TERMS AND CONDITIONS

DOCUMENT VERSION

- Last Updated: 22nd July 2019.
- Place: Cape Town, South Africa.
- Replaces all prior versions in their entirety.

COMPANY DETAILS

- Registered Name: Mighty Machines (Pty) Limited (trading name and hereafter referred to as "Spike").
- Registration Number: 018/010521/07
- Registered (and Mailing) Address: 20 Sydney Street, Cape Town, 8005
- Contact Person: Ilan Copelyn (Managing Director)
- Email Address: ilan@spikedata.co.za
- Telephone Number: +27 (0) 79 735 9213
- Website: https://spikedata.co.za/; https://app.spikedata.co.za/

1   PARTIES

1.1   The Parties to these Terms and Conditions or Terms of Service (hereafter termed "Agreement") are –

1.1.1   the **Client** ("you", "your" or "yourself"); and

1.1.2   **Spike** ("we", "us", "our", or "ourself")

1.2   The Parties agree as set out below

2   INTRODUCTION

2.1   The terms in this Agreement govern your use of our Website/APP or services (collectively, "Services") and software that we include as part of the Services, including any applications/APIs, content files, scripts, instruction sets, and any related documentation (collectively "Software").

2.2   By using the Services or Software, you agree to these terms. If you have entered into another agreement with us concerning specific Services or Software, then the terms of that agreement controls where it conflicts with these terms.

2.3   You retain all rights and ownership you have in your content that you make available through the Services. We do not claim any ownership rights to your content.

2.4   The Privacy Policy governs any personal information that you provide to us. By using the Services or Software you agree to the terms of the Privacy Policy .

2.5   Spike represents to the Client that it has expertise and experience in rendering the Services, and that it has sufficient capacity and resources to perform such Services in a cost-effective manner and in accordance with this Agreement.

2.6   The Client wishes to appoint Spike to provide the Services, in accordance with the terms of this Agreement, and Spike hereby accepts the appointment to provide the Services.

3   STRUCTURE OF THIS AGREEMENT

3.1   This Agreement is intended to operate as a master or framework agreement incorporating the terms of service provided to the Client by Spike.

3.2   Each separate Statement of Work Agreement (hereafter termed "SoW") or Service Level Agreement (hereafter termed "SLA"), if undertaken between the Parties, shall become an additional agreement

between Spike and the Client.

3.3 Each SoW or SLA shall be governed by and shall be construed in accordance with the terms and conditions of this Agreement.

3.4 Where Spike and the Client enters into a SoW or SLA of which the terms are different to any of the terms of this Agreement, then the term/s of that SoW or SLA (to the extent different from the terms of this Agreement) shall prevail, but only with respect to the particular Services which are described in such SoW or SLA.

3.5 The terms of any one SoW or SLA shall not apply to any other SoW or SLA, and each SoW or SLA shall be capable of termination in accordance with the provisions of the termination clauses in this Agreement (or the specific provisions relating to termination as contained in the relevant SoW or SLA) without affecting the remaining SoW or SLA.

4 APPLICABLE LAW AND JURISDICTION

4.1 This Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa.

4.2 Subject to **clause 19 (DISPUTE RESOLUTION section),** the Parties hereby consent and submit to the exclusive jurisdiction of the Western Cape High Court, Cape Town in any dispute arising from or in connection with this Agreement.

5   RELATIONSHIP

5.1   The relationship of the Parties in terms of this Agreement shall be that of independent contractors. No partnership or joint venture is hereby created between the Client and Spike. Neither Party shall be entitled to bind the credit of the other. Save as specifically herein contemplated:

5.1.1   this Agreement does not constitute Spike as the legal representative, employee or servant of the Client;

5.1.2   this Agreement does not constitute the Staff of Spike as being the Staff of the Client; and

5.1.3   Spike shall have no authority to assume any obligation of any kind on behalf of the Client or to bind or commit the Client in any way.

6   GENERAL

6.1   Whole Agreement

6.1.1   This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on either of the Parties. Except as provided under **clause 21 (BENEFIT OF THE AGREEMENT section)** there are no intended third-party beneficiaries to this Agreement. Each Agreement may be executed in one or more counterparts (including scanned copies), all of which when signed and taken together constitute a single agreement between the Parties.

6.1.2   This Agreement supersedes and replaces any and all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof. The Parties agree that this Agreement may only be amended in accordance with **clause 6.2 (GENERAL section/Variations to be in Writing)**, and that no terms and conditions printed on the back of or accompanying any purchase orders or those appearing on a Party's website or otherwise shall be binding on a Party insofar as this Agreement is concerned.

6.2   Variations to be in Writing

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

6.3   No Indulgences

No latitude, extension of time or other indulgence which may be given or allowed by any Party to the

other Party in respect of the performance of any obligation hereunder, and no delay or forbearance in the enforcement of any right of any Party arising from this Agreement and no single or partial exercise of any right by any Party under this Agreement, shall in any circumstances be construed to be an implied consent or election by such Party or operate as a waiver or a novation of or otherwise affect any of the Party's rights in terms of or arising from this Agreement or estop or preclude any such Party from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term hereof. Failure or delay on the part of any Party in exercising any right, power or privilege under this Agreement will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

6.4   No Waiver or Suspension of Rights

No waiver, suspension or postponement by any Party of any right arising out of or in connection with this Agreement shall be of any force or effect unless in writing and signed by such Party. Any such waiver, suspension or postponement will be effective only in the specific instance and for the purpose given.

6.5   Provisions Severable

All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses of this Agreement shall remain in full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.

6.6   Continuing Effectiveness of Certain Provisions

The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provided that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

6.7   **No Assignment**

Neither this Agreement nor any part, share or interest herein nor any rights or obligations hereunder may be ceded, delegated or assigned by either Party without the prior signed written consent of the other Party, save as otherwise provided herein.

7   PROVISION OF THE SERVICES

7.1   In addition to all other obligations which it may have in terms of this Agreement, Spike agrees and shall be obliged to:

7.1.1   perform the Services with effect from the relevant Commencement Date in accordance with the terms of this Agreement;

7.1.2   perform the Services in a workmanlike manner, in accordance with Good Industry Practice, in compliance with all applicable laws;

7.1.3   co-operate in good faith with the Client and such third parties where the Client retains any third parties to perform the Services or any part thereof, or where the Client requires Spike to interact with any third-party service providers of the Client;

7.1.4   ensure that all Deliverables comply with their respective Specifications;

7.1.5   promptly notify the Client upon becoming aware of circumstances that may reasonably be expected to jeopardise the performance or timely performance of the Services or any part of thereof; and

7.1.6   procure or otherwise provide all necessary Materials, Staff and other items required to provide the Services and otherwise to perform its obligations hereunder.

7.2   As part of the Services, Spike shall also provide reasonable assistance to the Client insofar as the implementation of the Deliverables is concerned as well as the reasonable assistance in respect of Acceptance Testing.

8   ACCEPTANCE TESTING

8.1   To the extent that any Deliverables are subject to Acceptance Testing as set out in the relevant Statement of Work and unless otherwise provided in a Statement of Work, Spike will be responsible for arranging and conducting testing and verification of the Deliverables so as to ensure that the Deliverables meet the relevant Specifications. Spike shall be required to ensure that its testing and verification procedures are consistent with Good Industry Practice and are thorough, comprehensive

and appropriate for the Deliverables being tested. The Client will, to the extent practicable, be entitled to participate in and be present during any testing and verification by Spike and Spike shall notify the Client thereof within a reasonable period in advance.

8.2   Following delivery of the Deliverables, the Client shall also be entitled to conduct Acceptance Testing in relation to the Deliverables or any part thereof, in addition to the testing and verification conducted by Spike, where the Client deems it necessary in order to verify that the Deliverables meets the Acceptance Criteria. Spike shall provide the Client with all assistance, information, resources and facilities as detailed in the relevant Statement of Work and as may be reasonably requested by the Client for the purposes of conducting Acceptance Testing.

8.3   Should any of the relevant Deliverables, in the Client's reasonable opinion, fail to meet the Acceptance Criteria in any material respect, then the Client may:

8.3.1   notify Spike of the reasons for such failure; and

8.3.2   request that Spike, at Spike's own expense, correct any aspect of the Deliverables that do not comply with the Acceptance Criteria within 10 (ten) Business Days (or such longer period as agreed between the Parties in writing) of being notified of the relevant failure and thereafter notify the Client that the relevant Deliverables are ready for repeat inspection and verification by the Client.

8.4   If the Deliverables in question have passed the inspection and verification, the Client shall confirm its Acceptance in writing as soon as reasonably practicable. Unless specifically stated otherwise, the Client shall be deemed to have accepted the Deliverables (or where a component of a Deliverable is used, such component): (i) once the Client uses the Deliverable (or a component thereof) in the normal course of the Client's business, whether or not the Client has confirmed its Acceptance in writing; or (ii) within 30 (thirty) days (or such other time frame as agreed in writing between the Parties depending on the time periods which are appropriate to conduct such Acceptance Testing) of receiving the Deliverable or any component of a Deliverable.

8.5   To the extent that the Client and Spike have agreed in a Statement of Work that one or more Deliverables shall be completed by a particular Milestone Date, then the Client may withhold payment until such time as Spike successfully delivers and completes the relevant Deliverable relating to the Milestone Date and passes the Acceptance Tests in accordance with the procedure described in **clauses 8.1 to 8.4 (ACCEPTANCE TESTING section)** above.

9 THE CLIENT'S OBLIGATIONS

9.1 The Client shall:

9.1.1 grant to Spike and its Staff access during ordinary business hours to such of the Client's Infrastructure and facilities as are necessary or requisite to enable Spike to provide the Services efficiently and timeously and such access should always be supervised by nominated Client Staff;

9.1.2 provide Spike and Spike's Staff with any and all assistance, support and information including as applicable, data, designs, programs, source code (if any), specifications, management decisions, approvals and other information and material as may be reasonably required by Spike in order to perform the Services in accordance with this Agreement;

9.1.3 not access, store or transmit any viruses, or material during the course of its use of the Services to the Spike Infrastructure which is unlawful, harmful or discriminatory

9.1.4 not reverse compile, duplicate or create derivative works in respect of the Spike Software; and

9.1.5 not provide the Services to third parties or provide assistance to third parties to access the Service, other than as contemplated in this Agreement.

9.2 In addition, the Client shall, where necessary and appropriate, allow Spike reasonable supervised access to and use of the Client owned hardware, software, equipment and other resources reasonably required by Spike to perform the Services for the Client, provided that Spike provides the Client with reasonable advance notice of Spike's requirements. All the Client's resources shall be provided to Spike by the Client in reasonable working order on an "as is, where is" basis with no warranties whatsoever.

10 CHARGES AND PAYMENT TERMS

10.1 In consideration of Spike performing its obligations under this Agreement, the Client agrees to pay to Spike the Charges in accordance with the provisions of this **clause 10 (CHARGES AND PAYMENT TERMS section)** or, if different, in accordance with the provisions of the relevant separate Statement of Work.

10.2 The Charges which are paid by the Client to Spike, the date of which is defined as the Effective Date of this Agreement, shall be deemed to be in consideration for the performance by Spike of all of its obligations under this Agreement, including all undertakings, assignments, waivers, transfers, cessions, authorities and licences given, made, procured and/ or granted by Spike.

10.3 With regard to the Software as a Service, the Client is required to purchase in advance a bundle of Chargeable Events that the Client proposes to use, in accordance with the pricing schedule detailed on the Website's pricing and payment section.

10.4   The Client will not be able to make use of the Software as a Service when its available balance has been depleted. Spike will, however, provide the Client with alerts when the available balance is running out, and the Client will be able to purchase an additional bundle of Chargeable Events at any time.

10.5   All amounts quoted in this Agreement and on the Website are quoted exclusive of VAT and, where applicable, the Party with the payment obligation agrees to pay any VAT due to the other in addition to the quoted amount, at the then prevailing rate.

10.6   Spike reserves the right to adjust the Charges at any time. However this will not impact any amount of Chargeable Events in the current available balance that may have already been pre-purchased by the Client. Adjusted charges will be clearly shown in an updated pricing schedule on the Website, which the Client can refer to prior to purchasing any new bundles of Chargeable Events.

11   COMMENCEMENT AND DURATION

11.1   This Agreement shall become effective on the Effective Date and shall continue in force until terminated in accordance with its terms.

11.2   Either Party may, for any reason whatsoever, terminate this Agreement by giving 3 (three) months' written notice to the other Party, such notice to be given on or before the last Business Day of any calendar month. It should be noted that any Service being provided in terms of a specific Statement of Work is subject to the existence of this Agreement.

11.3   Notwithstanding the provisions of this clause 11, upon termination of this Agreement, those provisions of this Agreement which take effect upon or apply following termination of this Agreement and/or regulate the termination of the Services, shall continue in force in respect of those Services which have been terminated or cancelled until such time as the Parties' obligations in respect of the termination or cancellation of those Services have been fully discharged in accordance with this Agreement.

11.4   The Client may stop using the Services at any time. Termination of the Client's account does not relieve the Client of any obligation to pay any outstanding fees.

11.5   The Client may, for any reason whatsoever, terminate this Agreement at any time by giving 1 (one) months' written notice to the other Party, such notice to be given on or before the last Business Day of any calendar month. It should be noted that any Service being provided in terms of a specific Statement of Work is subject to the existence of this Agreement.

11.6   Spike may, at any time, terminate the Client's right to use and access the Services or Software if:

11.6.1   the Client breaches any provision of these terms (or act in a manner that clearly shows the Client does not intend to, or are unable to, comply with these terms);

11.6.2   The Client fails to make timely payment of fees for the Software or the Services, if any;

11.6.3   Spike is required to do so by law (for example, where the provision of the Services or Software to the Client is, or becomes, unlawful);

11.6.4   Spike elects to discontinue the Services or Software, in whole or in part, (such as if it becomes impractical for Spike to continue offering Services in the Client's region due to change of law); or

11.6.5   there has been an extended period of inactivity in the Client's account.

11.7   Spike may modify, update, discontinue or terminate the Services/Software/Agreement (including any of their portions or features) at any time, without liability to the Client or anyone else, by giving 1 (one) months' written notice to the other Party, with such notice to be given on or before the last Business Day of any calendar month.

11.8   This written notice will be provided via the email address the Client has advised Spike which is saved on the given Client's profile.

11.9   Spike does not provide refunds except in cases requested by mandatory law or where otherwise explicitly communicated to the Client. All fees are exclusive of all taxes, levies, or duties imposed by taxing authorities, and the Client shall be responsible for payment of all such taxes, levies, or duties.

11.10   Should the service be terminated by Spike in its entirety, then this notice will include instructions on how to retrieve a refund, if any, which will be calculated pro rata for any unused fees for that Service that the Client may have prepaid.

12   CHANGE MANAGEMENT

12.1   The Parties may mutually agree to change any of the Services or any part thereof, subject to the provisions of this **clause 12 (CHANGE MANAGEMENT section).**

12.2   In respect of any changes requested by the Client, Spike will, within a period agreed between the Parties after notification by the Client, prepare a written proposal, which shall include:

12.2.1   specific details regarding any third-party software and additional infrastructure that will be required to implement the requested change;

12.2.2   an analysis of the impact on the Services and Specifications;

12.2.3   the impact that the change will have on the Charges;

12.2.4   an analysis of the timelines to achieve implementation of the change; and

12.2.5   any other information reasonably requested by the Client.

12.3   The written proposal referred to in **clause 12.2** (**CHANGE MANAGEMENT section)** above shall be valid for 5 (five) Business Days from submission thereof and shall be subject to negotiation. In the event that agreement is reached between the Parties, a new or replacement Statement of Work, whichever is appropriate, incorporating the requested change and the agreed terms shall be prepared and signed off by both Parties and the requested change shall be implemented in accordance with such new or replacement Statement of Work, subject to **clause 12.4** (**CHANGE MANAGEMENT section)** below.

12.4   In the event that any functionality is added to a Deliverable which affects the use of the relevant Deliverable by the Client, the Client shall have the right to conduct Acceptance Testing in accordance with the provisions of **clause 8 (ACCEPTANCE TESTING section)** above.

13   PUBLICITY

Neither Party shall use the name of the other in connection with any advertising or publicity materials without the prior written consent of the other Party. Spike may, however, include the Client's name on its customer list, and, similarly, the Client may, include Spike's name on its list of service providers.

14   **INTELLECTUAL PROPERTY**

14.1   All Intellectual Property Rights vesting in a Party and/or its Affiliates (or the licensors of such Intellectual Property Rights to the relevant Party and/or its Affiliates) as at the Signature Date shall remain vested in such Party, its licensors and/or its Affiliates.

14.2   All Intellectual Property Rights in and to all the Client Data shall at all times vest in and shall remain vested in the Client and Spike may only use the Client Data for purposes of providing the Services and then only in accordance with the terms of this Agreement.

14.3   The Intellectual Property Rights in and to all Spike Tools and Methodologies shall at all times vest in and shall remain vested in Spike.

14.4   Unless otherwise provided for in a Statement of Work, all Intellectual Property Rights in and to all Deliverables shall vest in Spike. To the extent that these Intellectual Property Rights do not vest in Spike by operation of law, the Client hereby cedes, assigns and make over to Spike such Intellectual Property Rights with effect from the date of its inception.

14.5   The Client shall, when called upon to do so by Spike, provide all reasonable documentation, information, materials, cooperation and/or assistance to Spike to enable Spike to prove the subsistence of the Intellectual Property Rights referred to in **clause 14.4 (INTELLECTUAL PROPERTY section)** before any court or wherever such proof may be reasonably required.

15   **WARRANTIES**

15.1   Each of the Parties hereby warrants to and in favour of the other that –

15.1.1   it has the legal capacity and has taken all necessary corporate action required to empower and authorise it to enter into this Agreement;

15.1.2   this Agreement constitutes an agreement valid and binding on it and enforceable against it in accordance with its terms;

15.1.3   the execution of this Agreement and the performance of its obligations hereunder does not and shall not –

15.1.3.1   contravene any law to which that Party is subject;

15.1.3.2   contravene any provision of that Party's constitutional documents; or

15.1.3.3   conflict with, or constitute a breach of any of the provisions of any other agreement, obligation, restriction or undertaking which is binding on it; and

15.1.4   to the best of its knowledge and belief, it is not aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of this Agreement;

15.1.5   it is entering into this Agreement as principal (and not as agent or in any other capacity);

15.1.6   the natural person who signs and executes this Agreement on its behalf is validly and duly authorised to do so;

15.1.7   no other party is acting as a fiduciary for it;

15.1.8   it shall not, without the Disclosing Party's express prior written consent, use any third party Intellectual Property Rights licensed to the Disclosing Party, and that should consent be granted by the Disclosing Party to the Receiving Party to use third party Intellectual Property Rights licensed to the Disclosing Party, the Receiving Party undertakes that it shall only use such Intellectual Property Rights strictly in accordance with the provisions of the relevant consent;

15.1.9   it shall at all times perform its responsibilities under the Agreement in a manner that does not infringe, or constitute an infringement or misappropriation of, any Intellectual Property Rights or other proprietary rights of the other or any third party; and

15.1.10   it is not relying upon any statement or representation by or on behalf of any other Party, except those expressly set forth in this Agreement.

15.2   The Client warrants that it:

15.2.1   shall use reasonable endeavours to prevent unauthorised access to or use of the Services and will immediately notify Spike in the event of such unauthorised access;

15.2.2   shall comply with all applicable laws, carry out its obligations under the Agreement in a timely manner, obtain all necessary licences and consents in order for Spike to perform its obligations under the Agreement;

15.2.3   shall ensure that its network and systems comply with any specifications provided by Spike from time to time; and

15.2.4   shall be responsible for maintaining its network and telecommunications links from the Client Infrastructure to the Spike Infrastructure.

15.3   Spike warrants that it:

15.3.1   shall for the duration of this Agreement use qualified Staff with suitable training, education, experience and skill to perform its obligations under the Agreement and perform its obligations with commercially reasonable efforts, in a workmanlike manner and in accordance with Good Industry Practice;

15.3.2   shall at all times perform its responsibilities under the Agreement in a manner that does not infringe, or constitute an infringement or misappropriation of, any Intellectual Property Rights or other proprietary rights of The Client or any third party;

15.3.3   has in place and will maintain in place all the necessary licenses, certificates, authorisations, permits, type approvals and consents that are required in terms of any applicable laws to provide the Services, and will comply in all material respects with the terms and conditions of its licenses, certificates, authorisations, permits, type approvals and consents, the provisions of the Electronic Communications Act and any other applicable laws, and any ruling or determination made by the authority in respect of the Services;

15.3.4   is and shall remain for the duration of this Agreement, fully cognisant of and compliant with any relevant legislative or regulatory requirements (as may be amended from time to time) and/or rulings or codes of practice of any competent authority or industry body that has jurisdiction over and/or is relevant to the performance of its responsibilities under the Agreement;

15.3.5   shall for the duration of this Agreement comply with any applicable the Client policies, which will be made available to Spike from time to time; and

15.3.6   shall ensure that no Deliverable infringes the Intellectual Property Rights of any third party.

15.4   Each of the representations and warranties given by the Parties in terms of clause 20.1 shall –

15.4.1   be a separate warranty and will in no way be limited or restricted by inference from the terms of any other warranty or by any other words in this Agreement;

15.4.2   continue and remain in force notwithstanding the completion of any or all the transactions contemplated in this Agreement; and

15.4.3   prima facie be deemed to be material and to be a material warranty inducing the other Party to enter into this Agreement.

15.5   Spike does not warranty that the Service provided in accordance with this Agreement will be uninterrupted or error free or that the Service will specifically meet the Client's requirements.

15.6   Except as expressly stated in this Agreement and insofar as permitted by law, the Parties disclaim all statutory and common law warranties.

16   INDEMNITIES

16.1   Each of the Parties hereby indemnifies and agrees to hold the other harmless from any and all Losses which may be suffered as a result of:

16.1.1   any and all claims, proceeding or action brought by a third party relating to the infringement of any Intellectual Property Rights or other proprietary rights of that third party, including misappropriation of trade secrets, arising out of or relating to the Services;

16.1.2   any claim or action whatsoever, including any claim or action arising from a Party's failure to observe or perform any duties or obligation in accordance with any applicable law, licence, certificate and/or authorisation relating to any legislation governing such companies; and/or

16.1.3   any claim or action relating to or arising from the breach of a Party's obligations with respect to Confidential Information of under this Agreement.

17   LIMITATION OF LIABILITY

17.1   The Parties agree that, in the event of a breach of any of the provisions of this Agreement and subject to the remaining provisions of this clause 20, the Party who committed the breach shall be liable to the other Party for all Losses which constitute direct and/or general damages and a Party's liability for Losses of an indirect and/or consequential nature not recoverable at law are hereby excluded.

17.2   Subject to **clauses 17.1 and 17.3 (LIMITATION OF LIABILITY section)**, the Parties agree that the aggregate liability of the Party who committed the breach shall not exceed 100% (one hundred percent) of the Charges paid and/or payable by the Client to Spike under this Agreement during the 12 (twelve) months preceding the Claim.

17.3   The exclusion and limitation as contained in **clauses 17.1 and 17.2 (LIMITATION OF LIABILITY section)**, shall not apply to Losses and Claims resulting from breach of any of clauses on DATA PRIVACY AND PROTECTION, INFORMATION SECURITY AND CONFIDENTIALITY (as stipulated in the separate Privacy Policy document) or to Losses being the subject of the indemnification obligations contained in **clause 16 (INDEMNITIES section)**.

18   BREACH AND TERMINATION

18.1   If either Party commits a breach of this Agreement and, provided that the breach in question is capable of remedy, fails to remedy such breach within 30 (thirty) days of notice thereof from the other, the notifying Party shall be entitled, in addition to any other rights and remedies that it may have in terms of the Agreement or otherwise, to terminate forthwith this Agreement upon written notice to the other, without prejudice to any claims which such Party may have for damages against the other.

18.2   Should the Client be in breach of this Agreement and should Spike terminate this Agreement, as provided for in **clause 18.1 (BREACH AND TERMINATION section)** above, Spike shall be entitled to disable the Client's access to the Services with effect from the date of termination.

18.3   If a Causal Event occurs, the Client shall be entitled, but not obliged, to terminate this Agreement on written notice to Spike, without prejudice to any claims which the Client may have for damages against Spike.

18.4   The termination rights as set out in this **clause 18 (BREACH AND TERMINATION section)** are in addition to and without prejudice to those contained elsewhere in this Agreement.

18.5   Spike shall notify the Client in writing by email immediately upon the occurrence of any Causal Event.

19   DISPUTE RESOLUTION

19.1   In the event of there being any dispute or difference of a technical nature between the Parties arising out of this Agreement, the said dispute or difference may, by written agreement, be referred to an Expert.

19.2   Should the Parties agree to appoint an Expert to adjudicate a technical dispute, the following shall apply:

19.2.1   the Parties shall agree on the identity of the independent Expert and shall agree with the Expert the terms of his/her appointment;

19.2.2   the Expert shall be required to prepare a written decision and give notice (including a copy) of the decision to the Parties within a maximum of 3 (three) months of the matter being referred to the Expert;

19.2.3   all matters under this **clause 19.2 (DISPUTE RESOLUTION section)** must be conducted, and the Expert's decision shall be written, in the English language;

19.2.4   the Parties are entitled to make submissions to the Expert and will provide (or procure that others provide) the Expert with such assistance and documents as the Expert reasonably requires for the purpose of reaching a decision;

19.2.5   to the extent not provided for by this clause, the Expert may in his/her reasonable discretion determine such other procedures to assist with the conduct of the determination as he/she considers just or appropriate.

19.2.6   each Party shall with reasonable promptness supply each other with all information and give each other access to all documentation and Staff as the other Party reasonably requires to make a submission under this **clause 19.2 (DISPUTE RESOLUTION section)**;

19.2.7   the Expert shall act as an expert and not as an arbitrator;

19.2.8   the Expert's written decision on the matters referred to him/her shall be final and binding on the Parties in the absence of manifest error or fraud;

19.2.9   each Party shall bear its own costs in relation to the reference to the Expert;

19.2.10   the Expert's fees and any costs properly incurred by him/her in arriving at his/her determination shall be borne by the Parties equally or in such other proportions as the Expert shall direct;

19.2.11   all matters concerning the process and result of the determination by the Expert shall be kept confidential among the Parties and the Expert; and

19.2.12   each Party shall act reasonably and co-operate to give effect to the provisions of this **clause 19.2 (DISPUTE RESOLUTION section)** and otherwise do nothing to hinder or prevent the Expert from reaching his/her determination.

19.3   Nothing herein contained shall be deemed to prevent or prohibit a Party from applying to the appropriate court for a remedy available to it at law.

20   .**NOTICES AND DOMICILIA**

20.1   The Parties select as their respective *domicilia citandi et executandi* the physical addresses noted on the Cover Page, and for the purposes of giving or sending any notice provided for or required under this Agreement, provided that a Party may change its *domicilium* or its address for the purposes of notices to any other physical address by written email notice to the other Party to that effect. Such change of address will be effective 5 (five) Business Days after receipt of the notice of the change.

20.2   All notices to be given in terms of this Agreement will be given in writing and will –

20.2.1   be delivered by hand courier service or email; and

20.2.2   if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a Business Day will be presumed to have been received on the following Business Day.

20.3   Notwithstanding the above, any notice given in writing, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with **clause 19.1 (DISPUTE RESOLUTION section)**.

21   BENEFIT OF THE AGREEMENT

This Agreement will also be for the benefit of and be binding upon the successors in title and permitted assigns of the Parties or either of them.

22   NON-SOLICITATION

The Parties agree that during this Agreement and for a 1 (one) year after termination of this Agreement, neither Party shall, without the prior written consent of the other Party, engage, employ or otherwise solicit for employment, whether directly or indirectly, any person who, at any time during the term of this Agreement, was a member of either Party's Staff who was directly involved with any activity relating to this Agreement.

23   CHANGES TO THESE TERMS AND CONDITIONS

23.1   We review these Terms and Conditions from time to time to ensure that it reflects our dealings with you, the Client, and accordingly we may, from time to time, amend these Terms and Conditions, in whole or part, in our sole discretion.

23.2   Any changes to these Terms and Conditions will be effective immediately upon the posting of the revised Terms and Conditions on the Website.

23.3   In the event of any material change to these Terms and Conditions, we will announce the change either: (a) on the homepage of the Website, or (b) by email if we have your email address. However, in any event, by continuing to use the Website following any changes, you will be deemed to have agreed to such changes. Accordingly, review the Website page frequently so that you are aware of such changes.

24 GLOSSARY, DEFINITIONS AND INTERPRETATION

24.1   In this Agreement, unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings –

24.1.1   "**Acceptance**" means that a Deliverable or component thereof meets the Acceptance Criteria and that acceptance of such component or Deliverable has occurred;

24.1.2   "**Acceptance Criteria**" means the applicable Specifications and/or standards, which have been developed by Spike and approved by the Client, such other success criteria agreed between the Parties or such criteria that have been specified in communications between the Parties;

24.1.3   "**Acceptance Testing**" means the testing by the Client of a Deliverable or component thereof delivered by Spike, for the purposes of determining whether the Deliverable complies with the Acceptance Criteria and the term "**Acceptance Tests**" shall have a corresponding meaning;

24.1.4   "**Affiliates**" shall mean, with respect to any entity, any other entity that Controls, is Controlled by, or is under common Control with such entity;

24.1.5   "**Agreement**" means this master services agreement (or "MSA" or " Terms and Conditions" or "Terms of Service").

24.1.6   "**API**" means an application programming interface;

24.1.7   "**Business Day**" means any business day other than a Saturday, Sunday or public holiday as gazetted by the government of the Republic of South Africa from time to time;

24.1.8   "**Business Rescue**" has the meaning given to it in section 128(1)(b) of the Companies Act;

24.1.9   "**Causal Event**" means (i) a compromise or composition or threatened compromise or composition by a Party with its creditors; (ii) provisional or final liquidation of a Party or the placement of a Party under judicial management, whether provisionally or finally; (iii) in circumstances where there is a default or cessation or a reasonable prospect of default or cessation (as the case may be) of a Party's normal line of business; (iv) commitment of any act or omission which would, had that Party been an individual, be an act of insolvency in terms of the Insolvency Act, 1936 (as amended); (v) disposal by Spike of a material portion of its undertaking or assets which may impact on its ability to render the Services; (vi) The Client becomes aware that that Spike is Financially Distressed; (vii) Spike is contemplating, considering, discusses or agrees to any Business Rescue or proposes to do any of these things or (vii) any person is proposing to take, or taking, any step to apply to court or actually applies to court for the Business Rescue of Spike;

24.1.10   **"Charges"** means the amounts, fees, and charges payable by the Client to Spike as set out in the relevant Pricing and Payment section of the Website.

24.1.11   **"Chargeable Event"** means any access to the Software as a Service which results in a charge to the Client, as detailed in **clause 11 CHARGES AND PAYMENT TERMS**;

24.1.12   **"Cover Page"** means the cover page to this Agreement, which sets out the full details of Spike;

24.1.13   **"Commencement Date"** means in respect of the relevant Services, the date so indicated in a Statement of Work;

24.1.14   **"Claim"** means a claim, action, demand, suit or proceeding;

24.1.15   **"The Client"** means the Client entity so named on the Cover Page;

24.1.16   **"The Client Data"** means Materials, data or information, including Personal Information, relating to the Client, any of the Client's Affiliates, any of the Client's or its Affiliates' Staff or the Client's or its Affiliates' operations, customers, business or activities, disclosed to Spike under this Agreement or to which Spike may have access to pursuant to this Agreement;

24.1.17   **"The Client Infrastructure"** means the Client's or any of the Client's Affiliate's information technology and telecommunications infrastructure and systems, including computer and telecommunications networks, equipment, hardware, software, middleware, firmware, data, databases, peripherals, terminals and components;

24.1.18   **"Companies Act"** means the Companies Act, 71 of 2008, as amended;

24.1.19   **"Confidential Information"** means any information or data, including any Personal Information, shared by the Disclosing Party which by its nature or content is identifiable as confidential and/or proprietary to the Disclosing Party and/or any third party, or which is provided or disclosed in confidence and which the Disclosing Party or any person acting on its behalf may disclose or provide to the Receiving Party or which may come to the knowledge of the Receiving Party by whatsoever means, including all information relating to the Disclosing Party's current and existing strategic objectives, its business activities, business relationships, technical, scientific, commercial, financial and market information and trade secrets, data concerning its architectural information, demonstrations, processes and machinery, all agreements to which it or its clients is/are a party, information relating to the Services and information relating to its clients and facilities, but specifically excluding information or data which -

24.1.19.1   is lawfully in the public domain at the time of disclosure thereof;

24.1.19.2   subsequently becomes lawfully part of the public domain by publication or otherwise;

24.1.19.3   becomes available from a source other than one of the Parties which is lawfully entitled without

any restriction on disclosure to disclose such Confidential Information; and

24.1.19.4   is disclosed pursuant to a requirement or request by operation of law, regulation or court order;

24.1.20   "**Control**" means the ability, by virtue of ownership, right of appointment, right to control election or appointment, voting rights, the ability to control the exercise of voting rights, management agreement, or agreement of any kind, to control or direct, directly or indirectly, the board or executive body or decision-making process or management of such entity;

24.1.21   "**Data Protection Legislation**" means any applicable data protection or data privacy laws applicable in South Africa or any other jurisdiction in which the Services may be provided from time to time and shall include the Protection of Personal Information Act, 4 of 2013;

24.1.22   "**Deficiency**" **or** "**Deficiencies**" means the occurrence of any error, problem, non-conformity or deficiency, fault or defect in relation to a Deliverable which results in the Deliverable in question not conforming with its Specifications in all material respects identified during Acceptance Testing;

24.1.23   "**Deliverables**" means the output of the Services as described in a Statement of Work;

24.1.24   "**Disclosing Party**" means either Party and/or any third party to the extent that it discloses any Confidential Information in terms of this Agreement;

24.1.25   "**Effective Date**" means the date the Client commences paying Charges for Spike's Services and Software;

24.1.26   "**End Date**" means in respect of the relevant Services, the date so indicated in a Statement of Work;

24.1.27   "**Expert**" means a duly qualified and experienced individual appointed by the Parties pursuant to **clause 19.2** to resolve a dispute of a technical nature in accordance with the provisions of **clause 19.2**;

24.1.28   "**Financially Distressed**" shall be defined in terms of section 128(1)(f) of the Companies Act, and "**Financial Distress**" shall have a corresponding meaning;

24.1.29   "**Good Industry Practice**" means in relation to an obligation, undertaking, activity or a service, the exercise of the degree of skill, speed, care, diligence, judgement, prudence and foresight and the use of current practices, controls, systems, technologies and processes, which would be expected of a skilled, experienced and market leading software developer or service provider (as applicable) performing the same or similar obligation, undertaking, activity, or service, and utilising and applying skilled resources with the requisite levels of expertise;

24.1.30   "**Intellectual Property Rights**" includes all current and future intellectual property rights of any kind whatsoever and however embodied which may subsist or be capable of protection wheresoever in the world, including (without limitation) patents, trademarks, present and future rights of copyright,

rights in and to designs, rights in and to inventions, topography rights, rights in and to trade secrets, rights in and to trade names, business names, domain names and logos, the right to keep information confidential and private, rights in and to know-how, rights in and to databases (including rights of extraction), and all rights and forms of protection of a similar nature or having equivalent effect to any of them which may subsist or be capable of protection as at the Signature Date or thereafter wheresoever in the world, whether or not any of these is registered and including applications for any such rights or registration thereof and any goodwill related to or arising from such rights;

24.1.31   "**Losses**" means all losses, liabilities, costs, expenses, fines, penalties, damage, damages and claims, and all related costs and expenses (including reasonable legal fees on the scale as between attorney and own client, tracing and collection charges, reasonable costs of investigation, as awarded by a competent court);

24.1.32   "**Material**" means all reports, documentation, information, software or inventions in material form, irrespective of the media on which they occur, and includes, without limiting the generality thereof, all written and printed material, all micro-graphic and other reproductions of the written word, depiction and pictorial material, and all audio-visual, machine-readable and other information;

24.1.33   "**Milestone**" means each of the milestones in respect of the delivery of the relevant Deliverable by Spike to the Client, as specified in a Statement of Work;

24.1.34   "**Milestone Date**" means each of the dates specified in a Statement of Work for the achievement of the relevant Milestones;

24.1.35   "**Parties**" means the Client and Spike collectively and "**Party**" shall mean any one of them as determined by the context;

24.1.36   "**Personal Information**" has the meaning given to it in the Protection of Personal Information Act, 4 of 2013;

24.1.37   "**Prime Rate**" means the publicly quoted Prime Rate of interest (expressed as a percentage per annum) from time to time charged by the Standard Bank of South Africa Limited, as certified by any Manager of such bank, whose appointment and authority it shall not be necessary to prove, calculated daily and compounded monthly interest in arrears;

24.1.38   "**Rand**" or "**R**" means South African Rand, the lawful currency of the Republic of South Africa;

24.1.39   "**Receiving Party**" means the Party, other than the Disclosing Party, to the extent that it receives any Confidential Information from the Disclosing Party;

24.1.40   "**Services**" means the professional services, Software as a Service, hosting services, work, tasks, obligations and activities to be performed or required to be performed by Spike, as set out in a

Statement of Work;

24.1.41   "**Software as a Service**" means the Spike API, which supports the pdf processing and web scraping functions for the extraction of banking transaction data;

24.1.42   "**Specifications**" means the function and technical specifications for the Deliverables;

24.1.43   "**Spike**" means the entity so named on the Cover Page;

24.1.44   "**Spike Infrastructure**" means the Spike information technology and telecommunications infrastructure and systems, including computer and telecommunications networks, equipment, hardware, software, middleware, firmware, data, databases, peripherals, terminals and components;

24.1.45   "**Spike Software**" means any software that is proprietary to Spike or any third party and which Spike gives the Client access to under and in accordance with the terms of the relevant Statement of Work;

24.1.46   "**Spike Tools and Methodologies**" means any and all Materials that are owned or acquired by Spike or licensed to Spike by third parties and that are used by Spike and its Staff in providing the Services and shall include the Spike Infrastructure;

24.1.47   "**Staff**" means any natural person who is either an employee, consultant or subcontractor of either Party or its Affiliates, and where the context requires, employees, consultants and subcontractors of a subcontractor;

24.1.48   "**Statement of Work**" (or "SoW") means an agreement entered into between the Client and Spike in respect of the provision of Services.

24.1.49   "**Support Services**" means the maintenance and support services to be provided by Spike to the Client in respect of the Spike Software in accordance with the terms in a separately agreed Service Level Agreement (or "SLA")

24.1.50   "**VAT**" means value-added tax, chargeable under the Value-Added Tax Act, 1991; and

24.2   In this Agreement -

24.2.1   clause headings and the heading of the Agreement are for convenience only and are not to be used in its interpretation;

24.2.2   an expression which denotes -

24.2.2.1   any gender includes the other genders;

24.2.2.2   a natural person includes a juristic person and *vice versa*;

24.2.2.3   the singular includes the plural and *vice versa*;

24.2.2.4   a Party includes a reference to that Party's successors in title and assigns allowed at law; and

24.2.2.5   a reference to a consecutive series of two or more clauses is deemed to be inclusive of both the first and last-mentioned clauses.

24.3   Any reference in this Agreement to –

24.3.1   "**business hours**" shall be construed as being the hours between 09h00 and 17h00 on any Business Day and "**days**" shall be construed as calendar days unless qualified by the words "**Business Day**" as defined;

24.3.2   "**laws**" means all applicable constitutions, statutes, regulations, by-laws, codes, ordinances, decrees, rules, judicial, arbitral, administrative, ministerial, departmental or regulatory judgements, orders, decisions, rulings, or awards, policies, voluntary restraints, guidelines, directives, compliance notices, abatement notices, agreements with, requirements of, or instructions by any Governmental Body, and the common law, and "**law**" shall have a similar meaning;

24.3.3   references to "**reasonable endeavours**" shall mean taking such steps and performing in such a manner as a well-managed company operating in the regulated financial services industry would undertake where such company was acting in a determined, prudent and reasonable manner to achieve the particular result; and

24.3.4   "**person**" means any person, company, close corporation, trust, partnership or other entity whether or not having separate legal personality.

24.4   The words "**include**" and "**including**" mean "**include without limitation**" and "**including without limitation**". The use of the words "**include**" and "**including**" followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it.

24.5   Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in this **clause 24** or elsewhere in this Agreement, shall be given effect to as if it were a substantive provision in the body of the Agreement.

24.6   Words and expressions defined in any clause shall, unless the application of any such word or expression is specifically limited to that clause, bear the meaning assigned to such word or expression throughout this Agreement.

24.7   Unless otherwise provided, defined terms appearing in this Agreement in title case shall be given their meaning as defined, while the same terms appearing in lower case shall be interpreted in accordance with their plain English meaning.

24.8   A reference to any statutory enactment shall be construed as a reference to that enactment as at the Signature Date and as amended or substituted from time to time.

24.9   Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

24.10   If the due date for performance of any obligation in terms of this Agreement is a day which is not a Business Day then (unless otherwise stipulated) the due date for performance of the relevant obligation shall be the immediately preceding Business Day.

24.11   Where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention.

24.12   The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting of this Agreement, shall not apply.

24.13   No provision of this Agreement shall (unless otherwise stipulated) constitute a stipulation for the benefit of any person (*stipulatio alteri*) who is not a Party to this Agreement.

24.14   Any reference in this Agreement to "**this Agreement**" or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document, as amended, varied, novated or supplemented from time to time.

24.15   In this Agreement the words "**clause**" or "**clauses**" refer to clauses of this Agreement.

24.16   Technical terms that are not defined in **clause 24.1** have the generally understood meaning in the information technology industry.