zingfit.

USER TERMS & CONDITIONS

1. **GENERALLY.**
   a. Unless a certain paragraph herein is expressly designated as only applying to a particular agreement, then these User Terms & Conditions shall apply equally to all zingfit agreements, which incorporate these User Terms & Conditions by reference, including but not limited to the App Hosting Agreement and the API Agreement.

2. **DEFINITIONS.**
   a. Capitalized terms are defined in the Glossary which can be located at the following URL: http://www.zingfit.com/legal-docs/glossary-terms/.

3. **TRIAL AND BETA SERVICES.**
   a. zingfit may in its sole discretion offer trial services or beta services from time to time at no charge (e.g., whether part of the zingfit System or its hosting service or otherwise) which are clearly marked as trial or beta and to which an End User may subscribe, and if an End User so subscribes then any trial or beta services are provided "AS IS" with no warranties of any kind. zingfit may discontinue any trial or beta services at any time, with or without notice and without any further obligation to any End User. zingfit will have no liability for any harm or damages suffered by any End User or any third Party in connection with any trial or beta services.

4. **THIRD-PARTY APPLICATIONS.**
   a. The zingfit System and Services may permit End Users to access certain Third-Party Applications, however, Third-Party Applications are not part of the zingfit System, the API or Services or any other services under the App Hosting Agreement, and none of zingfit's warrantees or obligations shall extend to such Third Party Applications.

   b. The availability of any Third-Party Applications through the zingfit System (or the API) does not imply zingfit's endorsement of or affiliation with the provider. zingfit does not control Third-Party Applications. Zingfit shall have no liability to End Users or their Affiliates or Consumers for or in connection with any Third Party Application.

   c. zingfit has no obligation to monitor or maintain Third-Party Applications, and zingfit in its commercially reasonable discretion may disable or restrict access to any Third-Party Applications at any time. By using or enabling any Third-Party Applications, each End User expressly permits zingfit to disclose Client Data or other information to the extent necessary to utilize Third-Party Applications.

   d. END USER'S USE OF THIRD-PARTY APPLICATIONS IS AT END USER'S OWN RISK AND IS SUBJECT TO ANY ADDITIONAL TERMS, CONDITIONS AND POLICIES APPLICABLE TO SUCH THIRD-PARTY APPLICATION (SUCH AS TERMS OF SERVICE OR PRIVACY POLICIES OF THE PROVIDERS OF SUCH THIRD-PARTY APPLICATION).

5. **END USER'S RESPONSIBILITIES**
   a. Access to zingfit System. Each End User's ability to use the zingfit System is conditioned upon and will depend upon the End User's material performance of End User's responsibilities as set forth in any agreement with the zingfit, including but not limited to the App Hosting Agreement (including all

schedules – e.g., Integration, Customization, etc.), the API Agreement and/or any nondisclosure agreement.

b. <u>Account Information</u>. Each End User agrees to provide zingfit with complete and accurate account information, including such End User's legal company name, street address, e-mail address, and such other contact information as may be requested by zingfit. Each End User is responsible for keeping such End User's account information up to date, and each End User agrees to promptly notify zingfit in writing if any information changes.

c. <u>Liability for Affiliates and Consumers</u>. Each End User is responsible for all activity occurring under its account. Each End User shall not falsely register its account or falsely transmit any data relating to any other End User or person by intentionally or recklessly using fictitious or incorrect data, and each Client shall take reasonable steps to ensure that its Consumers do not submit false, fictitious or incorrect information to the zingfit System.

d. <u>Client End Users</u>. Each Client will ensure that Client's Affiliates and Consumers who are using the zingfit System pursuant to App Hosting Agreement and Consumers comply with all of the provisions of the App Hosting Agreement and any applicable local, state, national and foreign laws, including those related to data privacy and transmission of personal data, at all times while using the zingfit System. Any reference in the App Hosting Agreement to Client's "access" or "use" of the zingfit System, the API or any Third Party Application (or similar phrase) is deemed to include access or use by Affiliates or Consumers, and any act or omission of an Affiliate or Consumer that if undertaken by Client would be a breach of the App Hosting Agreement will be deemed a breach of the App Hosting Agreement by Client. Additionally, Client will take commercially reasonable steps to ensure that Consumers comply with all provisions of the App Hosting Agreement and any applicable local, state, national and foreign laws, including those related to data privacy and transmission of personal data, at all times while using the zingfit System.

e. <u>Restrictions on Use</u>. Each End User and their Affiliates who are using the zingfit System pursuant to the App Hosting Agreement or the API Agreement will not: (i) submit any infringing, obscene, defamatory, threatening, or otherwise unlawful or tortious material to the zingfit System, the API or on the Hosted Webpages, including material that violates privacy rights; (ii) recklessly interfere with or disrupt the integrity or performance of the zingfit System, the API or Services or the data contained therein; (iii) attempt to gain access to the zingfit System, the API or Services or related systems or networks in a manner not permitted by the App Hosting Agreement or the API Agreement; (iv) post, transmit or otherwise make available through or in connection with the zingfit System, the API or Services any virus, worm, Trojan horse, Easter egg, time bomb, spyware or other harmful computer code, files, scripts agents or programs; (v) recklessly restrict or inhibit any other person or entity from using the zingfit System or Services; (vi) remove any copyright, trademark or other proprietary rights notice from the zingfit System or Services; (vii) frame or mirror any portion of the zingfit System or Services, or otherwise incorporate any portion of the zingfit System, the API or Services into any product or service, other than Client's websites and mobile apps which are contemplated to integrate with the zingfit System, API and/or Services hereunder; (viii) systematically download and store any content related to the zingfit System or Services[, other than any standard reporting made available to Client via the zingfit System and/or Services]; or (ix) use any robot, spider, site search/retrieval application or other manual or automatic device to retrieve, index, "scrape," "data mine" or otherwise gather content from the zingfit System or Services, or reproduce or circumvent the navigational structure or presentation of the zingfit System or Services. Notwithstanding the above, and subject to compliance with any instructions posted by zingfit or otherwise provided to each End User by zingfit, zingfit grants to the operators of public search engines permission to use spiders to copy materials from the Hosted Webpages for the sole purpose of (and solely to the extent necessary for) creating publicly available, searchable indices of such materials, but not caches or archives of such materials. zingfit reserves the right to revoke these permissions at any time and without notice.

f. <u>Personally Identifiable Information</u>. Client and/or API User agree(s) that they and their Affiliates will comply with all applicable PCI DSS and/or any governmental regulations – which address processing of electronic payments, debit or credit cards at anytime such Client or API User uses the zingfit System, the API or the Services to process credit cards. zingfit shall be solely liable if any Personally Identifiable Information is mishandled by zingfit, its, System or Services. However, Client and/or API User are solely liable

    i. if any Personally Identifiable Information is mishandled by Client under either the Client's account or the API User's account, and/or

    ii. for any damages or claims resulting from such Client's or such API User's (or any of their Affiliate's) handling of Personally Identifiable Information.

g. <u>PII – Consumer Names and Passwords</u>. Client and API Users will ensure all PII provided by Consumers in association with such Consumer's account (including but not limited to Consumer user names and passwords - e.g., so as to access the zingfit System, the API or otherwise-- are kept confidential. zingfit may reject or require that Client or any API User change any user name or password under their respective accounts. User names and passwords are for internal business use only and may not be shared with any third Party. Client and/or API User, but not zingfit, is/are solely responsible for any use or misuse of user names or passwords associated with Client's or API User's account.

h. <u>Export Controls</u>. Client, API User and any End User will comply with all applicable export laws and restrictions and regulations of the US Department of Commerce, the US Department of Treasury Office of Foreign Assets Control, or other United States or foreign agency or authority, and Client, API User and/or End User will not use the zingfit System, the API or Services to export, or allow any export or re-export in violation of any such restrictions, laws or regulations. Client, API User and/or End User represents and warrants to zingfit that Client, API User and/or End User is not a prohibited Party or located in, under the control of, or a national or resident of any restricted country, and that Client, API User and/or End User will otherwise comply with all applicable export control laws. If Client, API User and/or End User resides outside the United States, then in addition to complying with the foregoing, Client, API User and/or End User will comply with any relevant export control laws in their respective local jurisdiction.

i. <u>API or Third-Party Software Used by Client or API User</u>. Client and/or API User is solely responsible (and shall hold zingfit harmless) for using and/or maintaining any third-party software or application programming interfaces that Client and/or API User uses in conjunction with the Hosted Webpages or that it may use to interact with the zingfit System or API.

6. INTELLECTUAL PROPERTY RIGHTS

a. <u>zingfit IP</u>. zingfit owns all rights or title to and interest in the zingfit System, including but not limited to the zingfit Marks and the zingfit Data. Subject to the limited rights expressly granted to Client under any agreement (including the API Agreement or the App Hosting Agreement), zingfit reserves all rights, title and interest in and to (including without limitation all related intellectual property rights) the zingfit System, the zingfit Marks, the API, the Services and the zingfit Data. Except as provided in the App Hosting Agreement or the API Agreement, Client and/or API User (as the case might be) agrees not to display or use any zingfit Marks in any manner without zingfit's express prior written permission. Any trademarks, service marks and logos associated with a Third Party Application may be the property of the third Party provider, and Client and/or API User should consult with their trademark guidelines before using any of their marks.

b. <u>Developed Features</u>. All software or code used or developed by zingfit (at any time), all zingfit Data, the API and the zingfit System are and shall at all times remain the sole and exclusive property of

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zingfit and are protected by applicable intellectual property laws and treaties, unless otherwise set forth in a writing mutually agreed to by the Parties.

c. Restrictions. Client and/or API User will not: (a) modify, copy or create any derivative works based on the zingfit System, the API or Services ; (b) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share, offer in a service bureau, or otherwise make the zingfit System, the API or Services available to any third Party, other than to Affiliates and Consumers as permitted herein; (c) reverse engineer or decompile any portion of the zingfit System, the API or Services , including but not limited to, any software utilized by zingfit in the provision of the zingfit System, the API or Services ; (d) access or use (or allow a third Party to access or use) the zingfit System, the API or Services for competitive analysis or to build any competing products or services; (e) copy any features, functions, integrations, interfaces or graphics of the zingfit System, the API or Services ; (f) otherwise use or exploit the zingfit System, the API or Services in any manner not expressly permitted by the App Hosting Agreement, or (g) allow any third Parties to access or use the zingfit System, the API or Services other than in furtherance of the App Hosting Agreement.

d. License to zingfit. Client and/or API User grants zingfit permission to use, and to modify, and copy any End User's feedback in connection with providing the zingfit System, API or Services to Consumers or End Users and for general marketing purposes, to the extent such feedback does not constitute Confidential Information of the Client or otherwise directly or indirectly identify Client or any of its brands or businesses. Client and/or API User hereby grants to zingfit and its Affiliates permission to modify, copy, distribute and incorporate into the zingfit System, API or Services (without attribution of any kind) any suggestions, enhancement request, recommendations, proposals, correction or other feedback or information provided by Client, an End User, or Affiliates of Client or End User relating to the zingfit System, the API the Services or zingfit's business, to the extent such (i) does not constitute Client Confidential Information otherwise directly or indirectly identify Client or any of its brands or businesses and (ii) to use Client's or API User's Service Marks in connection with providing the zingfit System, the API, the Services and/or for marketing and promotional purposes in connection with zingfit's business. Other than those rights specifically granted to zingfit herein, all right, title and interest in and to Client's and/or API User's Service Marks are expressly reserved by any Client and/or API User.

7. DATA

a. Client Data. Client owns all right, title and interest in Client Data. Client hereby grants to zingfit a limited, nonexclusive, non-transferable, non-sublicensable, fully paid-up and royalty-free license and right -- which will inure to the benefit of any successors in interest -- to copy, distribute, display and perform, publish, prepare derivative works of and otherwise use Client Data solely as necessary to providing, improving and developing zingfit's products and services as set forth in App Hosting Agreement . Client represents and warrants to zingfit that Client has all rights necessary to grant the licenses in this Paragraph, and that Client's provision of Client Data through and in connection with the zingfit System and Services does not violate any applicable laws or rights of any third Party. Client further represents and warrants that the matter in which it uses and/or maintains Client Data does not violate zingfit's Privacy Policy and/or Security Requirements as such exist as of the date hereof. Client will: (i) have sole responsibility for the accuracy and quality of its Client Data and for ensuring that Client's collection and use of its Client Data complies with applicable laws, including those related to data privacy and transmission of personal data; (ii) prevent unauthorized access to, or use of, the zingfit System, and notify zingfit promptly of any unauthorized access or use by its Affiliates; and (iii) have sole responsibility for obtaining, maintaining and paying for any hardware, telecommunications, Internet and other services needed to use the zingfit System.

b. zingfit Data. Notwithstanding anything herein to the contrary, all right, title and interest in zingfit Data will be solely owned by zingfit.

c. <u>Consumer Data</u>. Client will own all Consumer Data, unless (i) certain Consumer Data also qualifies as Aggregator Data, and (ii) Client and Aggregator have agreed that Aggregator shall own the Aggregator Data. To the extent that Client owns Consumer Data, Client grants zingfit an irrevocable and perpetual license to use the Consumer Data in accordance with the zingfit Policies and these User Terms & Conditions. Client agrees that zingfit is entitled to use Consumer Data for any purpose, provided such Consumer Data does not reveal any Personally Identifiable Information about Client or any Consumers. Client further represents and warrants that the matter in which it uses and/or maintains Consumer Data does not violate zingfit's Privacy Policy and/or Security Requirements.

d. <u>Aggregator Data</u>.

    i. To the extent of Aggregator's interest in Aggregator Data, Aggregator

        1. grants to zingfit a nonexclusive, worldwide, assignable, sublicensable, fully paid-up and royalty-free license and right to copy, distribute, display and perform, publish, prepare derivative works of and otherwise use Aggregator Data for the purposes of providing, improving and developing zingfit's products and services and/or complementary products and services - provided however that such Aggregator Data does not reveal any Personally Identifiable Information about Client, Aggregator or any Consumers; and

        2. represents and warrants to zingfit that Aggregator has all rights necessary to grant the licenses in this Paragraph and the provision of Aggregator Data through and in connection with the zingfit System and Services does not violate any applicable laws or rights of any third Party.

    ii. Aggregator further represents and warrants that the matter in which it uses and/or maintains Aggregator Data does not violate zingfit's Privacy Policy and/or Security Requirements.

e. <u>HIPAA</u>. HIPAA imposes rules to protect certain Personal Health Information (or "PHI"). If Client, API User or any of their Affiliates is subject to HIPAA, prior to accessing or using the zingfit System, API or Services, Client or API User must notify zingfit and enter into a "Business Associate Agreement" (as defined under HIPAA) in the form as provided by zingfit. Client and/or API User is solely responsible for determining whether such Client and/or API User (or any their Affiliates) is subject to HIPAA.

f. <u>Protection and Security Under the App Hosting Agreement</u>. During the Subscription Term (as set forth in the App Hosting Agreement) and in accordance with applicable law and reasonable industry standards, zingfit will

    i. maintain administrative, physical and technical safeguards designed for the protection and integrity of Client Data, Consumer Data and Personally Identifiable Information; and

    ii. maintain PCI DSS compliance for the portions of the Services that store and process Personally Identifiable Information.

g. <u>Unauthorized Disclosure</u>. If any Party believes that there has been an unauthorized disclosure of Client Data, Consumer Data, Aggregator Data or Personally Identifiable Information in a manner not authorized under the App Hosting Agreement or the API Agreement, then such Party will promptly notify the other Party. Additionally, each Party will reasonably assist the other Party in remediating or mitigating any potential damage, including any notification which should be sent to individuals impacted or potentially impacted by such unauthorized disclosure.

h. <u>Data-Related Disputes of Client under the App Hosting Agreement</u>. Client is solely responsible for resolving disputes regarding ownership, use of or access to Client Data or Client Software, including those involving any current or former owners, co-owners, employees or contractors of Client's business. Client acknowledges and agrees that zingfit has no obligation whatsoever to resolve or intervene in such disputes.

i. <u>Data-Related Disputes of API User under the API Agreement</u>. API User is solely responsible for resolving disputes regarding ownership, use of or access to Consumer Data (or Aggregator Data if API User is an Aggregator) or its API User's Application(s), including those disputes involving any current or former owners, co-owners, employees or contractors of API User's business. API User acknowledges and agrees that zingfit has no obligation whatsoever to resolve or intervene in such disputes.

8. LIMITED WARRANTY UNDER THE APP HOSTING AGREEMENT AND API AGREEMENT.

The warranty provided under this paragraph applies to the App Hosting Agreement and the API Agreement, unless specifically provided for otherwise.

a. zingfit warrants to Client that during a Subscription Term the zingfit System, the API and Services (including any customization performed by zingfit during or as part of the Integration) will (i) perform materially in accordance with the functionality described in the documentation applicable to such API, zingfit System and/or Services; (ii) be compliant with all applicable law; and (iii) not be materially alter or diminish the API, the zingfit System and Services during the Subscription Term. For clarity, this warranty will not apply to the any trial or beta services or any Third-Party Applications.

b. zingfit will have no obligation with respect to a warranty claim under this Paragraph unless notified by Client in writing no later than thirty (30) days after the first instance of any material functionality problem.

c. The limited warranty under this Paragraph shall not apply and zingfit shall not be responsible for any problem in the operation of the API, the zingfit System and/or Services, including any problem that would otherwise be a breach of the warranty provided for in this Paragraph, which is caused by any of the following: (i) changes in the operating characteristics of the internet (in general) or Client's or an End User's computer hardware, network(s), or operating systems, (ii) interaction of the API, the zingfit System and/or Services with software not supplied or approved by zingfit, (iii) any accident, abuse, or misapplication on behalf of Client or an End User, or (iv) the an occurrence of a Force Majeure Event. Additionally, the limited warranty under this Paragraph shall not apply if Client or End User fails to use the subscribed API, the zingfit System and/or Services in material accordance with the API Agreement and/or the App Hosting Agreement and/or any applicable laws.

d. Client's sole and exclusive remedy for a breach of this warranty will be that zingfit will use commercially reasonable efforts to modify the applicable API, the zingfit System and/or Services to achieve the functionality described above. If zingfit is unable to restore such functionality, Client may terminate the App Hosting Agreement by providing written notice to zingfit, and Client will be entitled to receive, and zingfit shall promptly pay to Client, a pro-rata refund of any pre-paid fees (e.g., representing the period of time during which the zingfit System and/or Services failed to achieve the described functionality).

e. Notwithstanding the preceding, the warranty provided in this paragraph does not apply to service-level availability or uptime. The exclusive warranty and remedies with respect to service-level availability and uptime is set forth and governed by the Service Level Agreement.

f. EXCEPT AS EXPRESSLY PROVIDED IN THE APP HOSTING AGREEMENT AND/OR THE API AGREEMENT (AS THE CASE MAY BE), TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION ANY WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE ZINGFIT SYSTEM, THE API, SERVICES, INTEGRATION AND/OR RELATED DOCUMENTATION. EXCEPT AS EXPRESSLY PROVIDED IN THE APP HOSTING AGREEMENT AND/OR THE API AGREEMENT (AS THE CASE MAY BE), ZINGFIT DOES NOT WARRANT THAT CLIENT'S OR AN END USER'S USE OF THE API, THE ZINGFIT SYSTEM OR SERVICES WILL BE SECURE, TIMELY, ERROR-FREE OR UNINTERRUPTED, OR THAT THE API AND THE ZINGFIT SYSTEM ARE OR WILL REMAIN UPDATED, COMPLETE OR CORRECT, OR THAT THE API AND THE ZINGFIT SYSTEM AND/OR SERVICES WILL MEET CLIENT'S REQUIREMENTS OR THAT THE API AND/OR THE SYSTEMS THAT MAKE THE ZINGFIT SYSTEM AND/OR SERVICES AVAILABLE (INCLUDING WITHOUT LIMITATION THE INTERNET, OTHER TRANSMISSION NETWORKS, AND CLIENT'S LOCAL NETWORK AND EQUIPMENT) WILL BE UNINTERRUPTED OR FREE FROM VIRUSES OR OTHER HARMFUL COMPONENTS. EXCEPT AS EXPRESSLY PROVIDED IN THE APP HOSTING AGREEMENT AND/OR THE API AGREEMENT (AS THE CASE MAY BE), THE API, THE ZINGFIT SYSTEM, THE SERVICES, ALL INTEGRATION, ALL CUSTOMIZATION ALL THIRD-PARTY APPLICATIONS AND/OR ALL THIRD PARTY SERVICES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS AND SOLELY FOR CLIENT'S OR API USER'S USE IN ACCORDANCE WITH THE APP HOSTING AGREEMENT OR THE API AGREEMENT. ALL DISCLAIMERS OF ANY KIND (INCLUDING IN THIS PARAGRAPH AND ELSEWHERE IN THE APP HOSTING AGREEMENT OR THE API AGREEMENT) ARE MADE ON BEHALF OF ALL OF THE ZINGFIT PARTIES (SEE GLOSSARY FOR A DEFINITION OF "ZINGFIT PARTIES").

9. LIMITATION OF LIABILITY

a. <u>GENERAL DISCLAIMER</u>. FOR CLARITY THIS PARAGRAPH 9 (INCLUDING ALL OF ITS SUBPARAGRAPHS) APPLIES TO THE API AGREEMENT AND THE APP HOSTING AGREEMENT. ZINGFIT EXPRESSLY DISCLAIMS ANY AND ALL LIABILITY, AND THE PARTIES AGREE THAT ZINGFIT WILL NOT BE RESPONSIBLE FOR ANY DAMAGES OR LOSS CAUSED, OR ALLEGED TO BE CAUSED, BY THE TRANSMISSION OF PERSONALLY IDENTIFIABLE INFORMATION PRIOR TO ITS ENCRYPTION AND RECEIPT BY SERVER(S) OWNED OR CONTROLLED BY ZINGFIT. THESE EXCLUDED DAMAGES WILL INCLUDE, WITHOUT LIMITATION, DAMAGES RESULTING FROM FRAUD, EMBEZZLEMENT, THEFT, IDENTITY THEFT, OR INVASION OF PRIVACY.

b. <u>THIRD-PARTY APPLICATIONS AND THIRD-PARTY SERVICES.</u> CLIENT AND/OR API USER AGREES TO HOLD ZINGFIT HARMLESS WITH RESPECT TO ANY CLAIMS ATTRIBUTABLE TO ANY THIRD-PARTY APPLICATIONS AND/OR ACTIVITIES OR SERVICES OF A THIRD PARTY PERFORMED ON BEHALF OF THE CLIENT AND/OR API USER . FOR ANY DAMAGES ARISING FROM ANY THIRD-PARTY APPLICATIONS AND/OR SUCH ACTIVITIES OR SERVICES OF A THIRD PARTY AND/OR API USER, CLIENT SHALL LOOK SOLELY TO THE THE PROVIDER OF SUCH THIRD-PARTY APPLICATIONS AND/OR THIRD PARTY SERVICES.

c. <u>RELATED TO THE ZINGFIT SYSTEM, THE SERVICES OR THE API</u>. EXCEPT FOR OBLIGATIONS RELATED TO THE PROTECTION AND SECURITY OF PERSONALLY

IDENTIFIABLE INFORMATION OR OBLIGATIONS TO INDEMNIFY THIRD PARTY CLAIMS (WHICH SHALL BE LIMITED TO A MAXIMUM OF $1 MILLION IN AGGREGATE LIABILITY TO ZINGFIT), TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL ZINGFIT'S AGGREGATE LIABILITY COLLECTIVELY, FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THE API AGREEMENT AND/OR THE APP HOSTING AGREEMENT, WHETHER IN CONTRACT, TORT OR OTHERWISE, EXCEED THE TOTAL FEES ACTUALLY RECEIVED BY ZINGFIT DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE INCIDENT – WHETHER FOR SERVICES UNDER THE SUBSCRIPTION PLANOR USAGE OF THE API. ALL LIMITATIONS OF LIABILITY OF ANY KIND AS PROVIDED FOR IN THIS PARAGRAPH SHALL APPLY WITH RESPECT TO BOTH ZINGFIT AND ANY ZINGFIT PARTIES.

d. <u>NO INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES.</u>IN NO EVENT WILL ANY ZINGFIT PARTIES HAVE ANY LIABILITY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, HOWEVER CAUSED, OR FOR ANY LOST PROFITS, LOSS OF USE, DATA OR OPPORTUNITIES, COST OF DATA RECONSTRUCTION, COST OR PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, WHETHER IN CONTRACT, TORT, BREACH OF WARRANTY OR OTHERWISE, ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THE ZINGFIT SYSTEM, THE API, THE SERVICES OR THIRD PARTY OFFERINGS, INCLUDING BUT NOT LIMITED TO THE USE OR INABILITY TO USE THE ZINGFIT SYSTEM, THE API, AND/OR THE SERVICES AS WELL AS ANY INTERRUPTION, INACCURACY, ERROR OR OMISSION OF THE FOREGOING, EVEN IF ZINGFIT, ITS LICENSORS OR SUBCONTRACTORS HAVE BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES.

e. <u>Damages Related to Credit Card Processing</u>. To the extent permitted by law, in the event that a third party – regardless of whether such third-party is unrelated to zingfit or is an Affiliate of zingfit – provides payment processing (whether the processing is of a credit card, ACH payment or bank account payment) of transactions for the benefit of Client ("Payment Processor"), Client's sole remedies for any damages arising from or related to payment processing of transactions – whether in contract, tort or otherwise – are with such Payment Processor and must be pursued with such Payment Processor according to the terms (if any) and/or legal remedies available between Client and Payment Processor. Accordingly, Client and/or API User agrees to hold zingfit harmless for any damages or Claims arising from or attributable to such Payment Processor

f. <u>Aggregator Data</u>. Client agrees to hold zingfit harmless with respect to any claims attributable to Aggregator Data, and Client shall look solely to the Aggregator for compensation for such claims.

g. <u>INSURANCE STOPGAP</u>. EXCEPT FOR INSTANCES OF RECKLESS ACTION OR INACTION OR INTENTIONAL MISCONDUCT, AND IN ADDITION TO ALL OF THE OTHER LIMITATIONS SET FORTH IN THIS PARAGRAPH 9, IN NO EVENT SHALL ZINGFIT'S AGGREGATE LIABILITY – WHETHER IN CONTRACT, TORT OR OTHERWISE – EXCEED THE SUM OF $1 MILLION ("<u>INSURANCE LIMITATION</u>"). THE FOREGOING INSURANCE LIMITATION HAS BEEN NEGOTIATED SO AS NOT TO EXCEED INSURANCE COVERAGE PROVIDED BY ZINGFIT, BECAUSE SUCH EXCESS COULD CAUSE ZINGFIT TO CEASE BUSINESS OPERATIONS.

10. INDEMNIFICATION

a. <u>Generally</u>. To the maximum extent permitted by applicable law, each Client and/or API User agrees to hold harmless, and indemnify zingfit and its subsidiaries, Affiliates, officers, agents, licensors, co-branders or other partners, and employees (collectively referred to herein as the "<u>Indemnitee</u>") from

and against any third-party claims arising from or in any way related to Client's and/or API Users' (as well as any of Client's Affiliates or Third Party Providers) tortious acts or omissions, including any liability or expense arising from all claims, losses, damages (actual and/or consequential), suits, judgments, litigation costs and attorneys' fees, of every kind and nature ("Indemnifiable Damages"). Additionally, each Client and/or API User agrees to indemnify zingfit for any damages arising from the use of the zingfit System or the API in contravention of App Hosting Agreement or the API Agreement by such Client and/or such API User as well as any Affiliates or Third Party Providers of such Client or such API User, and the term "Indemnifiable Damages" shall also include any damages resulting therefrom.

b. IP Infringement. Each Client or API User shall defend, indemnify, and hold harmless zingfit from and against any claims that zingfit infringes or misappropriates, as applicable, the patent, trademark, copyright, trade secret or other intellectual property right of a third party. In the event that such a claim is made or appears possible, zingfit may, at its option (i) appropriately modify its systems, software or services so that they become non-infringing, or substitute functionally equivalent software, systems or services; or (ii) obtain a license to the applicable third-party intellectual property rights so that such Client or API User may continue to use the zingfit System or Services in accordance with the App Hosting Agreement and/or the API Agreement (as the case may be).

c. Notification. If a Client or API User becomes aware of a claim or cause of action that could result in Indemnifiable Damages against zingfit (e.g. so as to become an Indemnitee under this Paragraph), then such Client or API User shall provide prompt notice of such Indemnifiable Damages to zingfit.

d. Aggregators. Aggregator shall reimburse zingfit for any Claims arising out of the use or maintenance of any Aggregator Data.

e. Defense of Claims by zingfit. zingfit shall defend, indemnify, and hold harmless Client from and against any Claims that the zingfit System or Services infringes or misappropriates, as applicable, the patent, trademark, copyright, trade secret or other intellectual property right of a third party, provided that zingfit is notified of any such Claims in writing and fails to cure any alleged infringement or misappropriation within 30 days following receipt of written notice of such Claims.

f. Defensive of Claims by Client or API User. Each Client and/or API User shall defend, indemnify, and hold harmless zingfit, and zingfit Parties from and against any Claims arising or attributable to such Client's or API User's breach of the provisions in the App Hosting Agreement or the API Agreement with respect to intellectual property or Confidential Information.

11. CONFIDENTIALITY UNDER THE APP HOSTING AGREEMENT & THE API AGREEMENT

The confidentiality provisions as provided under this paragraph shall apply to the App Hosting Agreement and API Agreement, provided however that if Client or API User and zingfit have entered into a separate agreement regarding the treatment of confidential information (a "Separate Confidentiality Agreement") in the past or enter into a separate agreement in the future, then to the extent any terms of this paragraph are in conflict with the terms of such Separate Confidentiality Agreement, the terms of such Separate Confidentiality Agreement will control and the terms of this paragraph shall be interpreted to supplement the terms of any Separate Confidentiality Agreement where they do not conflict.

a. A Party will not disclose or use any Confidential Information of the other Party except:
   i. as reasonably necessary to perform its obligations or exercise any rights granted pursuant to either the App Hosting Agreement or the API Agreement;
   ii. with the other Party's prior written permission; or

iii. to the extent required by law or order of a court or other governmental authority or regulation.

b. Each Party agrees to protect the other Party's Confidential Information in the same manner that it protects its own Confidential Information of like kind, but in no event using less than a commercially reasonable standard of care.

c. "Confidential Information" means any of the following:

i. (With respect to zingfit) any software utilized by zingfit in the provision of its services or use of its software applications and its respective source code – including but not limited to the Integration, Services or zingfit System, and with respect to Client, any Client Data;
ii. each Party's business or technical information, information relating to software plans, designs, costs, prices and names, business opportunities, personnel, customers, research, development or know-how that is designated by the disclosing Party as "confidential" or "proprietary" or the receiving Party knows or should reasonably know is confidential or proprietary; and/or
iii. any special pricing or other non-standard terms agreed to by the Parties in any written document.

d. "Confidential Information" will not include any information that:
i. is or becomes generally known to the public without breach of any obligation owed to the disclosing Party;
ii. was known to a Party prior to its disclosure by the other Party without breach of any obligation owed to the other Party;
iii. was independently developed by a Party without breach of any obligation owed to the other Party; or
iv. was or is received from a third Party without breach of any obligation owed to the other Party.

12. DISPUTE RESOLUTION

a. Arbitration. Except as provided elsewhere in the App Hosting Agreement or the API Agreement, any Dispute that is not related to an intellectual property claim shall be resolved by final and binding arbitration administered by JAMS (Judicial Arbitration and Mediation Services) under its rules, which are applicable to commercial arbitration. The arbitration shall be conducted by the Arbitrators who shall conduct such evidentiary or other hearings as they deem necessary or appropriate and thereafter shall make their determination as soon as practicable. Any arbitration pursuant hereto shall be conducted by the Arbitrators under the guidance of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, but the Arbitrators shall not be required to comply strictly with such rules in conducting any such arbitration. All such arbitration proceedings shall take place in Manhattan, New York. Each Party shall bear its own costs and fees, including travel expenses, out-of-pocket expenses (including, but not limited to, copying and telephone), witness fees, and reasonable attorneys' fees and expenses. The fees and expenses of the Arbitrators and all other costs and expenses incurred in connection with the arbitration shall be borne equally by the Parties. Notwithstanding the foregoing, the Arbitrators shall be empowered to require any one or more of the Parties to bear all or any portion of the costs and fees of the other Party or the fees and expenses of the Arbitrators in the event that the Arbitrators determine such Party has acted unreasonably or in bad faith. For clarity, for any claims regarding intellectual property, the Parties shall not be required to arbitrate such claims under this Section 12(a) and may instead pursue a claim through the applicable state and federal courts located in the Borough of Manhattan, New York.

b. <u>Injunctive Relief.</u> Notwithstanding anything herein to the contrary, any Party may seek injunctive or other equitable relief from a court of competent jurisdiction with respect to Confidential Information or its intellectual property rights.

13. ZINGFIT DIRECTORY AND MARKETING SERVICES.

a. Client and Client's business locations or studios may be automatically be listed on zingfit's online marketing directory so as to allow Consumers (or potential Consumers) to locate zingfit subscribers and evaluate, review and book their services, directly through the zingfit System.

b. Client grants zingfit permission to allow third-party booking, directory or search engine services – which are reasonably appropriate for Client's business (e.g., such as Google) – to access the Hosted Webpages (e.g., so as to enable such third party to book services with the Client).

c. Client hereby grants zingfit the right and/or license to create zingfit's branding according to the terms of the Branding Requirements.

d. Client grants zingfit the right to use Client Data and/or Consumer Data in the aggregate and in an anonymized manner for marketing and promotional purposes.

e. zingfit is entitled to indicate that it is providing Services to Client for marketing and/or promotional purposes.

14. ILLEGAL USE

a. zingfit's servers, the zingfit System and the API may be used for lawful purposes only. Transmission, storage, or distribution of any information, data, or material in violation of any applicable law or regulation, or that may directly facilitate the violation of any particular law or regulation is prohibited. This includes but is not limited to: copyrighted material; trademarks; trade secrets or other intellectual property rights used without proper authorization; material that is obscene, defamatory, constitutes an illegal threat, or violates export control laws. Examples of unacceptable content or links include: pirated software, hacker programs or archives, Warez sites, MP3, and IRC bots.

15. SERVER RESOURCES

a. Any web site that uses a high amount of server resources (such as, but not limited to, CPU time, memory usage, and network resources) will be given the option to either pay additional fees (which will depend on the resources required), or reduce the resources used to an acceptable level. zingfit shall be the sole arbiter of what is considered to be a high server usage level.

b. Any attempts to undermine or cause harm to the zingfit System, the API, a zingfit server, a customer or any End User are strictly prohibited.

16. INSURANCE REQUIRED OF THE PARTIES UNDER THE APP HOSTING AGREEMENT AND API AGREEMENT.

The terms of this paragraph shall apply to the App Hosting Agreement and API Agreement.

a. zingfit, API User and Client shall each maintain during the Term of the App Hosting Agreement and/or the API Agreement (at their own respective expense) commercial general liability insurance,

errors and omissions insurance, contractual liability insurance, and cyber liability insurance, in each case with a minimum limit of $1,000,000 per occurrence and $2,000,000 in the aggregate.

b. Cyber liability insurance shall be on an "occurrence form" and shall include "contractual liability" insurance for the indemnity provided under this API Agreement and coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by API User in this API Agreement and shall include, but not be limited to, claims involving infringement of intellectual property, including but not limited to infringement of copyright, trademark, trade dress, invasion of privacy violations, information theft, damage to or destruction of electronic information, release of private information, alteration of electronic information, extortion and network security. The policy shall also provide coverage for breach response costs as well as regulatory fines and penalties as well as credit monitoring expenses with limits sufficient to respond to these obligations.

c. The above required insurance coverage shall include the other Party and the other Party's agents, officers, and employees" as an additional insured. Upon request, a Party shall provide the other Party with a certificate of insurance evidencing the above coverage within 15 days of such request. Absent such proof of insurance coverage, zingfit may suspend Client's or API User's access to the zingfit System or API until proof of such insurance coverage is provided. Either Party shall provide 30 days prior written notice of any change or cancellation in any applicable insurance policies and shall not permit a cancellation, material change, exhaustion of aggregate limits or intent not to renew the above required insurance coverage without 60 days written notice by such Party to the other Party. A lapse in any required insurance coverage during the App Hosting Agreement and/or the API Agreement shall be a material breach of these User Terms and Conditions as well as the corresponding agreement (e.g., the App Hosting Agreement and/or the API Agreement), which incorporates these User Terms and Conditions.

17. MISCELLANEOUS PROVISIONS FOR THE API AGREEMENT ONLY.

The terms of this paragraph shall only apply to the API Agreement and shall not apply to any other agreement.

a. <u>Complete Agreement</u>: the API Agreement together with the User Terms & Conditions and any other document, which is incorporated into the API Agreement by reference, constitutes the sole and entire agreement between the Parties and supersedes all prior understandings, agreements and documentation relating to such subject matter.

b. <u>Interpretation</u>. These User Terms & Conditions shall be construed to supplement the terms of the API Agreement. However, In the event of a direct conflict between the terms of this User Terms & Conditions and the API Agreement, then the terms of the API Agreement shall govern. In the event of a direct conflict between the terms of this User Terms & Conditions and the Glossary of Terms (and any addendum thereof), then the terms of the Glossary of Terms (and any addendum thereof) shall take precedence over the User Terms & Conditions unless explicitly stated otherwise in the Glossary of Terms.

18. MISCELLANEOUS PROVISIONS FOR THE APP HOSTING AGREEMENT ONLY

The terms of this paragraph shall only apply to the App Hosting Agreement and shall not apply to the API Agreement.

a. <u>Complete Agreement</u>: the App Hosting Agreement together with the User Terms & Conditions and any other document, which is incorporated into the App Hosting Agreement by reference, constitutes the sole and entire agreement between the Parties and supersedes all prior understandings, agreements and documentation relating to such subject matter. The terms of any document incorporated by

reference into the App Hosting Agreement (including these User Terms & Conditions) shall be construed to supplement the terms of the App Hosting Agreement. However, in the event of a direct conflict between the provisions of the App Hosting Agreement and any document incorporated by reference, the following hierarchy shall be followed (in ascending order) to resolve such direct conflicts, unless explicitly stated otherwise in the App Hosting Agreement:

    i.   the API Agreement shall take precedence over the App Hosting Agreement, then

    ii.   The Customization Estimate shall take precedence over the App Hosting Agreement and the API Agreement, then

    iii.   these User Terms & Conditions shall take precedence over any of the preceding documents, then

    iv.   any zingfit Policy shall take precedence over any of the preceding documents, then

    v.   the Glossary shall take precedence over any of the preceding documents, then

    vi.   any written rider or written amendment that is executed by the parties, which specifically states that it takes precedence over the above shall take precedence over as so indicated.

19. MISCELLANEOUS PROVISIONS FOR BOTH THE APP HOSTING AGREEMENT AND THE API AGREEMENT

a.   <u>Modifications to Agreement</u>: Modifications and amendments to the App Hosting Agreement and/or the API Agreement, including any document incorporated hereto by reference shall be enforceable only as provided in such agreement and/or only if it is in writing and signed by authorized representatives of both Parties.

b.   <u>Law & Enforcement Issues</u>. The App Hosting Agreement and/or API Agreement and the relationship between the respective Parties thereto shall be governed by the laws of the State of New York without regard to its conflict of law provisions. Each Party to the App Hosting Agreement (e.g., the Client) and the API Agreement (e.g., the API User) agree to submit to the personal jurisdiction of the courts located within the county of New York, NY as well as the County of Boulder, Colorado. The prevailing Party in any lawsuit or legal proceeding shall be entitled to receive reimbursement from the other Party for any and all costs (including attorney fees) attributable to enforcement of its rights hereunder in such lawsuit or legal proceeding. All disputes in connection with the App Hosting Agreement and/or the API Agreement shall be brought in the state or federal courts in Denver, Colorado, or in the Borough of Manhattan, New York.

c.   <u>Notices</u>: All notices and other communications given in connection with the App Hosting Agreement and/or the API Agreement shall be in writing and delivered via email. All notices to zingfit shall be sent to legal@zingfit.com. All notices to Client and/or the API User shall be to the email address as supplied by Client and/or the API User or that zingfit has on file for the Client and/or API User. To send email to Client and/or API User, zingfit may use a broadcast list email system, which may be provided through an external third party such as "Mail Chimp." This email broadcast system enables zingfit to provide support and updates to Client and/or API User with respect to the zingfit System. Should Client and/or API User unsubscribe from or disable its ability to receive email through the email broadcast system, Client and/or API User agrees to pay higher support costs as specified in the Subscription Plan or on zingfit's website. Client and/or API User hereby consents to receive notice from zingfit through email, and such notice will be deemed to be effective when sent if on a business day, and if not sent on a business day, then on the next business day.

d.   <u>Relationship of the Parties</u>. Notwithstanding any to the contrary, for all purposes of the App Hosting Agreement and/or the API Agreement, each Party (e.g., Client and zingfit with respect to the App Hosting Agreement and the API User and zingfit with respect to the API Agreement) shall be and act independently (e.g. and be considered independent contractors with respect to each other) and not as partner, joint venturer, agent, employee or employer of the other. None of the Parties with respect to the App Hosting Agreement and/or the API Agreement shall have any authority to assume or create

any obligation for or on behalf of the other Party thereto, express or implied, and neither Party thereto shall attempt to bind the other Party to any agreement or contract.

e. Assignment: The rights and obligations under the App Hosting Agreement and/or the API Agreement are not assignable by either Party thereto without the written and signed consent of the other Party thereto. Notwithstanding the foregoing, either Party of the App Hosting Agreement and/or the API Agreement is permitted to assign either such agreement -- without consent but upon written notice to the other Party -- to an Affiliate or to a third party only in connection with a merger, acquisition, or sale of all or substantially all of its equity or assets.

f. Successors and Assigns: The App Hosting Agreement and/or the API Agreement binds and benefits the heirs, successors and assigns of the respective Parties thereto.

g. Invalidity of Specific Terms. If any provision of the App Hosting Agreement and/or the API Agreement is found by a court of competent jurisdiction to be invalid or unenforceable, the Parties with respect to each such agreement nevertheless agree that the court should endeavor to give effect to the Parties' intentions as reflected in the provision and that the other provisions of such agreement remain in full force and effect to the maximum extent possible.

h. Mutual Representations and Warranties. Notwithstanding anything in the API Agreement and/or the App Hosting Agreement to the contrary, each Party thereto represents and warrants to the other Party thereto that they each have: (a) all requisite legal and corporate power to execute and deliver the App Hosting Agreement and/or the API Agreement; (b) taken all corporate action necessary for the authorization, execution and delivery of the App Hosting Agreement and/or the API Agreement; (c) no agreement or understanding with any Person that interferes with or will interfere with the performance of their respective obligations under the App Hosting Agreement and/or the API Agreement; (d) obtained and shall maintain all rights, approvals and consents necessary to perform their respective obligations under the App Hosting Agreement and/or the API Agreement; and (e) taken all action required or necessary to make such agreements legal, valid and binding obligations upon them.

i. Force Majeure: Except for a delay or failure to make any payments due under the API Agreement or the App Hosting Agreement, a Party shall be excused from any of its obligations under the API Agreement and/or the App Hosting Agreement upon the occurrence of a Force Majeure Event, provided however, that each Party will endeavor to use commercially reasonable efforts to perform their obligations thereunder after the occurrence of a Force Majeure Event.

j. Electronic Communications and Signatures. The Parties agree to the use of electronic communication in order to enter into agreements and place orders, and to the electronic delivery of notices, policies and records of transactions initiated or completed through the zingfit System and/or Posting. The words "execution," "signed," "signature," and words of like import in document shall be deemed to include electronic signatures or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based record keeping system, as the case may be, to the extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act.

k. Furthermore, the Parties hereby waive any rights or requirements under any laws or regulations in any jurisdiction that require an original (non-electronic) signature or delivery or retention of non-electronic records, to the extent permitted under applicable law. The App Hosting Agreement and/or the API Agreement may be signed by the Parties thereto in counterparts which together shall constitute one and the same agreement among the Parties.

l. <u>Waiver.</u> No waiver of any provision of the App Hosting Agreement and/or the API Agreement by a Party will be effective unless in writing and signed by such Party. No waiver by either Party of any breach or default hereunder will be deemed to be a waiver of any preceding or subsequent breach or default. Accordingly, a Party's failure to exercise or enforce any right or provision of the App Hosting Agreement and/or the API Agreement shall not constitute a waiver of such right or provision.

m. <u>Miscellaneous</u>. The Paragraph headings and subheadings contained in the App Hosting Agreement and/or the API Agreement are included for convenience only, and shall not limit or otherwise affect the terms of such agreement. Any construction or interpretation to be made of the terms contained within the App Hosting Agreement and/or the API Agreement shall not be construed against the drafter.

n. <u>Survival</u>. The obligations under these User Terms & Conditions that are intended to apply after termination of either the App Hosting Agreement and/or the API Agreement shall continue to survive and apply after termination of the same, including but not limited to paragraphs 6, 7, 8, 9, 10, 11, 12, 17, 18 and 19.Additionally, those provisions of the App Hosting Agreement and/or the API Agreement that are intended to apply after termination of the same shall continue to survive and apply after termination of the same.