

Terms & Conditions (SaaS)

 kyligence.io/terms-conditions-sass

I. Definitions

1.1 “Kyligence Data” means all data generated by the Kyligence Product, including without limitation, service and usage data. For clarity, Kyligence Data excludes Customer Data and Output.

1.2 “Kyligence Product” means the software-as-a-service with the functionalities described in the applicable Order Form(s), which are hosted on servers under the control or direction of Kyligence and provided for Customer to access and use via the internet, including any derivatives, improvements, enhancements and/or extensions related thereto.

1.3 “Confidential Information” means any information disclosed by either party to the other party pursuant to this Agreement that is (a) is in written, graphic, machine readable or other tangible form and is marked “Confidential,” “Proprietary” or in some other manner to indicate its confidential nature, or (b) in the case of oral or visual disclosure is identified as confidential at the time of disclosure, or (c) under the circumstances should in good faith be considered to be confidential. Confidential Information includes, without limitation, information related to: research, product plans, products, developments, inventions, processes, designs, markets, business plans, agreements with third parties, services, customers, marketing or finances of either party, the content or existence of any negotiations, and pricing. Notwithstanding the foregoing, all technology or proprietary information underlying the Kyligence Data and Kyligence Product shall be deemed Confidential Information of Kyligence without any need for designating the same as confidential or proprietary; Customer Data shall be deemed Confidential Information of Customer without any need for designating the same as confidential or proprietary.

1.4 “Customer Data” means any data or other content or information provided by or on behalf of Customer to Kyligence via the Kyligence Product.

1.5 “Data Protection Laws” means any applicable laws and regulations in any relevant jurisdiction relating to the use or processing of any information that constitutes “personal information,” “personal data” or “personally identifiable information” as defined in such laws and regulations.

1.6 “Intellectual Property Rights” means all rights of the following types, under the laws of any jurisdiction worldwide: (a) rights associated with works of authorship, including exclusive exploitation rights, copyrights, and moral rights; (b) trade secret rights; (c) patent and industrial property rights; (d) other proprietary rights of every kind and nature; and (e) rights in or relating to registrations, renewals, extensions, combinations, divisions, and reissues of, and applications for, any of the above.

1.7 "Output" means the report(s) generated directly from Customer Data via the Kyligence Product, excluding the templates of such reports.

1.8 "Prohibited Data" means (a) protected health information, personal health data or genetic data (e.g. medical records or an individual's health care claim information), (b) biometric information, (c) non-public, government-issued ID numbers, (d) personal financial data, account numbers, or other sensitive identifying number (e.g. passport number, driver's license numbers, Social Security Numbers, Tax Identification Number, or account numbers for a personal debit card or credit card, including, without limitation, cardholder data or sensitive authentication data, as such terms are defined under the Payment Card Industry Data Security Standards), (e) an individual's username or email address in combination with a password or security question that would permit access to such individual's account, (g) geolocation data that could identify the precise location of any individual; (h) any personally identifiable information regarding an individual under the age of 16; (i) any data regarding an individual's criminal convictions, offenses, or records; (j) any data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, or data concerning an individual's sex life or sexual orientation; (k) any other data that (i) is classified as "sensitive," "special category" or a similar categorization pursuant to applicable Data Protection Laws, including, without limitation (i) the Health Insurance Portability and Accountability Act, (ii) Gramm-Leach-Bliley Act,; (ii) for which there is no consent or other necessary authority from the owner of the data to be submitted to or stored in the Kyligence Product; (iii) is not appropriate for the nature of Kyligence Product; or (iii) if breached, is likely to result in the a risk to the rights and freedom to the related individual.

II. Kyligence's Responsibilities

2.1 Access. Subject to the terms and conditions of this Agreement, Kyligence will provide Customer with access to the Kyligence Product. Kyligence may in its sole discretion modify, enhance or otherwise change the Kyligence Product. Kyligence may delegate the performance of certain portions of the Kyligence Product to third parties, including Kyligence's wholly owned subsidiaries and providers of hosting services, provided that Kyligence will remain fully responsible for the acts and omissions of such third parties.

2.2 Passwords. Kyligence reserves the right to periodically change issued passwords. Kyligence will provide prompt notice to Customer of any such password changes.

2.3 Professional Services. Kyligence will provide the Professional Services set forth in the Order Form.

III. Customer's Responsibilities

3.1 Equipment. Customer will be responsible for obtaining and maintaining at its expense all the necessary computer hardware, software, services, modems, connections to the internet and other items operated or provided by third parties ("Third Party Services") as required for Customer's access and use of the Kyligence Product via the internet. Kyligence is not responsible for the operation of any Third Party Services nor the

availability or operation of the Kyligence Product to the extent such availability and operation is dependent upon Third Party Services. Kyligence does not make any representations or warranties with respect to Third Party Services or any third party providers.

3.2 Access. Customer will cooperate with Kyligence in establishing a password or other procedures for verifying that only designated employees of Customer have access to any administrative functions of the Services. Customer will be responsible for maintaining the security of Customer account, passwords (including but not limited to administrative and user passwords) and files, and for all uses of Customer account with or without Customer's knowledge or consent.

3.3 Unauthorized Use. Customer will use reasonable efforts to prevent any unauthorized use of the Kyligence Product, Kyligence Data or the Software (as defined in Section 4.3 below), and will promptly notify Kyligence in writing of any unauthorized use that comes to Customer's attention and provide all reasonable cooperation to prevent and terminate such use.

3.4 Customer Data; Prohibited Data. Customer represents and warrants that in connection with its collection, storage, transfer (including, without limitation, any transfer across national borders) and/or use of any Customer Data (including any personally identifiable information from any individuals), Customer shall, in its use of the Kyligence Product, at all times, comply with Data Protection Laws. Customer shall ensure that any instructions provided to Company for the processing of Customer Data is in compliance with Data Protection Laws, and Company's processing of Customer Data in accordance with Customer's instructions will not cause Company to be in breach of the Data Protection Laws. Customer is solely responsible for the accuracy, quality, and legality of (i) the Customer Data provided to Company by or on behalf of Customer, (ii) the means by which Customer acquired any such Customer Data, and (iii) the instructions it provides to Company regarding the processing of such Customer Data. Customer shall not, and shall not permit any third party to, submit, provide, or make available to Company, or use the Kyligence Product to store or process, any Prohibited Data, and shall indemnify Company from all claims and losses in connection therewith.

IV License Grants; Restrictions.

4.1 License to Customer. Subject to Customer's compliance with all the terms and conditions of this Agreement, Kyligence hereby grants Customer a limited, non-exclusive, non-transferable (except as permitted under Section 18) license, without right of sublicense, during the Term, to access and use the Kyligence Product up to the Licensed Capacity set forth on the applicable Order Form(s) and solely for its internal business purposes.

4.2 Customer Data Usage. Customer hereby grants Kyligence a license to use Customer Data and Output for the purposes of: (a) providing the Kyligence Product and related services to Customer as set forth in this Agreement; (b) testing, improving, and

providing the Kyligence Product (solely in aggregated and de-identified form and in a manner that does not disclose Customer Data, Output or other Confidential Information of Customer); and (c) enforcing its rights under this Agreement.

4.3 License Restrictions. Customer shall not, and shall not permit any third party to: (a) decompile, disassemble or reverse engineer the Kyligence Product, or otherwise attempt to discover the source code, object code, logic, process or underlying methodology, structure, ideas or algorithms of the Kyligence Product, or related trade secrets, or any software, documentation or data related to the Kyligence Product (“Software”); (b) use the Kyligence Data or Kyligence Product (or any portion thereof) except to the extent permitted in Section 4.1, or other than (i) in accordance with this Agreement and (ii) in compliance with all applicable laws and regulations; (c) modify or create any derivative work of any part of Kyligence Data or Kyligence Product (or any portion thereof); (d) market, sublicense, publish, distribute, reproduce, resell, assign, transfer, rent, lease, loan, or otherwise permit third parties to use the Kyligence Data or Kyligence Product (or any portion thereof); (e) use the Kyligence Data or Kyligence Product (or any portion thereof) for commercial time-sharing or service-bureau use or for any purpose other than its own internal use; or (f) publish any results of benchmark tests run on the Kyligence Product.

4.4 Reservation of Rights. Kyligence reserves all rights to the Kyligence Data or Kyligence Product (or any portion thereof) not otherwise expressly granted in this Section

V Payments and Taxes

5.1 Fees. Customer agrees to pay, and shall pay, the fees set forth above on the Order Form(s) within [thirty (30)] days of the date of an invoice from Kyligence. All payments shall be made in U.S. dollars in immediately available funds, and are non-refundable. Any amounts not paid when due shall bear interest at the rate of one and one-half percent (1.5%) per month or the maximum rate allowed by law, whichever is less.

5.2 Taxes. Customer shall pay any sales, use, value-added, property, and other taxes, withholdings and similar charges based on or arising from this Agreement (other than taxes based on Kyligence’s net income).

5.3 Expenses. Customer will reimburse Kyligence for reasonable pre-approved travel and living expenses incurred by Kyligence in performing services at sites other than Kyligence facilities at Customer’s request (including without limitation, any services relating to setup, training, technical support, and consulting).

VI Warranties and Disclaimers

6.1 Mutual. Each party represents and warrants that: (a) such party is duly organized, validly existing, and in good standing under the laws of the state of its organization, and has the full power and authority to enter into and perform its obligations under this Agreement; (b) the execution of this Agreement by such party, and the performance by such party of its obligations and duties hereunder do not and will not violate any other

agreement to which such party is a party or by which it is otherwise bound; and (c) when executed and delivered by such party, this Agreement will constitute the legal, valid, and binding obligation of such party, enforceable against such party in accordance with its terms.

6.2 Kyligence. Kyligence further represents and warrants that (a) the Kyligence Product will perform substantially in accordance with its documentation; (b) it will not knowingly include, in the Kyligence Product provided to Customer hereunder, any computer code or other computer instructions, devices or techniques, including without limitation those known as viruses, disabling devices, trojan horses, or time bombs, that intentionally disrupt, disable, harm, infect, defraud, damage, or otherwise impede in any manner, the operation of a network, computer program or computer system or any component thereof, including its security or user data; and (c) it shall perform the Professional Services and its other obligations under this Agreement in a professional and workmanlike manner.

6.3 Disclaimers. EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION 6 AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, KYLIGENCE DATA OR KYLIGENCE PRODUCT (OR ANY PORTION THEREOF) AND ALL RELATED INFORMATION, TECHNOLOGY, AND SERVICES PROVIDED BY OR ON BEHALF OF KYLIGENCE ARE PROVIDED “AS IS,” “AS AVAILABLE,” AND WITHOUT ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AND KYLIGENCE EXPRESSLY DISCLAIMS ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE (EVEN IF ADVISED OF THE PURPOSE), ACCURACY, TITLE, AND/OR NON-INFRINGEMENT. IN ADDITION, EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, KYLIGENCE DOES NOT WARRANT THAT ACCESS TO THE KYLIGENCE DATA OR KYLIGENCE PRODUCT (OR ANY PORTION THEREOF) WILL BE UNINTERRUPTED OR ERROR FREE, THAT KYLIGENCE DATA OR KYLIGENCE PRODUCT (OR ANY PORTION THEREOF) WILL MEET CUSTOMER’S NEEDS, OR THAT DATA WILL NOT BE LOST, OR THAT THE KYLIGENCE DATA OR KYLIGENCE PRODUCT (OR ANY PORTION THEREOF) IS FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS.

VII Term, Termination, and Survival

7.1 Term. This Agreement shall commence on the Effective Date, and shall continue for the Term specified on the Order Form.

7.2 Termination. Either party may terminate this Agreement: (a) on thirty (30) days’ prior written notice if the other party materially breaches any of the terms of this Agreement and such breach remains uncured thirty (30) days following such party’s receipt of the terminating party’s notice; (b) immediately on written notice if: (i) all or substantially all of the assets of the other party are transferred to an assignee for the benefit of creditors, to a receiver or trustee in bankruptcy; (ii) a proceeding is commenced

by or against the other party for relief under bankruptcy or similar laws and such proceeding is not dismissed within ninety (90) days; or (iii) the other party is adjudged bankrupt or insolvent.

7.3 Transition Services. In the event that Kyligence decides in its sole discretion to discontinue offering the Kyligence Product, Kyligence will use its commercially reasonable efforts to: provide reasonable advance written notice of such decision to Customer to the extent reasonably practicable.

7.4 Survival. Upon termination or expiration of this Agreement, all licenses granted hereunder shall immediately terminate. The following provisions shall survive any termination or expiration of this Agreement: Sections 1, 4.2, 4.3, 4.4, 5, 6.3, 7.3 (as stated therein), 7.4 and 8 through 18 (inclusive).

VIII Limitation of Liability

EXCEPT FOR EACH PARTY'S INDEMNIFICATION OBLIGATIONS HEREUNDER, CUSTOMER'S OBLIGATION TO PAY THE FEES UNDER SECTION 5, DAMAGES RESULTING FROM A PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT AND/OR ANY BREACH OF THE CONFIDENTIALITY OBLIGATIONS UNDER SECTION 11, THE AGGREGATE LIABILITY OF EITHER PARTY IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, INCLUDING WITHOUT LIMITATION CONTRACT, STRICT LIABILITY, NEGLIGENCE AND/OR OTHER TORT, SHALL IN NO EVENT EXCEED THE TOTAL AMOUNT OF SUBSCRIPTION FEES PAID BY CUSTOMER TO KYLIGENCE FOR THE KYLIGENCE SOFTWARE IN THE TWELVE (12) MONTHS PRIOR TO THE EVENT GIVING RISE TO SUCH LIABILITY. EXCEPT FOR EACH PARTY'S INDEMNIFICATION OBLIGATIONS HEREUNDER, CUSTOMER'S OBLIGATION TO PAY THE FEES UNDER SECTION 5, DAMAGES RESULTING FROM A PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT AND/OR ANY BREACH OF THE CONFIDENTIALITY OBLIGATIONS UNDER SECTION 11, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION DAMAGES FOR LOSS OF PROFITS, REVENUE, DATA, OR DATA USE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, INCLUDING, WITHOUT LIMITATION, ANY LIABILITY RELATED TO THE PROCUREMENT OF SUBSTITUTE GOODS OR ANY PROHIBITED DATA. THE FOREGOING LIMITATIONS FORM AN ESSENTIAL BASIS FOR THIS AGREEMENT AND SHALL SURVIVE REGARDLESS OF THE FAILURE OF ANY REMEDY OF ITS ESSENTIAL PURPOSE.

IX Ownership

9.1 Kyligence's Ownership Rights. Subject only to the limited license expressly granted under this Agreement, as between Kyligence and Customer, Kyligence shall retain all right, title, and interest in and to the Kyligence Data or Kyligence Product (and all portions thereof) (excluding the Customer Data), and all Intellectual Property Rights therein. Nothing in this Agreement will confer on Customer any right of ownership or

interest in the Kyligence Data or Kyligence Product (or any portion thereof) (excluding the Customer Data), and all Intellectual Property Rights therein. To the extent Customer has or obtains any right, title, or interest in the Kyligence Data or Kyligence Product (or any portion thereof) (excluding the Customer Data), or any Intellectual Property Rights therein, Customer hereby assigns, and agrees to assign, without further consideration, to Kyligence all such right, title, and interest Customer may have or obtain.

9.2 Customer's Ownership Rights. Subject only to the limited license expressly granted hereunder, as between Customer and Kyligence, Customer shall retain all right, title and interest in and to the Customer Data and Output, and all Intellectual Property Rights therein. Nothing in this Agreement will confer on Kyligence any right of ownership in the Customer Data, or the Intellectual Property Rights therein.

9.3 Feedback. Either party may voluntarily provide feedback, suggestions, ideas, enhancement requests, recommendations or other information (the "Feedback") to the other about the other party's Confidential Information and/or products and services. Each party shall be free to use or exploit the Feedback provided to it without further consideration or compensation to the other party.

X Indemnification

10.1 Indemnity. Subject to Section 10.2, each party shall indemnify, defend, and hold the other party and its affiliates, and its and their officers, members, directors, employees, agents, successors and assigns harmless from and against all liabilities (including liabilities arising out of the application of the doctrine of strict liability), obligations, losses, damages, penalties, fines, claims, penalties, actions, suits, judgments, costs, expenses, and disbursements (including reasonable legal fees and expenses and reasonable costs of investigation) ("Losses") arising from an unaffiliated third party claim: (a) with respect to Kyligence, that the Kyligence Product infringes or otherwise violates any third-party's Intellectual Property Rights; or (b) with respect to Customer, that the Customer Data infringes or otherwise violates any third-party's Intellectual Property Rights, privacy, or other proprietary rights.

10.2 Exclusions. Kyligence's indemnity obligations do not apply with respect to portions or components of the Kyligence Product (a) not created by Kyligence, including any data or content transmitted or provided by Customer, including Customer Data; (b) where Customer's use of the Kyligence Product is not strictly in accordance with this Agreement and the applicable documentation or applicable law; (c) combined with third-party software, hardware, or data other than that approved by Kyligence, where the alleged infringement relates to such combination; or (d) where Customer continues allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement. Customer will indemnify Kyligence from all Losses related to any claim of infringement or misappropriation excluded from Kyligence indemnity obligation by the preceding sentence.

10.3 Process. The indemnified party shall promptly notify the indemnifying party in writing of any claim for which it seeks indemnification hereunder; provided that the failure to provide such notice shall not relieve the indemnifying party of its indemnification obligations hereunder except to the extent of any material prejudice directly resulting from such failure. The indemnifying party shall bear full responsibility for, and shall have the right to solely control, the defense (including any settlements) of any such claim; provided, however, that (a) the indemnifying party shall keep the indemnified party informed of, and consult with the indemnified party in connection with the progress of such litigation or settlement and (b) the indemnifying party shall not have any right, without the indemnified party's written consent (which consent shall not be unreasonably withheld), to settle any such claim in a manner that does not unconditionally release the indemnified party. At the indemnifying party's request, the indemnified party will provide reasonable cooperation with respect to any defense or settlement.

10.4 Remedies. In the event any portion of the Kyligence Product is held or believed by Kyligence to infringe intellectual property rights of any third party (such portion to be deemed the "Infringing Materials") in any place where the Kyligence Product is used or accessed, then in addition to any other rights in this Section 10, Kyligence may, at its sole expense and at its option: (a) obtain from such third party the right for the other party to continue to use the Infringing Materials; (b) modify the Infringing Materials to avoid and eliminate such infringement or misappropriation; (c) remove and disable the Infringing Materials; or (d) if none of the foregoing remedies is commercially feasible, terminate this Agreement.

10.5 Sole Remedy for Intellectual Property Violations. This Section 10 contains each party's sole and exclusive remedy, and each party's entire liability, with respect to infringement, misappropriation, or violation of third party intellectual property rights relating to the Kyligence Product and the subject matter of this Agreement.

XI Confidentiality

Each party shall treat as confidential all Confidential Information of the other, shall not use such Confidential Information except as set forth in this Agreement, and will not disclose such Confidential Information to any third party except as expressly permitted herein without the disclosing party's written consent. The receiving party shall use at least the same degree of care which it uses to prevent the disclosure of its own confidential information of like importance to prevent the disclosure of the disclosing party's Confidential Information, but in no event less than reasonable care. The receiving party shall promptly notify the disclosing party of any actual or suspected misuse or unauthorized disclosure of any of the Confidential Information. In the event of any termination or expiration of this Agreement, each party will either return or, at the disclosing party's request, destroy the Confidential Information of the other party; provided however, that each receiving party may retain copies of the disclosing party's Confidential Information for routine backup and archival purposes. Notwithstanding the foregoing, the obligations set forth in this Section 11 shall not apply with respect to any

information to the extent that it is: (a) already in the possession of the receiving party without restriction prior to the first disclosure hereunder as shown by records or files; (b) is already or becomes generally available to the public after the time of disclosure other than as a result of any improper action by the receiving party; (c) was rightfully disclosed to it by a third party without restriction; or (d) is independently developed by either party without use of the Confidential Information from the other party. The receiving party may make disclosures required by law or court order provided that, if practicable, the receiving party provides adequate notice and assistance to the disclosing party for the purpose of enabling the disclosing party to prevent and/or limit the disclosure.

XII Customer Data Security

12.1 Protection of Customer Data. Kyligence will implement and maintain industry standard information security policies and processes (including reasonable technical, administrative and physical safeguards) that are designed to prevent unauthorized access to or use or disclosure of any Customer Data.

12.2 Data Hosting. Kyligence represents and warrants that it uses and will use a third party service provider to host the Kyligence Product that complies with ISO 27001, SOC II.

12.3 Security Breach. Kyligence will notify Customer promptly in writing upon discovery of any actual breach of any Customer Data's security or confidentiality. This notification will describe the breach and the status of Kyligence's investigation. Kyligence will not communicate with any third party regarding any security breach without consulting Customer.

12.4 Access to Customer Systems and Facilities. Kyligence may access any Customer systems or facilities (to the extent permitted by Customer in its discretion) only to provide the Kyligence Product and Services specified herein. Any access is limited to the time periods and personnel specified by Customer and is subject to Customer's security and other policies.

12.5 Deletion and Return of Customer Data. Upon Customer's request at any time, unless prohibited by applicable law, rule or regulation, Kyligence will securely delete any or all Customer Data in its possession or control. In addition, during the Term and for [three (3)] months thereafter, at Customer's request, Kyligence will provide a file of all Customer Data in a standard format specified by Customer.

XIII Notices

All notices and other communications required or permitted under this Agreement shall be in writing, addressed to the applicable party at its address set forth in this Agreement, and shall be deemed effectively delivered only: (a) upon personal delivery, (b) upon delivery by a courier service as confirmed by written delivery confirmation, (c) upon delivery by facsimile or email as confirmed by transmission receipt, or (d) three (3) business days after being deposited in the regular mail as certified or registered mail

(airmail if sent internationally) with postage prepaid. Either party may change its address for notice by giving notice to the other party in accordance with this section. A copy of any required notice must be sent via email delivery to legal@Kyligence.io (if to Kyligence) or [@.] (if to Customer).

XIV Governing Law, Jurisdiction, Venue, and Dispute Resolution

This Agreement shall be construed in accordance with applicable U.S. federal law and the laws of the State of California without regard to conflict of laws principles. In the event a dispute arises out of or in connection with this Agreement, the parties will attempt to resolve the dispute through good faith consultation. If the dispute is not resolved within a reasonable period, then any or all outstanding issues may be submitted to mediation in accordance with any statutory rules of mediation. If mediation is not successful in resolving the entire dispute or is unavailable, any outstanding issues shall be finally settled by arbitration in San Francisco, California, in accordance with the Arbitration Rules and Procedures of JAMS then in effect, by one or more commercial arbitrator(s) with substantial experience in resolving complex commercial contract disputes. Judgment upon the award so rendered may be entered in a court having jurisdiction or application may be made to such court for judicial acceptance of any award and an order of enforcement, as the case may be. Notwithstanding the foregoing, each party shall have the right to institute an action in a court of proper jurisdiction for injunctive or other equitable relief. For all purposes of this Section 14, unless otherwise elected by Kyligence in writing for a particular instance, the sole jurisdiction and venue for actions related to the subject matter hereof shall be the state or federal courts of San Francisco County, California, and both parties consent to the jurisdiction of such courts.

XV Force Majeure

Other than for payment of money, a party shall be excused from any delay or failure in performance hereunder due to any labor dispute, government requirement, internet congestion or breakdown, or any other cause beyond its reasonable control. Such party shall use commercially reasonable efforts to cure any such failure or delay in performance arising from such a condition, and shall timely advise the other party of such efforts. If such delay continues for more than sixty (60) days, the performing party may, upon not less than ten (10) days prior written notice to the non-performing party, terminate this Agreement.

XVI Relationship of the Parties.

The relationship between the parties shall only be that of independent contractors. Neither party is an agent, representative, partner, employer, or employee of the other party, and neither party shall have any right or authority to assume or create any obligations or to make any representations or warranties on behalf of any other party, whether express or implied, or to bind the other party in any respect whatsoever.

XVII Publicity

Neither party shall issue or release any announcement, statement, press release, or other publicity or marketing materials relating to this Agreement or otherwise use the other party's trademarks, service marks, trade names, logos, domain names, or other indicia of source, affiliation, or sponsorship without obtaining the express prior written consent of the other party. Notwithstanding anything to the contrary in this Agreement, Kyligence may reference Customer as a Kyligence Product user in its marketing and promotional materials, including but not limited to the Kyligence's website. Customer agrees to participate in press announcements, case studies, trade shows, or other forms reasonably requested by Kyligence.

XVIII General

A party shall not assign nor transfer any obligations or benefit under this Agreement without the written consent of the other party, provided that, without the other party's consent, a party may assign this Agreement freely without restriction to an affiliated entity or to a successor to substantially all of its business or assets to which this Agreement relates. Any purported transfer or assignment in violation of this section is void. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns. This Agreement, together with its exhibit(s), is the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements, and all prior and contemporary proposals and discussions relating to the subject matter of this Agreement, and controls over the preprinted terms of any purchase order or similar document. Any waiver by either party of any default or breach hereunder shall not constitute a waiver of any provision of this Agreement or of any subsequent default or breach of the same or different kind. All notices, modifications and waivers under this Agreement must be in a writing executed by a duly authorized representative of each of the parties. If any provision of this Agreement is determined to be unenforceable, that provision will be replaced with the valid one that most closely achieves the parties' intent and the remainder of this Agreement will remain enforceable. This Agreement may be executed in counterparts, electronically or by facsimile signatures, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument.