

## TERMS AND CONDITIONS FOR THE ATTAIN SYSTEM

### 1. Interpretation

- (a) **The following definitions and rules of interpretation apply in these Conditions.**

Definitions:

**Add-On Services:** means any additional services outlined in the Sign Up Process that are additional to those agreed between the Supplier and the Customer.

**Attain Rate Card:** is a card that defines the costs set out for that individual Customer by the Supplier which are based on the volume of email communications sent by the Attain System.

**Attain System:** is an online web application supplying complete programming code, applications and Graphical User Interfaces (GUI) / screen designs for Email Communications, Data Capture, Management and other marketing applications.

**Automated Data Merge:** means the process of merging Customer data from external sources to create one database for use in the Attain System

**Automatic Sign Up:** means the process where the Customer can sign up to the Attain System via the Sign Up Process.

- 1 **Business Day:** a day other than a Saturday, Sunday or public holiday in England, when banks in London are open for business.
- 2 **Charges:** the charges payable by the Customer for the supply of the Services in accordance with clause 5 (Charges and payment).
- 3 **Commencement Date:** has the meaning given in clause 2(b).
- 4 **Computers:** includes mainframes, desktops, laptop computers, tablets, smart phones and any other electronic device which is capable of receiving information (data) in a particular form and of performing a sequence of operations in accordance with predetermined but variable set of procedural instructions (program) to produce a result in the form of information or signals.
- 5 **Conditions:** these terms and conditions as amended from time to time in accordance with clause 12(f).
- 6 **Contract:** the contract between the Supplier and the Customer for the supply of Services in accordance with these Conditions.
- 7 **Contact database records:** are the database records the Customer can store within the Attain System
- 8 **Control:** has the meaning given in section 1124 of the Corporation Tax Act 2010, and the expression **change of control** shall be construed accordingly.
- 9 **Customer:** the person or firm who purchases Services from the Supplier.
- 10 **Customer Default:** has the meaning set out in clause 4(xvii).

- 11 **Customer Platform:** the platform in which the Customer's data originates from and is passed to the Supplier via a secure transfer.
- 12 **Customer's Database:** the database belonging to the Customer which is passed from the Customer Platform to the Attain System and is used within the same.
- 13 **Customised Count Engine:** relates to the addition of extra search functionality tailored to the Customer's exact specification outlined within the Sign Up Process.
- 14 **Data Guidelines:** are set out in the Sign Up Process and will outline the field structure the Customer will be allowed to upload as part of the "Automatic Sign Up" the fields set out in the Sign Up Process.
- 15 **Data Protection Legislation:** up to but excluding 25 May 2018, the Data Protection Act 1998 and thereafter (i) unless and until the GDPR is no longer directly applicable in the UK, the GDPR and any national implementing laws, regulations and secondary legislation, as amended or updated from time to time, in the UK and then (ii) any successor legislation to the GDPR or the Data Protection Act 1998.
- 16 **Dedicated Account Manager:** an Attain System account manager to work with the Customer in developing marketing campaigns at all reasonable times during usual business hours via telephone, email and in meetings, the campaign, in email, SMS or direct mailing format, will be discussed and agreed; at all times using the Attain System search and profiling capabilities.
- 17 **E-mail Broadcast Volumes:** is the number of e-mails that the Customer can send from the Attain System.
- 18 **E-mail Templates – Generic:** are standard HTML Email templates part of the Attain System.
- 19 **GDPR:** General Data Protection Regulation ((EU) 2016/679).
- 20 **Intellectual Property Rights:** includes the Related Works, patents, utility models, rights to inventions, copyright and neighbouring and related rights, moral rights, trade marks and service marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets), and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.
- 21 **Live data connections:** relates to external databases connected to the Attain System from the Customer's systems. Live data connections are only applicable if outlined within the Sign Up Process.
- 22 **One off set up fee:** the Supplier will, within 48 hours of a specified date, carry out an initial assessment of the Customer's database(s) in accordance with the agreed fee and the requirements of the Customer set out in the Sign Up Process and inspect the Customer's terms and conditions and Privacy and Cookie Statement (or equivalent) to give a non-legally binding assessment that any data transfer, sharing and/or swapping appears to be, from the face of the terms and conditions and statement, permissible and ensuring that the Customer can comply with the pre-requisite set out in clause 4 and report to the Customer with any legal obligations or data processes that will need to be adhered to in order to implement the Attain System.
- 23 **Order:** the Customer's access to the Attain System as set out in Appendix 1, and as specified in the Sign Up Process.
- 24 **Related Works:** any and all software and firmware including any modifications, patches and fixes, as well as any signs, logos, marks, drawings, photographs, films, videos, animations,

music, domain names, instructions, manuals, policies, however stored and/or distributed, and whether supplied by the Supplier (or under its authority) generally or individually to meet the Customer's specific requirements, are and shall remain the property of the Supplier or its own suppliers. The supplier and/or its own suppliers retain at all times trade secrets, confidential information, copyrights, registered trade marks and any other intellectual property right relating to such software and related works.

- 25 **Selection variables:** are the database fields the Customer can use to select from their databases within the Attain System.
- 26 **Services:** the services, including the Attain System, supplied by the Supplier to the Customer as set out in Appendix 1.
- 27 **Sign Up Process:** means the procedure by which the Customer signs up to the Attain System.
- 28 **SMS messages:** small messages that can be delivered to mobile phone handsets.
- 29 **Supplier:** Attain Group Limited registered in England and Wales with company number **03810856**.
- 30 **Supplier Materials:** has the meaning set out in clause 4(a)(vi).
- 31 **System Level:** refers to the level of system and services set out on the Attain Rate Card.
- 32 **Telephone technical helpline:** a dedicated technical telephone helpline during usual business hours to assist the Customer in installation of and familiarisation with the Attain System and its features via the Supplier's premium rate helpline.
- 33 **User:** a persona or individual who has been granted access to the Attain System for a certain ongoing task.
- 34 **User Licences:** are the number of concurrent Users able to be nominated in writing by the Customer to be then licenced by the Supplier to use Attain System at any one time, by being registered on the Attain System to use it.
- 35 **Usual business hours:** means 9am to 5.30pm on a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.
- 36 **Website usage Agreement:** means the Website Usage Agreement found on the Supplier's website: [insert direct link]
- (b) Interpretation:
- (i) A reference to a statute or statutory provision is a reference to it as amended or re-enacted. A reference to a statute or statutory provision includes all subordinate legislation made under that statute or statutory provision.
- (ii) Any words following the terms **including, include, in particular, for example** or any similar expression, shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
- (iii) A reference to **writing** or **written** includes fax and email.

## 2. Basis of contract

- (a) The Order constitutes an offer by the Customer to purchase Services in accordance with these Conditions.
- (b) The Order shall only be deemed to be accepted when the Supplier issues written acceptance of the Order at which point and on which date the Contract shall come into existence (**Commencement Date**).

- (c) Any samples, drawings, descriptive matter or advertising issued by the Supplier, and any descriptions or illustrations contained in the Supplier's catalogues or brochures, are issued or published for the sole purpose of giving an approximate idea of the Services described in them. They shall not form part of the Contract or have any contractual force.
- (d) These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- (e) Any quotation given by the Supplier shall not constitute an offer, and is only valid for a period of 15 Business Days from its date of issue.

### **3. Supply of Services**

- (a) The Supplier shall supply the Services to the Customer in accordance with Appendix 1 in all material respects.
- (b) The Supplier reserves the right to amend Appendix 1 if necessary to comply with any applicable law or regulatory requirement, or if the amendment will not materially affect the nature or quality of the Services, and the Supplier shall notify the Customer in any such event.
- (c) The Supplier warrants to the Customer that the Services will be provided using reasonable care and skill.
- (d) Provide, or where appropriate limit, the items set out in the Sign Up Process in accordance with the descriptions set out in clause 1
- (e) Enable, through the Attain System website, server port number, data base name, username and password, the Customer to communicate securely with the Attain System.
- (f) Import /export data in an exchange of updated data, allowing sharing of data between the Attain System and the Customer merging automated data where agreed to in the Sign Up Process.
- (g) Provide technical helpline support on line or e-mail to assist the Customer in installation of and familiarisation with the Supplier.
- (h) Where Telephone help is agreed to in the Sign Up Process, the Supplier will within a period of three months of the date hereof :
  - (i) Link the Customer's database files with the Attain System.
  - (ii) Schedule the synchronisation with delays dependent upon the software and platform the Customer has in place, and upon wishes of the Customer, as notified in writing to the Supplier.
  - (iii) Compress data into optimally sized files, and import these files in a constant exchange of updated data, allowing secure sharing of data between the Attain System and the Customer Platform.

- (iv) Personalise and format the Customer's Database within the Attain System, and store it on the Attain System secure server, with password and username and VPN/otherwise encrypted access, and ensure that all website links are active.
  - (v) Interrogate data capture channels from the Customer's business direct to the Attain System platform, develop the agreed data fields into the database, convert the Customer's data into an acceptable format and import it into the Attain System platform
  - (vi) Make secure backup copies of the Customer's data, which is located on the Attain System servers and the primary purpose of which is for the restoration of the Customer's data in the event of system or systems failure. The Supplier gives no warranties to the accuracy of backup data should restoration of such data be required.
  - (vii) Facilitate the sending of SMS messages on the terms agreeable to both parties above the number of free SMS messages outline in the Sign Up Process
- (i) The Supplier will ensure that the Customer's hosting and platform is compatible with the Attain System which then:
- (i) Uses dedicated secure servers to store all data.
  - (ii) Securely backs up all the data which is stored on servers daily
  - (iii) Gives the Customer complete access to their data remotely, through at all times secure password and login functions and be by means of VPN/other form of encrypted transmission and their own broadband connection. The number of individuals who are contracted to use the Attain System concurrently with unique usernames and passwords Users is dependent upon the number of user Licences set out in the Sign Up Process.
  - (iv) Allows the Customer to upload data from alternative sources. It is compatible with most commercially available software and cross platform operating systems and can import and export data from word documents and spreadsheet documents with equal ease at the Customer's own discretion, as and when required. The Attain System functionality is pre-designed with easy to use controls to this end.
  - (v) Provides for both automatic and manual input of data. This allows the Customer to manually enter data and update records as required without affecting the integrity or accuracy of the Attain System data. This functionality is accessed via the Attain System website and the Customer's own secure account details.
  - (vi) If provided for in the Sign Up Process; allows data to be captured from the Customer's website/server using the Attain System data tracking code. This allows online web registrations and other relevant data to automatically update the master data for each Customer. The tracking code is included in the Attain System download and can be activated by the Customer when the download is complete. For the avoidance of doubt, neither the Attain System nor any other tracking method of the Attain System is downloaded by the Attain System to the computer of the Customer's own Customer or potential Customer.

#### 4. Customer's obligations

- (a) The Customer shall:
- (i) co-operate with the Supplier in all matters relating to the Services;
  - (ii) provide the Supplier, its employees, agents, consultants and subcontractors, with access to the Customer's premises, office accommodation and other facilities as reasonably required by the Supplier;
  - (iii) provide the Supplier with such information and materials as the Supplier may reasonably require in order to supply the Services, and ensure that such information is complete and accurate in all material respects;
  - (iv) obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services are to start;
  - (v) comply with all applicable laws, including health and safety laws;
  - (vi) keep all materials, equipment, documents and other property of the Supplier (**Supplier Materials**) at the Customer's premises in safe custody at its own risk, maintain the Supplier Materials in good condition until returned to the Supplier, and not dispose of or use the Supplier Materials other than in accordance with the Supplier's written instructions or authorisation;
  - (vii) comply with any additional obligations as set out in Appendix 1;
  - (viii) comply with all the terms and conditions hereof and the Website Usage Agreement;
  - (ix) Be responsible for the activities of its employees or representatives or otherwise duly authorised to use the Attain System under this Contract.
  - (x) Not use the Attain System in an attempt to circumvent user authentication or security of any host, network, or account. This includes, but is not limited to, accessing data not intended for the Customer, logging into a server or account the Customer is not expressly authorised to access, password cracking, probing the security of other networks in search of weakness, or violation of any other organisation's security policy. The Customer may not attempt to interfere or deny service to any user, host, or network. This includes, but is not limited to, flooding, mail bombing, or other deliberate attempts to overload or crash a host or network. The Supplier will cooperate fully with investigations of violations of systems or network security at other sites, including cooperating with law enforcement authorities in the investigation of suspected criminal violations. Users who violate systems or network security may incur criminal or civil liability.
  - (xi) Permit a link to the Attain System website.
  - (xii) To ensure adequate width and quality of the broadband and to establish and configure a secure connection of a suitable standard using at times adequate hardware and software capable of maintaining and administering the Attain System.
  - (xiii) In the event that any links or data feeds have taken time to 'propagate' and show a tendency to lapse over a period of time these will be monitored and will be severed at the discretion of the Supplier. This specifically relates to affiliate prior-informed relationships which may have provided sources of data from online activities, which have been enhanced by their inclusion in the Supplier

- (xiv) In the event of that the Customer wishes to upgrade their Contract, the upgrade will all be carried out via the Sign Up Process by a representative of the Supplier on request of the Customer.
- (xv) Acknowledges and agrees that the Attain System continuously monitors all logged Users and attempted log-ins. If more Users than are allowed log or attempt to log in concurrently, the Supplier will immediately notify the Customer, requiring a prompt explanation. Should attempts to log in be persistent, or actually log in, more Users than paid / agreed for under this Contract after receipt by the Customer of warnings / requests for explanations from the Supplier. The Supplier may at its sole discretion terminate the agreement in accordance with clause 9.
- (xvi) Carry out the following pre-requisite requirements:-
  - (i) Check the quality and the quantity and ensure the data is fully compliant and opted in by the recipients on the database or flagged correctly where not. This includes checking all fields are complete, no significant gaps in data exist and that the data fields are relevant and fit for purpose
  - (ii) Make allowance in the data fields for the capture of email addresses and mobile phone numbers by each data entry as the Attain System is designed to offer this facility.
  - (iii) Develop a marketing or promotional plan that helps to build the new data captured into a commercially valuable and usable asset ongoing. This plan should include thought around key marketing or promotional messages that will create a response from the Customer and permit a strategic timeline for ongoing data capture and possibly more detailed data with time.
  - (iv) Need to initially provide sufficient computer memory to use and set up the Attain System after the installation of the Attain System the ongoing storage will not be a limited due to the Attain System server capacity
  - (v) Need sufficient bandwidth to use the Attain System
  - (vi) Need to format their database into CSV format and adhere to the field structure provided within the Data Guidelines.
  - (vii) Ensure punctual availability of data from any third party system providers
  - (viii) Ability to transmit and receive encrypted data and use VPN
  - (ix) In the event of "Automatic Sign Up" will upload their data using the "Data Guidelines" provided by the Supplier.
- (xvii) If the Supplier's performance of any of its obligations under the Contract is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation (**Customer Default**):
  - (i) without limiting or affecting any other right or remedy available to it, the Supplier shall have the right to suspend performance of the Services until the Customer remedies the Customer Default, and to rely on the Customer Default to relieve it from the performance of any of its obligations in each case to the extent the Customer Default prevents or delays the Supplier's performance of any of its obligations;
  - (ii) the Supplier shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from the Supplier's

failure or delay to perform any of its obligations as set out in this clause 4(a)(xvii); and

- (iii) the Customer shall reimburse the Supplier on written demand for any costs or losses sustained or incurred by the Supplier arising directly or indirectly from the Customer Default.

(xviii) The Customer acknowledges and warrants that it has employed all reasonable due diligence in choosing the selected services offered by the Supplier under this Contract and had considered other potential suppliers. The Contract acknowledges and warrants that it is acting, and has entered into this Agreement, as a business and not as a consumer. The Customer further acknowledges and warrants that it has taken and will continue to take reasonable due care in the supply to the Supplier of any and all technical requirements and/or information or request to the Supplier for the same. The Customer yet further acknowledges that a higher price would have been payable under this Contract but for the inclusion of the liability limitations referred to clause 8, and that such limitation were taken into account when it employed due diligence.

## 5. Charges and payment

- (a) The Charges for the Services are calculated and set out in the Sign Up Process.
- (b) The Customer shall pay the Supplier immediately for any external and/or additional expenses incurred by the Supplier on behalf of and approved in writing by the Customer.
- (c) The Supplier shall invoice the Customer in arrears.
- (d) The Customer shall pay each invoice submitted by the Supplier:
  - (i) within 15 days of the date of the invoice [or in accordance with any credit terms agreed by the Supplier and confirmed in writing to the Customer; and
  - (ii) in full and in cleared funds to a bank account nominated in writing by the Supplier, and

time for payment shall be of the essence of the Contract.

- (e) All amounts payable by the Customer under the Contract are exclusive of amounts in respect of value added tax chargeable from time to time (**VAT**). Where any taxable supply for VAT purposes is made under the Agreement by the Supplier to the Customer, the Customer shall, on receipt of a valid VAT invoice from the Supplier, pay to the Supplier such additional amounts in respect of VAT as are chargeable on the supply of the Services at the same time as payment is due for the supply of the Services.
- (f) If the Customer fails to make a payment due to the Supplier under the Contract by the due date, then, without limiting the Supplier's remedies under clause 9, the Customer shall pay interest on the overdue sum from the due date until payment of the overdue sum, whether before or after judgment. Interest under this clause 5(f) will accrue each day at 4% a year above the Bank of England's base rate from time to time, but at 4% a year for any period when that base rate is below 0%.

- (g) All amounts due under the Contract shall be paid in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).

## **6. Intellectual property rights**

- (a) All Intellectual Property Rights in or arising out of or in connection with the Services (other than Intellectual Property Rights in any materials provided by the Customer) shall be owned by the Supplier.
- (b) The Supplier grants to the Customer, or shall procure the direct grant to the Customer of, a fully paid-up, worldwide, non-exclusive, royalty-free licence during the term of the Contract to use the Attain System (excluding materials provided by the Customer) for the purpose of receiving and using the Services and the Attain System in its business. The use of which is limited to the number of Users. No concurrent Users / any Users other than that which was stipulated in the Sign Up Process, are permitted to said licence to use the Services and the Attain System.
- (c) The Customer shall not sub-license, assign or otherwise transfer the rights granted in clause 6(b).
- (d) The Customer may not decompile or reverse engineer any of the Software (including firmware, patches or fixes) provided by the Services, unless approved in writing by the Supplier.
- (e) The Customer may not modify any part of the software (including any firmware, patches or fixes) or related works that are not clearly intended to be user-modifiable.
- (f) The Supplier is under no obligation to supply any new versions / updates of the Software that are created after the date of this Contract.
- (g) On termination of this Contract for whatever reason, unless otherwise already agreed in writing by the Supplier, the Customer shall promptly return all software (including firmware, patches or fixes) and Related Works supplied to it by the Supplier or under its authority, and shall confirm such return by a signed witness statement. If any such copies are not reasonably capable of being returned, the Customer shall cause them to be securely deleted or destroyed and shall make a signed witness statement confirming such deletion and/or destruction.

## **7. Data protection and data processing**

- (a) Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause 7 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Legislation.
- (b) The parties acknowledge that for the purposes of the Data Protection Legislation, the Customer is the data controller and the Supplier is the data processor (where Data Controller and Data Processor have the meanings as defined in the Data Protection Legislation).

- (c) Without prejudice to the generality of clause 7(a), the Customer will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the Personal Data (as defined in the Data Protection Legislation) to the Supplier for the duration and purposes of the Contract.
- (d) Without prejudice to the generality of clause 7(a), the Supplier shall, in relation to any Personal Data processed in connection with the performance by the Supplier of its obligations under the Contract:
  - (i) process that Personal Data only on the written instructions of the Customer unless the Supplier is required by the laws of any member of the European Union or by the laws of the European Union applicable to the Supplier to process Personal Data (**Applicable Data Processing Laws**). Where the Supplier is relying on laws of a member of the European Union or European Union law as the basis for processing Personal Data, the Supplier shall promptly notify the Customer of this before performing the processing required by the Applicable Data Processing Laws unless those Applicable Data Processing Laws prohibit the Supplier from so notifying the Customer;
  - (ii) ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the Customer, to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);
  - (iii) ensure that all personnel who have access to and/or process Personal Data are obliged to keep the Personal Data confidential; and
  - (iv) not transfer any Personal Data outside of the European Economic Area unless the prior written consent of the Customer has been obtained and the following conditions are fulfilled:
    - (i) the Customer or the Supplier has provided appropriate safeguards in relation to the transfer;
    - (ii) the Data Subject (as defined in the Data Protection Legislation) has enforceable rights and effective legal remedies;
    - (iii) the Supplier complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred; and
    - (iv) the Supplier complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the Personal Data;
  - (v) assist the Customer, at the Customer's cost, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;

- (vi) notify the Customer without undue delay on becoming aware of a Personal Data breach;
  - (vii) at the written direction of the Customer, delete or return Personal Data and copies thereof to the Customer on termination of the agreement unless required by Applicable Data Processing Law to store the Personal Data; and
  - (viii) maintain complete and accurate records and information to demonstrate its compliance with this clause 7.
- (e) Either party may, at any time on not less than 30 days' notice, revise this clause 7 by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when replaced by attachment to the Contract).

## **8. Limitation of liability**

- (a) The Supplier has obtained professional indemnity insurance cover, and cyber and data insurance cover in respect of its own legal liability for individual claims not exceeding £1,000,000 per claim. The limits and exclusions in this clause reflect the insurance cover the Supplier has been able to arrange and the Customer is responsible for making its own arrangements for the insurance of any excess loss.
- (b) Nothing in the Contract limits any liability which cannot legally be limited, including liability for:
  - (i) death or personal injury caused by negligence;
  - (ii) fraud or fraudulent misrepresentation; and
  - (iii) breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982 (title and quiet possession).
- (c) Subject to clause 8(b), the Supplier's total liability to the Customer shall not exceed three months fees as outlined within the Sign Up Process. The Supplier's total liability includes liability in contract, tort (including negligence), breach of statutory duty, or otherwise, arising under or in connection with the Contract.
- (d) The amounts awarded or agreed to be paid under clause 8 shall count towards the cap on the Supplier's liability under clause 8(c).
- (e) This clause 8(e) sets out specific heads of excluded loss [and exceptions from them]:
  - (i) Subject to clause 8(b), the types of loss listed in clause 8(e)(ii) are wholly excluded by the parties, but the types of loss and specific losses listed in clause 8(e) are not excluded.
  - (ii) The following types of loss are wholly excluded:
    - (i) Loss of profits
    - (ii) Loss of sales or business.
    - (iii) Loss of agreements or contracts.
    - (iv) Loss of anticipated savings.
    - (v) Loss of use or corruption of software, data or information.

- (vi) Loss of or damage to goodwill.
- (vii) Indirect or consequential loss.
- (f) The Supplier has given commitments as to compliance of the Services with relevant specifications in clause 3. In view of these commitments, the terms implied by sections 13 to 15 of the Sale of Goods Act 1979 and sections 3 and 5 of the Supply of Goods and Services Act 1982 are, to the fullest extent permitted by law, excluded from the Contract.
- (g) Unless the Customer notifies the Supplier that it intends to make a claim in respect of an event within the notice period, the Supplier shall have no liability for that event. The notice period for an event shall start on the day on which the Customer became, or ought reasonably to have become, aware of the event having occurred and shall expire 2 months from that date. The notice must be in writing and must identify the event and the grounds for the claim in reasonable detail.
- (h) This clause 8 shall survive termination of the Contract.

## **9. Termination**

- (a) Without affecting any other right or remedy available to it, either party may terminate the Contract by giving the other party 1 months' written notice.
- (b) In the event of the Customer engaging or alleged to be engaging in any of the activities set out in Appendix 2, the Supplier reserves the right to remove such illegal or allegedly illegal material or links to such material forthwith from its servers. Further, the Supplier may terminate this agreement upon the Customer continuing to engage in such activity or further or similar activity after the expiration of a reasonable notice, not exceeding 30 days in any event, in writing, requiring the Customer to cease such activity. If the Customer is alleged by a third party to be engaging in such activities, the Supplier will promptly contact the Customer at the e-mail address supplied by the Customer for contact purposes, setting out the general nature of the allegation, stating whether the material or links complained about have already been removed by the Supplier, and if not already removed, setting out a time when they will be removed if the Customer cannot rapidly justify their remaining on the Supplier's servers. The Supplier will consider any reply from the Customer in deciding whether to restore any material or links already removed by the Supplier, or whether to remove any material or links still on the Supplier's servers.
- (c) Without affecting any other right or remedy available to it, either party may terminate the Contract with immediate effect by giving written notice to the other party if:
  - (i) the other party commits a material breach of any term of the Contract and (if such a breach is remediable) fails to remedy that breach within 30 days of that party being notified in writing to do so;
  - (ii) the other party takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business;

- (iii) the other party suspends, or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business; or
  - (iv) the other party's financial position deteriorates to such an extent that in the terminating party's opinion the other party's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy.
- (d) Without affecting any other right or remedy available to it, the Supplier may terminate the Contract with immediate effect by giving written notice to the Customer if:
- (i) the Customer fails to pay a sum of moneys equal to or greater than three months licence fees as outlined in the Sign Up Process; or
  - (ii) there is a change of control of the Customer.
- (e) Without affecting any other right or remedy available to it, the Supplier may suspend the supply of Services under the Contract or any other contract between the Customer and the Supplier if the Customer fails to pay any amount due under the Contract on the due date for payment, the Customer becomes subject to any of the events listed in clause 9.(d)(i) to clause 9(d)(iv), or the Supplier reasonably believes that the Customer is about to become subject to any of them.

## **10. Consequences of termination**

- (a) On termination of the Contract:
- (i) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has been submitted, the Supplier shall submit an invoice, which shall be payable by the Customer immediately on receipt;
  - (ii) the Customer shall return all of the Supplier Materials which have not been fully paid for. If the Customer fails to do so, then the Supplier may enter the Customer's premises and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose not connected with the Contract.
  - (iii) the Supplier will copy the database within the Attain System secure server in its enhanced and secure format including all new customers recruited and securely delivers it to the Customer on disk.
  - (iv) the Supplier will, where applicable, copy the encrypted data files within the Attain System and securely delivers it to the Customer on disk.
  - (v) the Supplier will, cancel all secure passwords and usernames, any affiliate or other data links will be eradicated with immediate effect.
  - (vi) the Supplier will, to the fullest extent possible, facilitate an orderly and timely handover.
- (b) Termination or expiry of the Contract shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination or expiry, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination or expiry.

- (c) Any provision of the Contract that expressly or by implication is intended to come into or continue in force on or after termination or expiry of the Contract shall remain in full force and effect.

## **11. Indemnity**

- (a) In this clause, a reference to the Supplier shall include the Supplier's subsidiaries, and the provisions of this clause shall be for the benefit of the Supplier and each such subsidiary, and shall be enforceable by each such subsidiary, in addition to the Supplier.
- (b) the Customer shall indemnify the Supplier against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other reasonable professional costs and expenses) suffered or incurred by the Supplier arising out of or in connection with:
  - (i) breach of clause 4(a)(x) and/or Appendix 2;
  - (ii) the Customer's breach or negligent performance or non-performance of this agreement;
  - (iii) the enforcement of this agreement;
  - (iv) any claim made against the Supplier for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with Clause 6.
  - (v) any claim made against the Supplier by a third party arising out of or in connection with the provision of the Services, to the extent that such claim arises out of the breach, negligent performance or failure or delay in performance of this agreement by the Customer, its employees, agents or subcontractors;
  - (vi) any claim made against the Supplier by a third party for death, personal injury or damage to property arising out of or in connection with defective Goods, to the extent that the defect in the Goods is attributable to the acts or omissions of the Customer, its employees, agents or subcontractors.
- (c) This indemnity shall apply whether or not the Supplier has been negligent or at fault.
- (d) If a payment due from the Customer under this clause is subject to tax (whether by way of direct assessment or withholding at its source), the Supplier shall be entitled to receive from the Customer such amounts as shall ensure that the net receipt, after tax, to the Supplier in respect of the payment is the same as it would have been were the payment not subject to tax.
- (e) Nothing in this clause shall restrict or limit the Supplier's general obligation at law to mitigate any loss it may suffer or incur as a result of an event that may give rise to a claim under this indemnity.
- (f) Liability under this indemnity is limited under Clause 8.

## 12. General

- (a) **Force majeure.** Neither party shall be in breach of the Contract nor liable for delay in performing, or failure to perform, any of its obligations under the Contract if such delay or failure result from events, circumstances or causes beyond its reasonable control.
- (b) **Assignment and other dealings.**
  - (i) The Supplier may at any time assign, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any or all of its rights and obligations under the Contract.
  - (ii) The Customer shall not assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under the Contract without the prior written consent of the Supplier.
- (c) **Confidentiality.**
  - (i) Each party undertakes that it shall not at any time disclose to any person any confidential information concerning the business, affairs, customers, clients or suppliers of the other party, except as permitted by clause 10(c)(ii).
  - (ii) Each party may disclose the other party's confidential information:
    - (i) to its employees, officers, representatives, subcontractors or advisers who need to know such information for the purposes of carrying out the party's obligations under the Contract. Each party shall ensure that its employees, officers, representatives, subcontractors or advisers to whom it discloses the other party's confidential information comply with this clause 11(c); and
    - (ii) as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
  - (iii) Neither party shall use the other party's confidential information for any purpose other than to perform its obligations under the Contract.
- (d) **Entire agreement.**
  - (i) The Contract constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
  - (ii) Each party acknowledges that in entering into the Contract it does not rely on, and shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in the Contract. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in the Contract.
  - (iii) Nothing in this clause shall limit or exclude any liability for fraud.

- (e) **No Partnership.** Nothing in this Agreement shall constitute or be deemed to constitute a partnership between the Parties hereto and none of them shall have authority to bind the others in any way.
- (f) **Variation.** Except as set out in these Conditions, no variation of the Contract shall be effective unless it is in writing and signed by the parties (or their authorised representatives).
- (g) **Waiver.** A waiver of any right or remedy under the Contract or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy. A failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under the Contract or by law shall prevent or restrict the further exercise of that or any other right or remedy.
- (h) **Severance.** If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of the Contract.

(i) **Notices.**

- (i) Any notice or other communication given to a party under or in connection with the Contract shall be in writing and shall be delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office (if a company) or its principal place of business (in any other case); or sent by email to the address specified in the Sign Up Process.
- (ii) Any notice or communication shall be deemed to have been received:
  - (i) if delivered by hand, on signature of a delivery receipt or at the time the notice is left at the proper address; and
  - (ii) if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second Business Day after posting or at the time recorded by the delivery service; and
  - (iii) if sent by email, at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume. In this clause 12(i)(iii), business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.
- (iii) This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any other method of dispute resolution.

(j) **Arbitration**

Any dispute, controversy or claim arising out of or relating to this agreement, including any question regarding its breach, existence, validity or termination or the legal relationships established by this agreement, shall be finally resolved by arbitration. It is agreed that:

- the tribunal shall consist of one arbitrator;
- in default of the parties' agreement as to the arbitrator, the appointing authority shall be the Chartered Institute of Arbitrators in London;
- the seat of the arbitration shall be London;
- the law governing this arbitration agreement shall be English; and
- the language of the arbitration shall be English.

(k) **Third party rights.**

Unless it expressly states otherwise, the Contract does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract.

- (l) **Governing law.** The Contract, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by, and construed in accordance with the law of England and Wales.
- (m) **Jurisdiction.** Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with the Contract or its subject matter or formation.

## APPENDIX 1

### **The Attain System:**

1. Is hosted on its own secure server and uses MySQL and Mongo databases to store and update all data. The Attain System has been developed on a Linux platform.
2. Is operable on a Microsoft based PC or Apple Mac the software collects or imports new data and automatically filters and sorts the data into pre-determined data fields in a database. The resulting

databases can be clearly reported on screens within the Attain System and the exact information captured can be viewed in extreme detail or as a summary management report.

3. Enables the Customer to manipulate and format the data into meaningful data sets that allow data to be input into the Attain System. However, the Supplier specifically gives no warranties or guarantees as to the availability, in whole or part, of the Attain System over any given period. For the avoidance of doubt the Supplier offers no agreement on explicit or implicit service levels. The Supplier will endeavor to give advance notification by e-mail of any scheduled system "downtime" period(s) of system unavailability, either in part or in whole, and will further endeavor to schedule such downtime between the hours of 1.00am and 5.30am.
4. Allows data to be imported into one main database through programmed data channels that automatically update. The data can be captured from multiple sources including existing lists, websites, online data logs, CRM systems, Epos systems and call centres and the data will be labelled by its origin and commercial value and stored.
5. Will allow data to be imported for one off campaigns and managed outside of the main database to ensure that any licensed information can be list managed.
6. Will permit the Customer to view individual Customers or prospects as a single record, clearly presented on screen so that specifics can be analysed and important decision made from an informed standpoint. Gives the user the ability to create and deploy marketing campaigns using E-mail & SMS when agreed to in the Sign Up Process.
7. Will allow the data to be segmented using the count engine facility and key selection criteria applied to the data to give detailed and precise search results. These searches are very flexible and can be as detailed, specific and exact as the Customers data allows, or the searches can be broad and more general.
8. Allows the Customer to create specific marketing and promotional campaigns using the inbuilt tools provided and send them to the selected audience and at each stage of communication, capture and record the results into the existing data sets.
9. Will automatically manage the bounce and unsubscribe data and ensure that this information is quarantined and excluded from future campaigns.

## **APPENDIX 2**

### **Prohibited Uses of the Attain System and Services:**

1. The Customer shall not:-
  - (a) transmit, distribute or store, or any attempt thereof, of any material in violation of any applicable law or regulation is prohibited. This includes, without limitation, material protected by copyright, trademark, trade secret or other intellectual property right used without proper authorisation, and material that is obscene, defamatory, liable to cause a breach of the peace or similar offence, constitutes an illegal threat or illegal discrimination, or violates export control laws.

- (b) send or attempt to send Unsolicited Bulk Email ("UBE", "spam"). Send any form of Unsolicited Bulk Email through the Supplier's servers.
- (c) run Unconfirmed Mailing Lists (including Unsolicited Commercial e-mail ("UCE", also known as "spam"). Subscribe email addresses and mobile telephone numbers for the reception of SMS messages to any mailing list without the express and verifiable permission of the email address or mobile telephone owner or other legal justification.
- (d) operate an account on behalf of, or in connection with, or reselling its service to, any third party or persons or firms.
- (e) make unauthorised attempts by any User to gain access to any account or computer resource not belonging to that User (e.g. "cracking").
- (f) access, alter, destruct, or any attempt thereof, of any information of any the Attain System customers or end-users by any means or device without authorisation to do so.