

## HYPERTUNE TERMS AND CONDITIONS

This agreement sets out the terms on which Hypertune Ltd, a company incorporated and registered in England and Wales with company number 14179060 whose registered office is at 367 Acton Lane, London, England, W3 8NR (**Hypertune**), will make the Services (as defined below) available to the organisation whose details are set out on the payment confirmation page (**Customer**).

### **Agreed terms**

#### **1. Interpretation**

1.1 The definitions and rules of interpretation in this clause apply in this agreement.

**Applicable Data Protection Laws:** To the extent the UK GDPR applies, the law of the United Kingdom or of a part of the United Kingdom which relates to the protection of personal data and; to the extent the EU GDPR applies, the law of the European Union or any member state of the European Union to which Hypertune is subject, which relates to the protection of personal data.

- 1 Authorised Users:** those employees, agents and independent contractors of the Customer who are authorised by the Customer to use the Services and the Documentation, as further described in 2.2(d).
- 2 Business Day:** a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.
- 3 Confidential Information:** information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in 11.1.
- 4 Customer Data:** the data inputted by the Customer, Authorised Users, or Hypertune on the Customer's behalf for the purpose of using the Services or facilitating the Customer's use of the Services.
- 5 Documentation:** the document(s) made available to the Customer by Hypertune online via <https://www.hypertune.com/> or such other web address notified by Hypertune to the Customer from time to time which sets out a description of the Services and the user instructions for the Services.
- 6 Effective Date:** the date the Customer accepts these terms.
- 7 Initial Subscription Term:** one month from the Effective Date.
- 8 Normal Business Hours:** 8.00 am to 6.00 pm local UK time, each Business Day.
- 9 Renewal Period:** the period described in 14.1.
- 10 Services:** the subscription services provided by Hypertune to the Customer under this agreement via <https://www.hypertune.com/> or any other website notified to the Customer by Hypertune from time to time, as more particularly described in the Documentation.
- 11 Software:** the online software applications provided by Hypertune as part of the Services.
- 12 Subscription:** the subscription purchased by the Customer pursuant to 9.1 which entitles Authorised Users to access and use the Services and the Documentation in accordance with this agreement and the Subscription Limits.
- 13 Subscription Fees:** the subscription fees payable by the Customer to Hypertune for the Subscription, as set out on the payment confirmation page.
- 14 Subscription Limits:** the limits that apply to the usage of the Services for the Customer's Subscription as detailed on the payment confirmation page, including the limit on the number of Visits and the number of Authorised Users that can use the Services.
- 15 Subscription Term:** has the meaning given in 14.1 (being the Initial Subscription Term together with any subsequent Renewal Periods).
- 16 UK GDPR:** has the meaning given to it in the Data Protection Act 2018.
- 17 Virus:** anything or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole

or part or otherwise); or adversely affect the user experience, including worms, trojan horses, viruses and other similar things or devices.

**18 Visit:** any interaction with or visit to the Website(s) by the Visitor. **Visits**, and **Visiting** shall be construed accordingly.

**19 Visitor:** any third party (including whether human or a robot or otherwise) Visiting the Website(s).

**20 Website(s):** any website that the Customer uses the Services in relation to.

1.2 Clause headings shall not affect the interpretation of this agreement.

1.3 A person includes an individual, corporate or unincorporated body (whether or not having separate legal personality). A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.

1.4 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular. Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

1.5 A reference to a statute or statutory provision is a reference to it as it is amended, extended or re-enacted from time to time. A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.

1.6 Any words following the terms **including**, **include**, **in particular**, **for example** or any similar expression shall be interpreted as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms. A reference to writing or written excludes fax but not email.

## **2. The Customer's Subscription**

2.1 Subject to the restrictions set out in this **2** and the other terms and conditions of this agreement, Hypertune hereby grants to the Customer a non-exclusive, non-transferable right, without the right to grant sublicences, to permit the Authorised Users to use the Services and the Documentation during the Subscription Term, within the Subscription Limits, solely for the Customer's internal business operations.

2.2 In relation to the Authorised Users, the Customer undertakes that:

- (a) the maximum number of Authorised Users that it authorises to access and use the Services and the Documentation shall not exceed the maximum number of Authorised User accounts it has purchased from time to time;
- (b) it will not allow or suffer any Authorised User account to be used by more than one individual Authorised User unless it has been reassigned in its entirety to another individual Authorised User, in which case the prior Authorised User shall no longer have any right to access or use the Services and/or Documentation;
- (c) each Authorised User shall keep a secure password for their use of the Services and Documentation, that such password shall be changed reasonably frequently, and that each Authorised User shall keep their password confidential;
- (d) it shall maintain a written, up to date list of current Authorised Users and provide such list to Hypertune within 5 Business Days of Hypertune's written request at any time or times;

2.3 The Customer shall:

- (a) permit Hypertune or Hypertune's designated auditor to audit the Services in order to establish the name and password of each Authorised User and the Customer's data processing facilities to audit compliance with this agreement. Each such audit may be conducted no more than once per quarter, at Hypertune's expense, and this right shall be exercised with reasonable prior notice, in such a manner as not to substantially interfere with the Customer's normal conduct of business;
- (b) if any of the audits referred to in 2.3(a) reveal that any password has been provided to any individual who is not an Authorised User, then without prejudice to Hypertune's other rights, the Customer shall promptly disable such passwords and Hypertune shall not issue any new passwords to any such individual; and
- (c) if any of the audits referred to in 2.3(a) reveal that the Customer has underpaid Subscription Fees to Hypertune, then without prejudice to Hypertune's other rights, the Customer shall pay to

Hypertune an amount equal to such underpayment as calculated in accordance with the Subscription Fees within 5 Business Days of the date of the relevant audit.

2.4 The Customer shall not access, store, distribute or transmit any Viruses, or any material during the course of its use of the Services that:

- (a) is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;
- (b) facilitates illegal activity;
- (c) depicts sexually explicit images;
- (d) promotes unlawful violence;
- (e) is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability; or
- (f) is otherwise illegal or causes damage or injury to any person or property;

and Hypertune reserves the right, without liability or prejudice to its other rights to the Customer, to disable the Customer's access to the Services in the event the Customer breaches the provisions of this clause.

2.5 The Customer shall not:

- (a) except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties and except to the extent expressly permitted under this agreement:
  - (i) attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or
  - (ii) attempt to de-compile, reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
- (b) access all or any part of the Services and Documentation in order to build a product or service which competes with the Services and/or the Documentation; or
- (c) use the Services and/or Documentation to provide services to third parties; or
- (d) subject to 21.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Documentation available to any third party except the Authorised Users; or
- (e) attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under this 2; or
- (f) introduce or permit the introduction of, any Virus into Hypertune's network and information systems.

2.6 The Customer shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorised access or use, promptly notify Hypertune.

2.7 The rights provided under this 2 are granted to the Customer only, and shall not be considered granted to any subsidiary or holding company of the Customer.

### **3. Increasing the Subscription Limits**

3.1 Subject to 3.2, the Customer may, from time to time during any Subscription Term, increase the Subscription Limits for its Subscription and Hypertune shall increase such Subscription Limits in accordance with the provisions of this agreement.

3.2 If the Customer wishes to increase the Subscription Limits for its Subscription, the Customer shall notify Hypertune in writing. Hypertune shall evaluate such request to increase the Subscription Limits for its Subscription and respond to the Customer with approval or rejection of the request (such approval not to be unreasonably withheld). If the increase has been approved, Hypertune shall either: (i) send the Customer a new quote or (ii) the parties may agree the details relating to the increase (such as any adjustment to the Subscription Fees or the Subscription Term) in writing. Where the Customer accepts

the quote, or the parties otherwise agree the increase in writing, the Subscription Limits shall be deemed to be amended accordingly and Hypertune may immediately invoice the Customer for such increased Subscription Fees, and shall implement such increase within 14 days of its approval of the Customer's request.

3.3 The Customer shall pay the relevant fees for such increased Subscription Limits on the date on which they are activated, and the same date in each following month on which the Subscription Fees are payable for the existing Subscriptions.

**4. Services**

4.1 Hypertune shall, during the Subscription Term, provide the Services and make available the Documentation to the Customer on and subject to the terms of this agreement.

4.2 Hypertune shall use commercially reasonable endeavours to make the Services available, except for any periods of required maintenance which Hypertune deems necessary. Hypertune will use reasonable endeavours to give the Customer advance notice by email or an in-app message (where this is practicable).

4.3 Hypertune will, as part of the Services and at no additional cost to the Customer, provide the Customer with Hypertune's standard customer support services whereby the Customer may submit support queries to Hypertune during Normal Business Hours by emailing support@hypertune.com. Hypertune may amend the nature of its support services in its sole and absolute discretion from time to time.

4.4 Hypertune will ensure the Documentation is made available to the Customer and its Authorised Users on the Effective Date.

**5. Data protection**

5.1 Both parties will comply with all applicable requirements of the Applicable Data Protection Laws. This clause 5 is in addition to, and does not relieve, remove or replace, a party's obligations under the Applicable Data Protection Laws.

5.2 The parties acknowledge that for the purposes of the Applicable Data Protection Laws, the Customer is the data controller and Hypertune is the data processor (where **Data Controller** and **Data Processor** have the meanings as defined in the Applicable Data Protection Laws). The following table sets out the scope, nature and purpose of processing by Hypertune, the duration of the processing and the types of Personal Data and categories of Data Subject:

<b>Data Processing Details</b>	
<b>Subject-matter</b>	The processing of personal data resulting from the provision of services by Hypertune under this agreement.
<b>Nature and purpose</b>	The personal data will be processed in the course of the operation of the Services.
<b>Duration</b>	The duration of this agreement
<b>Types of personal data</b>	Names and email addresses of Authorised Users.
<b>Categories of Data Subject</b>	Authorised Users.

5.3 Without prejudice to the generality of clause 5.1, Hypertune shall, in relation to any Personal Data processed in connection with the performance by Hypertune of its obligations under this agreement:

(a) process that Personal Data only on the written instructions of the Customer unless Hypertune is required by Applicable Data Protection Laws to otherwise process that Personal Data. Where Hypertune is relying on Applicable Data Protection Laws as the basis for processing Personal Data, Hypertune shall promptly notify the Customer of this before performing the processing

required by Applicable Data Protection Laws unless the Applicable Data Protection Laws prohibits Hypertune from so notifying the Customer;

- (b) ensure that it has in place appropriate technical and organisational measures, 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);
- (c) not transfer any Personal Data outside the United Kingdom or the EEA unless the following conditions are fulfilled:
  - (i) the Customer or Hypertune has provided appropriate safeguards in relation to the transfer;
  - (ii) the Data Subject has enforceable rights and effective legal remedies;
  - (iii) Hypertune complies with its obligations under the Applicable Data Protection Laws by providing an adequate level of protection to any Personal Data that is transferred; and
  - (iv) Hypertune complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the Personal Data;
- (d) 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 Applicable Data Protection Laws with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
- (e) notify the Customer without undue delay on becoming aware of a Personal Data breach;
- (f) 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 Protection Laws to store the Personal Data; and
- (g) maintain complete and accurate records and information to demonstrate its compliance with this clause 5.3.

5.4 The Customer consents generally to Hypertune appointing third-party processors of Personal Data under this agreement. Hypertune confirms that it has entered or (as the case may be) will enter with the third-party processor into a written agreement incorporating terms which are substantially similar to those set out in this clause 5. As between the Customer and Hypertune, Hypertune shall remain fully liable for all acts or omissions of any third-party processor appointed by it pursuant to this clause 5.4.

5.5 Hypertune may, at any time on not less than 30 days' notice, revise this clause 5 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 this agreement).

## **6. Third party providers**

The Customer acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third-party websites and that it does so solely at its own risk. Hypertune makes no representation, warranty or commitment and shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any such third-party website, or any transactions completed, and any contract entered into by the Customer, with any such third party. Any contract entered into and any transaction completed via any third-party website is between the Customer and the relevant third party, and not Hypertune. Hypertune recommends that the Customer refers to the third party's website terms and conditions and privacy policy prior to using the relevant third-party website. Hypertune does not endorse or approve any third-party website nor the content of any of the third-party website made available via the Services.

## **7. Hypertune's obligations**

- 7.1 Hypertune undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care.
- 7.2 The undertaking at 7.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to Hypertune's instructions, or modification or alteration of the Services by any party other than Hypertune or Hypertune's duly authorised contractors or agents. If the Services do not conform with the foregoing undertaking, Hypertune will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the undertaking set out in 7.1.
- 7.3 Hypertune:
- (a) does not warrant that:
    - (i) the Customer's use of the Services will be uninterrupted or error-free; or
    - (ii) that the Services, Documentation and/or the information obtained by the Customer through the Services will meet the Customer's requirements; or
    - (iii) the Software or the Services will be free from Viruses; or
  - (b) is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communications facilities.
- 7.4 This agreement shall not prevent Hypertune from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under this agreement.
- 7.5 Hypertune warrants that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under this agreement.
- 7.6 In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy against Hypertune shall be for Hypertune to use reasonable commercial endeavours to restore the lost or damaged Customer Data from the latest back-up of such Customer Data maintained by Hypertune. Hypertune shall not be responsible for any loss, destruction, alteration or disclosure of Customer Data caused by any third party (except those third parties sub-contracted by Hypertune to perform services related to Customer Data maintenance and back-up for which it shall remain fully liable).

## **8. Customer's obligations**

- 8.1 The Customer shall:
- (a) provide Hypertune with:
    - (i) all necessary co-operation in relation to this agreement; and
    - (ii) all necessary access to such information as may be required by Hypertune;  
in order to provide the Services, including but not limited to Customer Data, security access information and configuration services;
  - (b) without affecting its other obligations under this agreement, comply with all applicable laws and regulations with respect to its activities under this agreement;
  - (c) carry out all other Customer responsibilities set out in this agreement in a timely and efficient manner. In the event of any delays in the Customer's provision of such assistance as agreed by the parties, Hypertune may adjust any agreed timetable or delivery schedule as reasonably necessary;
  - (d) ensure that the Authorised Users use the Services and the Documentation in accordance with the terms and conditions of this agreement and shall be responsible for any Authorised User's breach of this agreement;

- (e) obtain and shall maintain all necessary licences, consents, and permissions necessary for Hypertune, its contractors and agents to perform their obligations under this agreement, including without limitation the Services;
  - (f) ensure that its network and systems comply with the relevant specifications provided by Hypertune from time to time; and
  - (g) be, to the extent permitted by law and except as otherwise expressly provided in this agreement, solely responsible for procuring, maintaining and securing its network connections and telecommunications links from its systems to Hypertune's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's network connections or telecommunications links or caused by the internet.
- 8.2 The Customer shall own all right, title and interest in and to all of the Customer Data that is not personal data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of all such Customer Data.
- 9. Charges and payment**
- 9.1 The Customer shall pay the Subscription Fees to Hypertune for the Subscription in accordance with this 9.
- 9.2 The Customer shall on the Effective Date provide to Hypertune (or as applicable its authorised third-party payment provider, the **Payment Provider**) valid, up-to-date and complete credit card details or approved purchase order information acceptable to Hypertune (and/or the Payment Provider, as applicable) and any other relevant valid, up-to-date and complete contact and billing details and, if the Customer provides:
- (a) its credit card details to Hypertune (and/or the Payment Provider, as applicable), the Customer hereby authorises Hypertune (and/or the Payment Provider, as applicable) to bill such credit card:
    - (i) on the Effective Date for the Subscription Fees payable in respect of the Initial Subscription Term; and
    - (ii) subject to clause 14.1, on the final Business Day of the Initial Subscription Term and each Renewal Period for the Subscription Fees payable in respect of the next Renewal Period;
  - (b) its approved purchase order information to Hypertune, Hypertune shall invoice the Customer:
    - (i) on the Effective Date for the Subscription Fees payable in respect of the Initial Subscription Term; and
    - (ii) subject to 14.1, at least 7 days prior to next Renewal Period,
 and the Customer shall pay each invoice within 7 days after the date of such invoice.
- 9.3 Unless the Customer gives notice to terminate this agreement under clause 14.1(a), the Customer will be liable to pay the Subscription Fees for the next applicable Renewal Period.
- 9.4 If Hypertune has not received payment within 7 days after the due date, and without prejudice to any other rights and remedies of Hypertune:
- (a) Hypertune may, without liability to the Customer, disable the Customer's password, account and access to all or part of the Services and Hypertune shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
  - (b) interest shall accrue on a daily basis on such due amounts at an annual rate equal to 5% over the then current base lending rate, commencing on the due date and continuing until fully paid, whether before or after judgment.
- 9.5 All amounts and fees stated or referred to in this agreement:
- (a) shall be payable in pounds sterling;
  - (b) are, subject to 13.3(b), non-cancellable and non-refundable;
  - (c) are exclusive of value added tax, which shall be added to Hypertune's invoice(s) at the appropriate rate.

9.6 If, at any time whilst using the Services, the Customer exceeds the amount of disk storage space specified in the Documentation, Hypertune shall charge the Customer, and the Customer shall pay, Hypertune's then current excess data storage fees. Hypertune's excess data storage fees current as at the Effective Date are set out on the payment confirmation page.

9.7 Hypertune shall be entitled to increase the Subscription Fees at the start of each Renewal Period upon 30 days' prior notice to the Customer and the Subscription Fees shall be deemed to have been amended accordingly.

## 10. Proprietary rights

10.1 The Customer acknowledges and agrees that Hypertune and/or its licensors own all intellectual property rights in the Services, Software, and the Documentation. Except as expressly stated herein, this agreement does not grant the Customer any rights to, under or in, any patents, copyright, database right, trade secrets, trade names, trade marks (whether registered or unregistered), or any other rights or licences in respect of the Services, Software or the Documentation.

10.2 Hypertune confirms that it has all the rights in relation to the Services, Software and the Documentation that are necessary to grant all the rights it purports to grant under, and in accordance with, the terms of this agreement.

## 11. Confidentiality

11.1 **Confidential Information** means all confidential information (however recorded or preserved) disclosed by a party or its Representatives (as defined below) to the other party and that party's Representatives whether before or after the date of this agreement in connection with the Services provided by Hypertune under this agreement, including but not limited to:

- (a) the existence and terms of this agreement or any agreement entered into in connection with this agreement;
- (b) any information that would be regarded as confidential by a reasonable business person relating to:
  - (i) the business, assets, affairs, customers, clients, suppliers, or plans, intentions, or market opportunities of the disclosing party (or of any member of the group of companies to which the disclosing party belongs); and
  - (ii) the operations, processes, product information, know-how, designs, trade secrets or software of the disclosing party (or of any member of the group of companies to which the disclosing party belongs);
- (c) any information developed by the parties in the course of carrying out this agreement and the parties agree that:
  - (i) details of the Services, and the results of any performance tests of the Services, shall constitute Hypertune's Confidential Information; and
  - (ii) Customer Data shall constitute Customer Confidential Information.

**Representatives** means, in relation to a party, its employees, officers, contractors, subcontractors, representatives and advisers.

11.2 Each party may disclose the other party's confidential information:

- (a) to its Representatives who need to know such information for the purposes of exercising the party's rights or carrying out its obligations under or in connection with this agreement. Each party shall ensure that its Representatives to whom it discloses the other party's confidential information comply with this clause 11; and
- (b) as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.

11.3 No party shall use any other party's confidential information for any purpose other than to exercise its rights and perform its obligations under or in connection with this agreement.



## **12. Indemnity**

- 12.1 The Customer shall defend, indemnify and hold harmless Hypertune against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Customer's use of the Services and/or Documentation, provided that:
- (a) the Customer is given prompt notice of any such claim;
  - (b) Hypertune provides reasonable co-operation to the Customer in the defence and settlement of such claim, at the Customer's expense; and
  - (c) the Customer is given sole authority to defend or settle the claim.
- 12.2 Hypertune shall defend the Customer, its officers, directors and employees against any claim that the Customer's use of the Services or Documentation in accordance with this agreement infringes any patent effective as of the Effective Date, copyright, trade mark, database right or right of confidentiality, and shall indemnify the Customer for any amounts awarded against the Customer in judgment or settlement of such claims, provided that:
- (a) Hypertune is given prompt notice of any such claim;
  - (b) the Customer does not make any admission, or otherwise attempt to compromise or settle the claim and provides reasonable co-operation to Hypertune in the defence and settlement of such claim, at Hypertune's expense; and
  - (c) Hypertune is given sole authority to defend or settle the claim.
- 12.3 In the defence or settlement of any claim, Hypertune may procure the right for the Customer to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate this agreement on 2 Business Days' notice to the Customer without any additional liability or obligation to pay liquidated damages or other additional costs to the Customer.
- 12.4 In no event shall Hypertune, its employees, agents and sub-contractors be liable to the Customer to the extent that the alleged infringement is based on:
- (a) a modification of the Services or Documentation by anyone other than Hypertune; or
  - (b) the Customer's use of the Services or Documentation in a manner contrary to the instructions given to the Customer by Hypertune; or
  - (c) the Customer's use of the Services or Documentation after notice of the alleged or actual infringement from Hypertune or any appropriate authority.
- 12.5 The foregoing and 13.3(b) state the Customer's sole and exclusive rights and remedies, and Hypertune's (including Hypertune's employees', agents' and sub-contractors') entire obligations and liability, for infringement of any patent, copyright, trade mark, database right or right of confidentiality.

## **13. Limitation of liability**

- 13.1 Except as expressly and specifically provided in this agreement:
- (a) the Customer assumes sole responsibility for results obtained from the use of the Services and the Documentation by the Customer, and for conclusions drawn from such use. Hypertune shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to Hypertune by the Customer in connection with the Services, or any actions taken by Hypertune at the Customer's direction;
  - (b) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this agreement; and
  - (c) the Services and the Documentation are provided to the Customer on an "as is" basis.
- 13.2 Nothing in this agreement excludes the liability of Hypertune:
- (a) for death or personal injury caused by Hypertune's negligence; or

(b) for fraud or fraudulent misrepresentation.

13.3 Subject to 13.1 and 13.2:

- (a) Hypertune shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this agreement; and
- (b) Hypertune's total aggregate liability in any 12-month period beginning on the Effective Date or any anniversary of it (each a **Contract Year**) in contract (including in respect of the indemnity at 12.2), tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this agreement shall be limited to the total Subscription Fees paid in that Contract Year.

13.4 Nothing in this agreement excludes the liability of the Customer for any breach, infringement or misappropriation of Hypertune's Intellectual Property Rights.

#### 14. Term and termination

14.1 This agreement shall, unless otherwise terminated as provided in this 14, commence on the Effective Date and shall continue for the Initial Subscription Term and, thereafter, this agreement shall be automatically renewed for successive periods of one month (each a **Renewal Period**), unless:

- (a) either party notifies the other party of termination, in writing, at least 7 days before the end of any Renewal Period, in which case this agreement shall terminate upon the expiry of the applicable Renewal Period; or
- (b) otherwise terminated in accordance with the provisions of this agreement;

and the Initial Subscription Term together with any subsequent Renewal Periods shall constitute the **Subscription Term**.

14.2 Without affecting any other right or remedy available to it, either party may terminate this agreement with immediate effect by giving written notice to the other party if:

- (a) the other party fails to pay any amount due under this agreement on the due date for payment and remains in default not less than 7 days after being notified in writing to make such payment;
- (b) the other party commits a material breach of any other term of this agreement and (if such breach is remediable) fails to remedy that breach within a period of 7 days after being notified in writing to do so;
- (c) the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 (**IA 1986**) as if the words "it is proved to the satisfaction of the court" did not appear in sections 123(1)(e) or 123(2) of the IA 1986.
- (d) the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (e) the other party applies to court for, or obtains, a moratorium under Part A1 of the IA 1986;
- (f) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other party other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (g) an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the other party (being a company, partnership or limited liability partnership);

- (h) the holder of a qualifying floating charge over the assets of that other party (being a company or limited liability partnership) has become entitled to appoint or has appointed an administrative receiver;
- (i) a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;
- (j) a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within 14 days;
- (k) any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in 14.2(c) to clause 14.2(j) inclusive);
- (l) the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business;
- (m) the other party's financial position deteriorates so far as to reasonably justify the opinion that its ability to give effect to the terms of this agreement is in jeopardy;
- (n) there is a change of control of the other party (within the meaning of section 1124 of the Corporation Tax Act 2010).

14.3 On termination of this agreement for any reason:

- (a) all licences granted under this agreement shall immediately terminate and the Customer shall immediately cease all use of the Services and/or the Documentation;
- (b) each party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other party;
- (c) Hypertune may destroy or otherwise dispose of any of the Customer Data in its possession unless Hypertune receives, no later than ten days after the effective date of the termination of this agreement, a written request for the delivery to the Customer of the then most recent back-up of the Customer Data. Hypertune shall use reasonable commercial endeavours to deliver the back-up to the Customer within 30 days of its receipt of such a written request, provided that the Customer has, at that time, paid all fees and charges outstanding at and resulting from termination (whether or not due at the date of termination). The Customer shall pay all reasonable expenses incurred by Hypertune in returning or disposing of Customer Data; and
- (d) any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination shall not be affected or prejudiced.

## **15. Force majeure**

Neither party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. The time for performance of such obligations shall be extended accordingly. If the period of delay or non-performance continues for 2 weeks, the party not affected may terminate this agreement by giving 5 Business Days written notice to the affected party.

## **16. Variation**

No variation of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

## **17. Waiver**

17.1 A waiver of any right or remedy is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy.

17.2 A delay or failure to exercise, or the single or partial exercise of, any right or remedy shall not waive that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy.

## **18. Rights and remedies**

Except as expressly provided in this agreement, the rights and remedies provided under this agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

## **19. Severance**

19.1 If any provision or part-provision of this agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this agreement.

19.2 If any provision or part-provision of this agreement is deemed deleted under 19.1 the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

## **20. Entire agreement**

20.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous and contemporaneous agreements, promises, assurances and understandings between them, whether written or oral, relating to its subject matter.

20.2 Each party acknowledges that in entering into this agreement 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 this agreement.

20.3 Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.

## **21. Assignment**

21.1 The Customer shall not, without the prior written consent of Hypertune, assign, novate, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

21.2 Hypertune may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

## **22. No partnership or agency**

Nothing in this agreement is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

## **23. Third party rights**

This agreement does not confer any rights on any person or party (other than the parties to this agreement and, where applicable, their successors and permitted assigns) pursuant to the Contracts (Rights of Third Parties) Act 1999.

## **24. Counterparts**

24.1 This agreement may be executed in any number of counterparts, each of which shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.

24.2 No counterpart shall be effective until each party has provided to the other at least one executed counterpart.

## **25. Notices**

25.1 Any notice given to a party under or in connection with this agreement shall be in writing and shall be:

- (a) delivered by hand or by pre-paid first-class post or other next Business Day delivery service at its registered office (if a company) or its principal place of business (in any other case); or
- (b) sent by email to the following addresses (or an address substituted in writing by the party to be served):

Hypertune: legal@hypertune.com

Customer: The email address entered on the payment confirmation page.

25.2 Any notice shall be deemed to have been received:

- (a) if delivered by hand, at the time the notice is left at the proper address; or
- (b) if sent by pre-paid first-class post or other next Business Day delivery service, at 9.00 am on the second Business Day after posting; or
- (c) 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.

25.3 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

**26. Governing law**

This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and interpreted in accordance with the law of England and Wales.

**27. Jurisdiction**

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).