii) notify Overtone promptly of any unauthorized use of its account.

#### **10. INDEMNIFICATION.**

**10.1** Overtone will indemnify, defend, and hold harmless Customer and its officers, directors, employees and agents (each, a "Customer Indemnified Party") from and against any and all damages, liabilities, costs, and expenses (including reasonable attorneys' fees) incurred by a Customer Indemnified Party in any third party action arising from or in connection with: (i) Overtone's breach of any of its obligations set forth in sections 2.1 or 8 of these Terms and Conditions or (ii) any third party claim that any Overtone Technology, when used within the scope as set forth in the applicable Transaction Document, infringes any third party's Intellectual Property Rights. In addition, if the Overtone Technology is, or in the opinion of Overtone may become, the subject of any claim for infringement or if it is adjudicatively determined that the Overtone Technology is infringing, then Overtone may, at its option and expense, either (i) procure for Customer the right from such third party to use the Overtone Technology, (ii) replace or modify the Overtone Technology with other suitable and reasonably equivalent products so that the Overtone Technology becomes noninfringing or (iii) if (i) and (ii) are not practicable, terminate the applicable Transaction Document and provide Customer with a pro rata refund of prepaid Services Fees, if any. THIS SECTION 10.1 STATES OVERTONE'S ENTIRE OBLIGATION AND CUSTOMER'S SOLE REMEDIES WITH RESPECT TO ANY CLAIM REGARDING THE INTELLECTUAL PROPERTY RIGHTS OF ANY THIRD PARTY. Overtone will have no liability for any infringement to the extent that Customer (i) used other than the then-current, commercially available version of the Overtone Technology; (ii) used the Overtone Technology other than as set forth in its accompanying documentation; (iii) modified the Overtone Technology unless such modification was made or authorized by Overtone, when such infringement would not have occurred but for such modification; or (iv) combined or used the Overtone Technology with other software, hardware or other products not specifically approved by Overtone in advance and in writing if such infringement would have been avoided by the use of the Overtone Technology not in such combination.

**10.2** Customer will indemnify, defend, and hold harmless Overtone and its officers, directors, employees and agents (each, an "Overtone Indemnified Party") from and against any and all damages, liabilities, costs, and expenses (including reasonable attorneys' fees) incurred by an Overtone Indemnified Party in any third party action arising from or in connection with: (i) Customer's breach of any of its obligations set forth in Sections 2.2 or 8 of these Terms and Conditions and (ii) Overtone's collection and storage of Customer Data on behalf of Customer as set forth in the applicable Transaction Document.

**10.3** Each Indemnifying Party's obligations as set forth in this Section 10 are contingent upon the Indemnified Party promptly notifying the Indemnifying Party in writing of the claim and promptly tendering the control of the defense and settlement of any such claim to the Indemnifying Party at the Indemnifying Party's expense and with the Indemnifying Party's choice of counsel. The Indemnified Party will also cooperate with the Indemnifying Party, at the Indemnifying Party's expense, in defending or settling such claim and the Indemnified Party may join in defense with counsel of its choice at its own expense.

**11. LIMITATION OF LIABILITY.** In no event shall either Party have any liability to the other Party for any loss of use, interruption of business, or any lost profits, loss of use, costs of procurement of substitute goods or services, or for any indirect, special, incidental, punitive, or consequential damages however caused and, whether in contract, tort or under any other theory of liability, whether or not the party has been advised of the possibility of such damage. Notwithstanding anything in a Transaction Document to the contrary, in no event shall Overtone's aggregate liability, however arising out of or related to such Transaction Document, whether in contract, tort or under any other theory of liability, exceed the lesser of \$100,000 or the amounts actually paid by Customer under such Transaction Document.

**12. MISCELLANEOUS** As additional protection for Overtone's proprietary information, for so long as a Transaction Document remains in effect, and for two years thereafter, Customer agrees that it shall not, directly or indirectly, solicit, hire or attempt to solicit any employees of Overtone. In the event that

Customer hires any such employee (whether as an employee or consultant or otherwise engages the services of such employee), Customer shall pay to Overtone an amount equal to 100% of the total first-year compensation which Customer pays such individual as a fee, salary, or other compensation. The failure of either Party hereto to enforce at any time any of the provisions or terms of a Transaction Document, or any rights in respect thereof, or the exercise of or failure to exercise by either Party any rights or any of its elections herein provided, shall in no way be considered to be a waiver of such provisions, terms, rights or elections or in any way to affect the validity of this Agreement. If any of the provisions of a Transaction Document, or portion thereof, are held invalid or unenforceable, such invalidity or unenforceability shall not affect the remainder of such Transaction Document. In such event, the Parties shall negotiate, in good faith, a substitute, enforceable provision which most nearly affects their original intent in entering into a Transaction Document, failing which the parties agree that the governmental body, arbitrator, or mediator making such determination shall have the power to modify the provision in a manner consistent with its objectives such that it is enforceable, and/or to delete specific words or phrases, and in its reduced form, such provision shall then be enforceable and shall be enforced. Neither party may assign (voluntarily, by operation of law, or otherwise) any rights or obligations under a Transaction Document without the other party's prior written consent, which may not be unreasonably withheld. Any attempt to do so without such consent will be void. Notwithstanding the foregoing, either party may without consent assign a Transaction Document to any person or entity controlling, controlled by or controlled in conjunction with such party or to any person or entity that acquires substantially all of the shares, assets, or business of such party. Each Attachment will bind and inure to the benefit of the parties and their respective successors and permitted assigns. Unless notice to the contrary is provided by Customer, Overtone may use Customer's name, logo, service marks, trade names and other identifying or branding elements of Company during the Term on Overtone's websites and in its publicly distributed marketing materials to promote the relationship between the parties, in addition to referencing Company's legal and trade names in press releases issued by Overtone respecting a Transaction Document. Additionally, Customer agrees to work in good faith with Overtone to produce a Case Study within the first six (6) months of the Term and will act as a reference to media and/or industry analysts and to Overtone's prospective customers. Each transaction Document shall be governed exclusively by the internal laws of the State of California, without regard to its conflicts of laws rules. The state and federal courts located in San Diego County, California shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to such Transaction Document. Each Party hereby consents to the exclusive jurisdiction of such courts. Each Party also hereby waives any right to jury trial in connection with any action or litigation in any way arising out of or related to a Transaction Document. If either Party employs attorneys to enforce any rights arising out of or relating to a Transaction Document, the prevailing Party shall be entitled to recover reasonable attorneys' fees and costs. Any reports or other deliverables set forth in a Transaction Document may, to the extent practicable, be delivered by Overtone to Customer by electronic transmission (email) or by facsimile. Each Transaction Document constitutes the entire agreement between the Parties and supersedes any and all other agreements and understandings between Overtone and Customer, whether oral or written, with respect to the subject matter hereof. No Transaction Documents shall be modified or amended in any manner except by a writing signed by authorized representatives of both Parties. Nothing contained in a Transaction Document shall modify any of the express terms or conditions set forth in these Terms and Conditions, and if any provision in a Transaction Document conflicts with a provision of these Terms and Conditions, such conflict shall be resolved in favor of these Terms and Conditions unless the provision of such Transaction Document expressly provides otherwise. Any Transaction Document may be executed in one or more counterparts, all of which together shall constitute one original document. In lieu of the original, a facsimile transmission or copy of the original shall be as effective and enforceable as the original. Provisions of each Transaction Document that should reasonably survive expiration or termination of such Transaction Document shall survive the expiration or termination of such Transaction Document.