

# EnCirca VPS Hosting Services

## 1. GENERAL TERMS

These General Terms apply to all persons using EnCirca Services.

### EnCirca Services

In consideration of Client's timely payment of all Service Fees, and subject to Client's compliance with this MSA, EnCirca will provide to Client the EnCirca Services as described in the Order Form. In furtherance of providing the EnCirca Services to Client, EnCirca hereby grants to Client a worldwide, limited, non-exclusive, non-transferable, fully revocable license to use EnCirca Systems in connection with the EnCirca Services as permitted in this MSA. EnCirca may, at its sole discretion, add to, modify, remove, or re-price any particular product or service from the EnCirca Services based on factors including the unavailability of any relevant Third Party Products. To prevent downtime caused by outdated components or malfunction of the EnCirca Systems, Client hereby consents to (a) EnCirca upgrading or repairing the EnCirca Systems that are hosting Client Data at any time with or without notice to Client, and (b) EnCirca migrating Client Data within the EnCirca Systems at any time with or without notice to Client. EnCirca may (at EnCirca's sole discretion) provide any of the EnCirca Services (in whole or in part) through an Affiliate of EnCirca, a Third Party Vendor, or other subcontractors. Client understands and agrees that, as a part of providing the EnCirca Services, such Affiliates, Third Party Vendors, or other subcontractors, may require access to Client's systems or Client Data, either within the EnCirca Systems or in another data center or with another service provider, and Client expressly acknowledges and consents to such access. In the event that Client refuses or fails to permit such access, Client understands and agrees that EnCirca is not responsible for any malfunction or delay in the performance of the EnCirca Services resulting therefrom. In connection with Technical Support, EnCirca makes no representation or warranty that EnCirca will be able to find the cause of, or resolve, the problem for which Client contacts EnCirca for Technical Support. Unless otherwise expressly specified in the Order Form, EnCirca is not responsible for providing Technical Support, or any other support (including customer service, billing support, and sales support), to Client's resellers, customers, and End Users.

### 1.4 Connectivity

Except for the EnCirca Systems specifically licensed to Client hereunder, Client is solely responsible, and EnCirca is not responsible, for sourcing and paying for network resources used to connect Client to the Internet.

### 1.5 Third Party Products

Client will agree to, be bound by, and comply with the terms of any license or other agreement for Third Party Products. Client acknowledges that Client's use of Third Party Products is subject to Client's agreement to, and compliance with, the terms and conditions

of the Third Party Vendors who provide the respective Third Party Products. The Third Party Vendors are permitted to perform directly Third Party Audits on the EnCirca Systems (including any computer server or other hardware licensed to Client by EnCirca as part of the EnCirca Services) with regards to their respective Third Party Products. All trademarks and other Intellectual Property rights associated with or attached to a Third Party Product belong solely to the relevant Third Party Vendor and are used by EnCirca subject to license from such Third Party Vendor. Except as permitted in the licenses which are a part of the Third Party Products, nothing herein grants to Client any right, title, or interest in or to a Third Party Vendor's Intellectual Property. EnCirca makes no warranty of any kind, either express or implied, regarding the quality, accuracy, reliability, validity, or continued existence of any or all aspects of Third Party Products. Client acknowledges that Third Party Products may, at any given time, be no longer be available or may be revoked at the discretion of the Third Party Vendor. Any mention of Third Party Products by EnCirca, its employees, or any third party entity related to EnCirca is for information purposes only and does not constitute an endorsement or recommendation by EnCirca. EnCirca disclaims any and all liabilities for any representation or warranty made by the Third Party Vendors of the Third Party Products.

## **1.6 Client Account**

Upon Client's submission or execution of an Order Form, EnCirca will create a unique Client Account and Client ID for Client. Once the Client Account and associated Client ID have been set up, EnCirca will provide Client with appropriate login credentials and access to the Client Portal.

## **1.7 Client Account Ownership**

The legal owner of the Client Account is the person who is identified as the "Client" in the applicable Order Form or, in the absence of such name in the Order Form, the person otherwise using EnCirca Services. It is Client's sole responsibility, and not EnCirca's responsibility, to ensure that (a) Client's correct full legal name is stated on the Order Form and in the Client Account, (b) Client's current name and other contact information is kept up-to-date with EnCirca, (c) the Client ID and associated password are kept secure and disclosed only to those with a need to know, and (d) EnCirca receives all documentation reasonably requested by EnCirca to ascertain the correct legal owner of the Client Account in the event of a dispute or verification of Client's identification. The includes regularly updating the Client Account to accurately reflect staff departures or changes in service providers Client may have used to subscribe for EnCirca Services (e.g., website design companies or online media management companies) who may have used their name as the contact person for the Client Account. In the event of a dispute, or in the event of a reorganization or dissolution of the Client, the legal ownership of the Client Account will be as follows in order of precedence: (1) the company or organization listed on the Client Account in EnCirca's database; (2) the individual who submitted or executed the Order Form; (3) the individual who is the cardholder of the credit card used to pay the most recent Service Fees for the Client Account.

## **1.9 Identification Verification**

Each time Client wishes to communicate with EnCirca about the Client Account or Client Data, Client will abide by EnCirca's then-current security measures and identification verification processes, including answering identification verification questions over the phone and submitting a proof of identity form. EnCirca is not responsible or obligated to restore access to the Client Account to any person if that person is unable to meet EnCirca's security measures and procedures to EnCirca's sole reasonable satisfaction.

## **1.10 Ownership Disputes**

EnCirca has no responsibility to act as an arbiter, mediator or other authority in the event of a dispute over the ownership of the Client Account or domain name associated with the Client Account or any other dispute between Client and a third party (including Client's current or former employees, contractors, agents or vendors). EnCirca may suspend Client's access to, or place an administrative lock on, the Client Account and associated domain name(s) pending an investigation into the ownership thereof.

## **1.11 EnCirca Access**

EnCirca reserves the right to physically access the EnCirca Systems at any time, including any computer servers and other hardware licensed to Client as part of the EnCirca Services. In addition, Client will provide EnCirca with continuous root administrative access to all computer servers and other EnCirca Systems licensed to Client and under Client's control as part of the EnCirca Services. Client acknowledges that EnCirca requires such access to in order to provide the EnCirca Services, including Technical Support. The access provided hereunder may also be used by EnCirca for the purposes of conducting or performing an audit or report, whether by EnCirca directly or by an authorized third party, or pursuant to compliance with any applicable statute, government regulation, or Third Party Vendor requirement (such as in the course of a Third Party Audit).

## **1.12 Client Access**

Client will not physically access any of the EnCirca Systems, including computer servers and other hardware licensed to Client as part of the EnCirca Services. Client may access the Client Account through the Client Portal using only Client's own authentication credentials (username and password). Client is prohibited from accessing or attempting to access the client account, billing data, or other data of any other person using the EnCirca Services.

## **1.13 Email Accounts**

All email accounts, including POP email accounts, which have not been logged into for a period of 4 consecutive months or more will be deemed abandoned and EnCirca may, at its sole discretion, delete the email account ("Abandoned Mailbox") and all emails residing in

the Abandoned Mailbox (“Abandoned Emails”). In such case, EnCirca will send an email to the master email account identified under the Client Account to notify that the Abandoned Mailbox and the Abandoned Emails will be deleted if the Abandoned Mailbox is not logged into within 14 calendar days. EnCirca may delete all content and data stored in any of Client’s spam folders, junk mail folders, and email accounts for 30 calendar days or more.

## **1.14 Client Data**

Client represents and warrants that Client is the owner of, or is duly authorized or licensed by the legal owner to, hold, store, upload, create, destroy, use, run, implement, modify, edit, or otherwise manage the Client Data. In the event that Client Data includes any software or application that is not provided by EnCirca, Client is solely responsible for supporting such software or application including maintaining the licenses and installing updates and upgrades to such software or application. EnCirca is in no way liable for the support of such software or application, including Client’s use or misuse thereof. Client is solely liable, and EnCirca will not be liable, for any unpaid licenses installed by Client on EnCirca Systems that are reported in the course of a Third Party Vendor Audit. Client further warrants that the access by EnCirca of any and all materials and data as furnished by Client to EnCirca in the provision of the EnCirca Services will not violate or conflict with any Intellectual Property or privacy rights of any third parties including copyrights, patents and trademarks, protected health information, or personally identifiable information. Client warrants that it is authorized to permit EnCirca to use all relevant code for the purposes of performing the EnCirca Services hereunder. In the event that Client requests EnCirca’s assistance or participation in any third party audit of the Client Data or of Client’s use of the EnCirca Services, EnCirca agrees to reasonably cooperate with Client (at Client’s expense) to respond to any audit inquiries solely as related to the EnCirca Services.

## **1.15 Protected Health Information**

If Client uses, transmits, or otherwise handles any information related to an individual’s past, present, or future physical or mental health condition, any treatment for that condition, and any payment for that treatment which information identifies the individual or could reasonably be used to identify the individual (such information referred to as “Protected Health Information” or “PHI”), then Client will: (a) inform EnCirca in writing of Client’s intended use of the EnCirca Services for PHI, (b) comply with all requirements of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and its implementing rules and regulations, (c) comply with all requirements of the Health Information Technology for Economic and Clinical Health Act, codified at 42 U.S.C. §§17931-17953 (“HITECH”) and its implementing rules and regulations, and (d) execute, as between Client and EnCirca, a Business Associate Agreement as mandated by HIPAA and HITECH (in EnCirca’s standard form), whereby Client is the covered entity and EnCirca is the business associate or whereby Client is the business associate and EnCirca is the subcontractor if Client is the service provider of a covered entity (as the terms “covered entity”, “business associate”, and “subcontractor” are defined by HIPAA and HITECH). In addition to Client’s indemnification obligations under this MSA, Client will further indemnify EnCirca (including EnCirca’s Representatives) from and against any Claims against EnCirca or Losses incurred by EnCirca that result from: (i) Client’s breach of or misrepresentation with respect to Client’s

obligations regarding Protected Health Information, or (ii) Client's breach of HIPAA, HITECH, or any other relevant statute.

## **1.17 Data Backup**

Unless the Order Form expressly includes EnCirca's data backup services as part of the EnCirca Services to be provided, Client is solely responsible, and EnCirca is not responsible in any way, for the backup (copy and storage for purposes of retrieval or data loss recovery) of Client's data or the management of such backup. Client acknowledges that for any of EnCirca data backup services, Client's data is backed up onto EnCirca Systems "as is" and that EnCirca's backup services do not include any software, application, or other method for monitoring, remediating, or preventing viruses, malfunctions, corruptions, or other security issues with Client's data or the backup thereof. It is Client's sole responsibility, and not the responsibility of EnCirca, to (a) secure and protect, including encrypt, all Client Data which may be backed up through EnCirca Systems, (b) implement and maintain a disaster recovery plan, including adequate offsite backup commercially reasonable given the nature, scope, and sensitivity of Client's data, and (c) locally backup all essential data on Client's own systems independent of EnCirca (including at Client's own premises) for purposes requiring data recovery or retrieval. Client is solely responsible, and EnCirca is not responsible, for the backup of any of Client's data which may have resided on EnCirca Systems at one time but which no longer resides on EnCirca Systems at the time EnCirca's backup services, if expressly included in the Order Form, is implemented. EnCirca expressly disclaims the usability, functionality, or accuracy of Client's data backed up using EnCirca's backup services. EnCirca makes no warranty of any kind (either express or implied) regarding any of EnCirca's backup services, including (a) the format, readability, configuration, accuracy, completeness, retrievability, functionality or restorability of Client's data backed up on EnCirca Systems to its original state, and (b) the functionality, compatibility or reliability of any of EnCirca's backup services with any firewall or software or updates and upgrades thereto. If expressly included in the Order Form, then EnCirca provides its backup services "as is" without warranties of merchantability or fitness for a particular purpose. Under no circumstances will EnCirca be liable for any loss of Client's data or for third party fees related to the recovery or restoration of Client's data. Client's use of EnCirca's backup services is at Client's sole risk.

## **1.18 Data Security**

EnCirca will use industry standard measures to detect and prevent unauthorized third parties from accessing EnCirca Systems. Notwithstanding anything to the contrary, Client acknowledges that EnCirca does not guarantee, and does not represent or warrant, that the EnCirca Systems cannot or will not be accessed by unauthorized third parties. Client will review EnCirca's Privacy Policy, as amended from time to time, posted at <http://www.EnCirca.com/privacy-policy/> (or such other redirected webpage or alternate URL as designated by EnCirca), which is incorporated herein by reference.

## **1.19 Data Disclosures**

Client hereby consents to EnCirca disclosing Client's data required to be disclosed by any (a) law of the U.S.A., or (b) court order of any jurisdiction in the U.S.A. or other jurisdiction in which either EnCirca or Client operates its business. However, if and to the extent allowed by such law or court order, EnCirca will promptly notify Client in writing of the legal obligation and, if Client chooses, Client may seek protective measures against the requirement at Client's sole expense and reimburse EnCirca for any reasonable expenses (including costs for legal advice, staff hours, and disbursements) incurred by EnCirca in complying with such requirement.

## **1.20 Data Transfers**

1.20.1 Cross-Border Data Transfers. Client acknowledges that the EnCirca Services and Third Party Products may be provided from the U.S.A. or any other country in which EnCirca, its Affiliates, and its Third Party Vendors maintain their business operations. As such, EnCirca, its Affiliates, and its Third Party Vendors may transmit, store, access, process, and use (collectively "Process") Client's data in, to, or from the U.S.A. or any other country in which EnCirca, its Affiliates, and its Third Party Vendors maintain their business operations. In furtherance of the MSA and the applicable Order Form, and in connection with the provisioning of EnCirca Services and Third Party Products to Clients, Client acknowledges that Client Data may not remain in the country such data originated from. Client hereby consents to EnCirca, its Affiliates, and its Third Party Vendors Processing Client Data in the U.S.A. or any other country in which EnCirca, its Affiliates, and its Third Party Vendors maintain their business operations.

1.20.2 Consent Revocation; Migration; Deletion. Client may revoke its consent to having Client Data Processed in the U.S.A., or such other jurisdiction in which EnCirca's Affiliates and Third Party Vendors may reside, by providing EnCirca with written notice of Client's revocation of consent ("Consent Revocation"). Upon receipt of the Consent Revocation, EnCirca will cooperate with Client in transferring all Client Data to a lawful destination of Client's choice ("Migration"). Client acknowledges that the Migration entails the actions of Client (and, if applicable, Client's vendor or new hosting service provider) and does not entail any action on EnCirca's part other than to provide access to the Client Data. Upon Client's written request, EnCirca may provide Client with reasonable Migration assistance as part of the Enterprise Services, in which case, EnCirca may charge (and Client will pay in advance) the Services Fees EnCirca normally charges for migrations of the magnitude and complexity Client requires for the Migration. Client acknowledges that Client must complete the Migration, and remove all Client Data off of EnCirca Systems, within 60 calendar days of the date EnCirca received the Consent Revocation ("Migration Period"). If any Client Data remains on EnCirca Systems beyond the Migration Period, then EnCirca may permanently delete such Client Data and all backups and copies thereof. It is Client's sole responsibility, and not EnCirca's responsibility, to perform backups and keep copies of Client Data as needed by Client.

1.20.3 Transfer Restrictions. As between EnCirca and Client, it is the sole responsibility of Client, and not the responsibility of EnCirca, to ensure that Client Data, including End User Data, required to remain in a particular country is restricted to that country. Prior to Client's

submission of an Order Form or use of EnCirca Services, Client will inform EnCirca in writing of all transfer restrictions or jurisdictional requirements pertaining to Client Data and the Parties will work in good faith together to determine if the transfer restrictions and jurisdictional requirements can be satisfied. Client will review EnCirca's Privacy Policy, as amended from time to time, posted at <http://www.EnCirca.com/about/legal/> (or such other redirected webpage or alternate URL as designated by EnCirca), which is incorporated herein by reference.

## **1.21 EnCirca's Intellectual Property**

In no way will any license granted by EnCirca in this MSA be an assignment of rights, title, or ownership in any of EnCirca's Intellectual Property, including any of the EnCirca Systems, and EnCirca retains sole and exclusive right, title and ownership in and to all of EnCirca's Intellectual Property. As between EnCirca and Client, all Internet Protocol addresses provided to Client by EnCirca belong exclusively to EnCirca. Client acknowledges that Client has no right to use such Internet Protocol addresses except as permitted by EnCirca in connection with the EnCirca Services and in accordance with this MSA. EnCirca may change or remove Internet Protocol numbers and addresses at its sole discretion. Except as otherwise expressly permitted in this MSA, Client may not use EnCirca's Intellectual Property without obtaining the prior written consent, in each instance, of EnCirca. EnCirca's Intellectual Property includes any data relating to EnCirca, the EnCirca Services, or EnCirca Systems, including (a) Internet Protocol addresses, Uniform Resource Locators, Web pages and other website data, (b) source codes, digital files, encryption keys, and digital certificates, (c) user identifications, account access, log-in information, and passwords, (d) usage data collected by EnCirca regarding Client's use of EnCirca Services, and (e) all other data owned or controlled by EnCirca.

## **1.22 Other Restrictions**

Client will not take any action or use any of EnCirca's Intellectual Property or any Third Party Vendor's Intellectual Property in a manner that (a) acquires, or may reasonably acquire, any rights, title, or interest in or to EnCirca's Intellectual Property or any Third Party Vendor's Intellectual Property by Client or a third party, or (b) compromises or diminishes EnCirca's rights, title, or interest in or to EnCirca's Intellectual Property or any Third Party Vendor's rights, title, or interest in or to their Intellectual Property. If Client does acquire any rights, title, or interest in or to any of EnCirca's Intellectual Property, by operation of law or otherwise, then Client will immediately assign such rights, title, or interest to EnCirca at Client's sole cost. Client will not, and will not permit any third party, including its resellers, customers or End Users, to copy, use, analyze, reverse engineer, decompile, disassemble, translate, convert, or apply any procedure or process to any of the EnCirca Services, EnCirca Systems, and Third Party Products to ascertain, derive, or appropriate for any reason or purpose the source code or source listings thereof or trade secrets contained therein.

## **1.23 Resellers, Customers & End Users**

Client is solely responsible, and EnCirca is not responsible, for the activities of any End User and for the activities of Client's resellers and customers. Client will ensure that the use of EnCirca Services by Client's resellers, customers, and End Users will not be in contravention this MSA. If EnCirca receives complaints about Client's resellers, customers or End Users (including complaints about infringement of a third party's Intellectual Property), subject to EnCirca's rights in this MSA to suspend EnCirca Services, EnCirca may at its sole discretion (a) send a notice directly to the reseller, customer or End User requesting them to cease, remedy, and resolve the matter, or (b) forward the complaint to Client whereupon Client will take immediate action to ensure that the matter is resolved to EnCirca's satisfaction. If the particular activity continues or the complaint is otherwise unresolved, then Client may be subject to termination or other action as EnCirca may deem appropriate.

## **1.24 Domain Name Proxy Services**

If the EnCirca Services provided to Client includes domain name registration services where EnCirca or a third party provider is named as the Registrant or Admin Contact in Client's place ("Proxy Services"), Client agrees that if EnCirca or the third party provider does not receive a response to a communication sent to Client within 48 hours of such communication being sent, then EnCirca or the third party provider, as applicable, may suspend the Proxy Services or terminate all services (including, as applicable, all EnCirca Services) at its sole discretion.

## **1.25 Other Representations & Warranties**

Client represents and warrants to EnCirca as follows:

(a) Client has the full authority to execute, deliver, and perform under the MSA, the MSA is valid, binding, and enforceable against Client in accordance with the terms herein, and no provision requiring Client's performance is in (a) conflict with Client's obligations under any other agreement, (b) violation of any law applicable to Client, or (c) contravention of Client's by-laws or other governing rules, as applicable;

(b) Client is duly organized, authorized, and in good standing under the laws of the jurisdiction of its organization and is duly authorized to do business in all other jurisdictions in which Client's business makes such authorization necessary or required; and

(c) Client's purpose for entering into this Agreement and using or delivering the EnCirca Services is not to engage in, or be part of, any activity that is, or may reasonably be deemed, objectionable in the Internet community, unethical, unlawful or illegal.

## **1.26 Disclaimer**



Notwithstanding anything to the contrary in this MSA, EnCirca (a) makes no representation or warranty of any kind, either express or implied, regarding the quality, accuracy, reliability, completeness, non-infringement, or validity of the EnCirca Services, EnCirca Systems, or Third Party Products, and (b) provides all aspects of the EnCirca Services, EnCirca Systems, and Third Party Products “as is” and specifically disclaims all warranties of merchantability and fitness for a particular purpose. Client acknowledges that Client uses the EnCirca Services, EnCirca Systems, and Third Party Products at Client’s sole risk. No verbal advice or written information given by EnCirca, its employees, licensors or the like, will create a warranty and Client will not rely on any such advice or information as a warranty.

## **1.27 Force Majeure**

EnCirca will not be liable for delays in its performance of this MSA caused by circumstances beyond EnCirca’s reasonable control including natural disasters and other “acts of God”, fire and other destruction, sabotage, terrorism, war, insurrection, embargo and other acts of any governmental body, or strikes and other labor disturbances (“Force Majeure”). If EnCirca is affected by a Force Majeure, EnCirca will (a) promptly give written notice to Client, and (b) make reasonable efforts to reduce to a minimum and mitigate the effect of the Force Majeure.

## **1.28 Limitation of Liability**

Under no circumstances will EnCirca be liable to Client for any consequential, indirect, special, general, incidental, reliance, exemplary, or punitive damages arising out of or relating to this MSA or the EnCirca Services, whether foreseeable or not, and whether based on breach of any express or implied warranty, breach of contract, misrepresentation, negligence, strict liability in tort, or other cause of action (including damages for loss of data, goodwill, reputation, business, money, or opportunity), even if EnCirca has been advised of the possibility of such damages. EnCirca’s aggregate liability to Client, if any, arising out of or relating to this MSA or the EnCirca Services will not exceed the aggregate amount of Service Fees paid hereunder during the 3 calendar months immediately preceding the event giving rise to the liability. No Claim by Client against EnCirca, relating to this MSA or the EnCirca Services, will be effective after 1 calendar year (12 calendar months) from the time the event or cause of action comprising the basis of the Claim first occurred regardless of any statutory limitation period allowing for a longer period.

## **1.29 Indemnification**

If EnCirca, or any Representative of EnCirca, incurs any Losses because of any Claim arising out of or in connection with the acts or omissions of Client or its employee, contractor, or agent which amount to (a) breach of this MSA (including a breach of any representations or warranties made by Client herein), (b) gross negligence or willful misconduct, (c) misrepresentation, or (d) alleged or actual violations by Client of any law, regulation or rule, then Client will indemnify, reimburse, and compensate EnCirca and, as applicable, EnCirca’s Representatives, for all Losses, as they accrue and become payable

by EnCirca, and defend, hold harmless, and protect EnCirca, including EnCirca's Representatives, from and against all Claims. "Representatives" means, collectively, shareholders, Affiliates, directors, officers, employees, contractors, agents, and advisors, including lawyers, accountants, consultants, financial advisors, bankers, and lenders. In addition, if EnCirca (including EnCirca's Representatives) incurs Losses because of any Claim arising out of, or in connection with, the acts or omissions of any of Client's resellers, customers, or End Users, then Client will indemnify, reimburse, and otherwise compensate EnCirca for all Losses related thereto, as they accrue and become payable by EnCirca, and defend, hold harmless, and protect EnCirca from and against all Claims related thereto.

EnCirca agrees to give prompt written notice to Client of the Losses and the Claim for which indemnification is sought, and Client will have the right to control the defense and settlement of any Claim at the sole expense of Client. EnCirca agrees to fully cooperate in the defense or settlement of any Claim at the sole expense of Client. Notwithstanding the foregoing, the failure of EnCirca to give prompt notice, cooperate, or timely mitigate will not affect EnCirca's rights to indemnification, except (and only to the extent) that Client's ability to provide indemnification is impeded or frustrated, or Losses would have been avoided or mitigated. Client will obtain the prior written agreement of EnCirca for any settlement or proposal of settlement, which will not be unreasonably withheld

### **1.30 Abuse of Services**

Client will use the EnCirca Services, and access the EnCirca Systems, only in a manner that is legal, lawful, ethical, and generally acceptable in the Internet community. Client will not engage in, and will ensure that Client's resellers, customers, and End Users do not engage in any Abuse of Services. Without limiting the generality and scope of the definition of Abuse of Services in this MSA, Abuse of Services include (i) infringement of a person's Intellectual Property or other rights, (ii) publishing or transmitting material which is threatening, obscene, or defamatory, (iii) non-compliance with applicable anti-spam legislation, including the U.S. Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003 (CAN-SPAM Act), as amended, and Canada' Anti-Spam Legislation (CASL), as amended, (iv) violation of applicable import or export control laws, regulations, and policies, and (v) system or network security violations. System or network security violations include the following: (A) unauthorized access to or use of data, systems or networks, including any attempt to ping, probe, scan or test the vulnerability of a system or network or to breach security or authentication measures without express authorization of the owner of the system or network); (B) interference with service to any user, host or network, including mail bombing, flooding, deliberate attempts to overload a system, denial of service attacks, and broadcast attacks; (C) forging any TCP-IP packet header or any part of the header information in an email or a newsgroup posting; (D) creating or sending Internet viruses, worms or Trojan horses; (E) engaging in any other activity which is intended to disrupt or interfere with, or that results in the disruption of or interference with, the ability of others to effectively use the EnCirca Services and EnCirca Systems (or any connected network, system, service or equipment) or conduct their business over the Internet. Client represents and warrants that Client (or any person employed or contracted by Client or otherwise acting on Client's behalf in connection with this MSA or the EnCirca

Services) is not engaged in any activity which is, or may reasonably be deemed, an Abuse of Services.

### **1.31 Executive Order 13224**

Client will not use the Enterprise Services, in whole or in part, to do business with any person who has been determined to have committed or supported, or who poses a risk of committing or supporting, acts of terrorism or who otherwise is subject to the prohibitions of Executive Order 13224. Client represents and warrants that Client (or any person employed or contracted by Client or otherwise acting on Client's behalf in connection with this MSA or the EnCirca Services) is not, and has not been designated, (a) a "suspected terrorist" as defined in Executive Order 13224, (b) owned or controlled by a "suspected terrorist" as defined in Executive Order 13224, or (c) a member of, related to, associated with, or controlled by any organizations on the list contained in the Annex to Executive Order 13224 and all amendments thereto.

### **1.32 Sanctions**

Client will not use the EnCirca Services, in whole or in part, to do business with any country, person or group sanctioned by the United Nations, U.S.A., or Canada, including those identified by the Office of Foreign Assets Control, as updated from time to time. Client will not export the EnCirca Services, in whole or in part, to any country, person or group sanctioned by the United Nations, U.S.A., or Canada. Client represents and warrants that Client (or any person employed or contracted by Client or otherwise acting on Client's behalf in connection with this MSA or the EnCirca Services) is not, and has not been designated, (a) a resident of a country sanctioned by the United Nations, U.S.A., or Canada, or (b) a person or member of a group sanctioned by the United Nations, U.S.A., or Canada. Client further represents and warrants that Client (or any person employed or contracted by Client or otherwise acting on Client's behalf in connection with this MSA or the EnCirca Services) is not engaged in any activity which is, or may reasonably be deemed, in contravention of any of the abovementioned sanctions.

### **1.33 Suspension**

EnCirca may, at its sole discretion and without prior notice, immediately suspend the EnCirca Services and the Client Account if EnCirca determines that Client is engaging, or has engaged, in any Abuse of Services or if the Client Account is involved in any way, whether directly or indirectly, in an attack on another person's server or system ("Third Party Server") or EnCirca Systems. EnCirca will promptly notify Client in writing upon suspending EnCirca Services pursuant to an Abuse of Services. A suspension based on an Abuse of Services or an attack on a Third Party Server may be implemented until the Abuse of Services or threat has been remedied to EnCirca's sole reasonable satisfaction. Service Fees will continue to accrue during the suspension and Client will ensure timely payment of all Service Fees due. If Client engages in or the Client Account is involved in any Abuse of Services, Client will be responsible for all costs, including labor and other resources, to remedy any damage done to EnCirca Systems or attend to complaints received by EnCirca.

### **1.35 Survival Clauses**

The provisions of this MSA which by their nature continue beyond the termination of this MSA will survive such termination, including the provisions of this MSA relating to ownership, Intellectual Property, representations and warranties, disclaimer, limitation of liability, indemnification, and governing law and jurisdiction.

### **1.36 Minimum Age Requirement**

Client must be at least 18 years of age or the age of majority in the state, province, or country of Client's residence in order to agree to this MSA and submit an Order Form. If the person wishing to use EnCirca Services is under such age of majority (a "Minor"), then such person must have a parent or legal guardian accept this MSA, and submit the Order Form, in the name of the parent or legal guardian in order for the Minor to use EnCirca Services. If Client is a parent or legal guardian who accepts this MSA and submits an Order Form on behalf of a Minor, then Client will be the legal owners of the Client Account and primarily liable for (a) the use of EnCirca Services by the Minor, and (b) for the Minor's compliance with this MSA, including timely payment of all Service Fees. Client will remain primarily liable for (a) and (b) mentioned above even after the Minor has reached the age of majority unless Client executes a valid assignment of the Client Account to transfer ownership to the Minor. Any agreement to this MSA or submission of an Order Form by a Minor will be deemed null and void to the extent that EnCirca will not be liable in any way as a result of the Minor's age or legal incapacity or the Minor's use of the EnCirca Services.

### **1.37 Assignment**

Client may not assign or otherwise transfer Client's respective rights or obligations under this MSA without the prior written consent of EnCirca, which will not be unreasonably withheld. Without requiring Client's prior consent, EnCirca may assign or otherwise transfer this MSA, and EnCirca's rights and obligations hereunder, to (a) any of its Affiliates, or (b) to any third party who succeeds to all or substantially all of EnCirca's business, stock or assets. Any assignment or transfer in violation of this MSA will not have any effect against EnCirca. This MSA will be binding and have effect upon EnCirca and Client and their respective successors and permitted assigns. Nothing herein, express or implied, is intended to confer upon any person, other than EnCirca and Client and their respective successors and permitted assigns, any rights, remedies, obligations or liabilities in connection with this MSA. Notwithstanding the foregoing, Client acknowledges that EnCirca may, at its sole option, perform any of its duties or obligations hereunder, by itself or with or through any of EnCirca's Affiliates, which will not be deemed an assignment of this MSA.

### **1.38 Waiver; Severability; Cumulative Rights**

No waiver by EnCirca of a breach of any provision of this MSA will take effect or be binding upon EnCirca unless expressly waived in writing, and such waiver will extend and apply only to the particular breach so waived and will not limit or affect the rights of EnCirca in respect of any future breach or in respect of a breach of any other provision hereof. If any

portion of this MSA is held by a court of competent jurisdiction to be illegal, invalid or unenforceable for any reason, such illegality, invalidity or unenforceability will not affect the validity of the remainder of this MSA. Any specific right or remedy provided in this contract will not be exclusive but will be cumulative of all other rights and remedies.

### **1.39 Non-Solicitation and Relationship of Parties**

While a Client of EnCirca and for a period of 1 year thereafter, Client will not, individually or in association or in combination with any other person or entity, directly or indirectly solicit for employment, entice away from EnCirca, induce, or procure services directly from any employee of EnCirca. Nothing in this MSA will be construed as creating a relationship of employer and employee, principal and agent, partnership or joint venture between EnCirca and Client. Each of EnCirca and Client will be deemed an independent contractor at all times and will not have any right or authority to assume or create any obligation on behalf of the other party except as may be expressly permitted herein. This MSA is for the sole benefit of EnCirca and Client only and does not create any rights on the part of any third party, including Client's resellers, customers or End Users.

### **1.40 Non-Exclusivity**

EnCirca and Client each acknowledge that the relationship between them in connection with the EnCirca Services and this MSA is non-exclusive and that EnCirca may grant a license to use, market, sublicense, or distribute the EnCirca Services, including providing access to the EnCirca Systems, to other parties who may engage in the same or similar activities as Client, or who may compete with Client or Client's goods or services.

### **1.41 No 3rd Party Beneficiary**

The MSA is for the sole benefit of the Parties and does not create any rights on the part of any third party, including Client's resellers, customers, and End Users. Client acknowledges that EnCirca's obligations under the MSA are to Client only. Client is solely responsible, and EnCirca is not responsible, for ensuring Client satisfies all of Client's obligations to Client's resellers, customers, and End Users.

### **1.42 Governing Law**

This MSA will be governed and construed in accordance with the laws of the State of Illinois without giving effect to any rule of conflicts of law. Any Claim against a Party in connection with the subject matter of this MSA (or the MSA itself) will be brought in Chicago, Illinois. This MSA will not be governed by or construed in accordance with the United Nations Convention on Contracts for the International Sale of Goods.

### **1.43 Dispute Resolution**

All Claims arising out of or relating in any way to this MSA (including requests for specific performance) will be submitted to mandatory binding arbitration. The arbitration will be administered by the American Arbitration Association (“AAA”) and conducted pursuant to the AAA’s then current Commercial Arbitration Rules. The arbitration hearing will be conducted in the English language and will take place in Chicago, Illinois before a single arbitrator selected in accordance with the Commercial Arbitration Rules. The parties will each bear the costs of the arbitration in equal shares. The parties will also bear their own legal fees (including lawyer fees and witness costs) in connection with the arbitration and the arbitrator may not reallocate the legal fees in conjunction with the award. Any award rendered by the arbitrator will be confirmed in a state or federal court of competent jurisdiction in Chicago, Illinois and each of EnCirca and Client hereby irrevocably submits and consents to, and waives any objection to, personal jurisdiction and venue in such court.

#### **1.44 Notices**

Any notice or other communication between the Parties required or permitted under this MSA will be in writing and will be delivered by commercial courier or transmitted by electronic mail. It is Client’s responsibility to ensure that Client’s contact information is kept up to date with EnCirca, and EnCirca will not be liable for Client missing any notice or communication as a result of an outdated or seldom accessed address, phone number, or email address.

#### **1.45 Amendments**

Client acknowledges that the Internet and information technology industries (and the laws, regulations, policies, and risks associated with them) are constantly and rapidly changing and, as such, Client further acknowledges that EnCirca, at its sole reasonable discretion, may update the MSA from time to time to address the changes affecting the MSA and the EnCirca Services. If EnCirca makes any amendment to the MSA or any portion thereof, such as any Supplemental Terms, EnCirca may post a notice on EnCirca’s Legal webpage. Client’s continued use of EnCirca Services following notice of the amendment constitutes Client’s agreement and acceptance of the amendments.

## **2. Supplemental Terms**

Depending on the type of EnCirca Services that Client orders, Client may be subject to certain Supplemental Terms as described herein. If there is any conflict between this MSA and such Supplemental Terms, then the Supplement Terms will govern Client’s use of the applicable EnCirca Services to the extent of the conflict. The Supplemental Terms are collectively an integral part of this MSA and supplement the General Terms and Billing Terms above and are hereby incorporated into this MSA by reference.

### **2.1 Web & Apps Supplemental Terms**

These Web & Apps Supplemental Terms apply only to those Clients and End Users using EnCirca Services relating to Web Hosting, Domains, Emails and E-Commerce and other Applications or Web Solutions.

### **2.1.1 Refund Policy**

Refunds for EnCirca Services pertaining to Web Hosting and E-Commerce are available for shared hosting plans and virtual private server (“VPS”) plans only. Each shared hosting plan and VPS plan carries a 30-day money back guarantee. If Client cancels a shared hosting plan or VPS plan within the first 30 calendar days of Client’s first Billing Cycle in accordance with EnCirca’s cancellation process, Client may request a refund of the Service Fees (excluding setup fees) Client have paid in advance. Cancellations received after the first 30 days of the Billing Cycle do not qualify for any refund. Refunds will be provided to the original payee via the same payment method as the original payment. The following services do NOT qualify for the 30-day money back guarantee: (a) add-on features to EnCirca Services; (b) domain name registrations; (c) Enterprise Services as defined under the Enterprise Supplemental Terms; (d) EnCirca Services ordered through EnCirca’s reseller program; (e) domain parking plus; and (f) overage fees.

### **2.1.2 Server Resources**

Any website that uses a high amount of server resources (including CPU time, memory usage, and network resources) will be given the option to either pay additional Service Fees (which will depend on the resources required), reduce the resources used to an acceptable level, or upgrade to Enterprise Services (including Managed Hosting or Cloud Hosting). EnCirca will be the sole arbiter of what is considered to be a high server usage level. All Web Hosting and E-Commerce plans come with a limit of 5,000 files per Client Account. Each block of 5,000 files after the initial 5,000 will incur an additional charge of \$9.95 per month. Any Web Hosting and E-Commerce plan deemed to be adversely affecting server performance or network integrity may be shut down without prior notice.

### **2.1.3 CGI Scripts**

Any script that poses a potential security risk or are deemed to be adversely affecting server performance or network integrity will be shut down or will be automatically removed without prior notice. EnCirca does not permit CGI script sharing with domains not hosted by EnCirca or scripts which may be abused for UCE purposes.

### **2.1.4 Chat Rooms**

Client is not permitted to install chat rooms because chat rooms tend to require significant system resources. However, for a small charge, EnCirca may provide Client with Java chat rooms.

## **2.1.5 Background Running Programs and Cron Jobs**

EnCirca may allow programs to run in the background, which programs will be considered by EnCirca on a case-by-case basis. Client will incur extra Service Fees based on system resources used and operational maintenance needed. If Client wishes to run background programs, contact EnCirca at [support@EnCirca.com](mailto:support@EnCirca.com) to arrange the setup.

## **2.1.6 IRC**

Client is not permitted to operate IRC or IRC bots.

## **2.1.7 Software Distribution**

Client is not configured for the purposes of distributing software or multimedia products. If Client wishes to distribute software and/or multimedia files, contact [sales@EnCirca.com](mailto:sales@EnCirca.com) to make special arrangements.

## **2.1.8 Multimedia Files**

Client is not permitted to use the Client Account to distribute or store unusual amounts of graphics, audio, or video files (collectively "Multimedia Files"). If the Client Account's disk space usage for storing Multimedia Files exceeds 70% of its total usage, in terms of total size or number of files, EnCirca may suspend or cancel the Client Account.

## **2.1.9 Databases**

If Client stores any database on EnCirca's Web Hosting and E-Commerce servers, Client must limit the size to 10% of the total disk space allotted for the particular domain name associated with the Client Account.