



# LICENSE AGREEMENT GENERAL TERMS & CONDITIONS



## LICENSE AGREEMENT – GENERAL TERMS AND CONDITIONS

PLEASE READ THE FOLLOWING LICENSE AGREEMENT BEFORE USING CARMINE’S WEBSITE OR BEGINNING YOUR USE OF OUR SERVICES. BY ACCEPTING THIS LICENSE AGREEMENT, YOU ARE ACKNOWLEDGING AND AGREEING TO BE LEGALLY BOUND BY THE TERMS AND CONDITIONS OF USE CONTAINED HEREIN.

### 1. PURPOSE

This License Agreement – General Terms and Conditions (“Agreement”) governs your (hereafter “you” or “your”) access to and use of the Fleet Management Services, consisting generally of your purchase of the plug-in device (“Device”) and your use of the server application (“Software”) (collectively hereinafter the “Services”) provided by Microtelematics, Inc. dba Carmine (“we” or “Carmine”), a Delaware Corporation.

### 2. ACCEPTANCE OF AGREEMENT

2.1 Your use of and access to the Services are conditioned upon your acceptance of the terms and conditions of this Agreement, the exclusive offer of tiered pricing plan as provided in your special offer (“Special Offer”) which shall be incorporated into this Agreement by reference, log in on our website, and compliance with all applicable laws, rules, and regulations. By accepting this Agreement, you acknowledge and agree to be legally bound by the terms and conditions of use contained herein. If the Services are to be used by or on behalf of a company or other organization, the individual expressing acceptance of this Agreement represents and warrants that he or she has the authority to bind that company or other organization to this Agreement, and the terms “you” and “your” as referenced herein will refer to that company or other organization. If you do not accept the terms of this Agreement and do not desire to be legally bound thereby, you will not be granted any license to use Carmine’s Services, you may not use the Services, and you must delete all existing copies of the Free Mobile App or Software, if any, without retaining any copies thereof.

2.2 The technology related to the Services is constantly changing and further developing. As such, Carmine reserves the right to change the terms in this Agreement at any time. Carmine will notify of any such changes by publishing the updated terms and conditions on its website at [www.carmine.io](http://www.carmine.io). Changes shall take effect immediately upon publication.

### 3. EFFECTIVE DATE OF THE AGREEMENT

This Agreement commences as of the date in which you sign and submit to Carmine the executed Special Offer, receives an order confirmation (*i.e.*, Carmine’s “Welcome Email”), provision of payment information, and made a payment to purchase the Devices (“Effective Date”).

#### 4. LICENSE, RESTRICTIONS ON USE, REPRESENTATION

4.1 From the Effective Date, Carmine grants to you a limited, revocable, non-exclusive, non-transferable license to use the Services for the duration of this Agreement, subject to the terms and conditions as set forth herein ("License"). The License does not grant you the right to use the Services in any manner not expressly permitted in this Agreement, and all rights not expressly granted to you in this Agreement are retained by Carmine. The License shall automatically terminate upon termination of this Agreement.

4.2 You understand and agree that the Services are being provided to you for business purposes only, and are intended to be used only to locate and track your vehicles, collect data regarding your vehicle status and usage, and provide other relevant business related data. You understand that the Services are in no way intended to be used in emergency situations or for the prevention of crime.

4.3 You acknowledge and agree that you, your employees, authorized users, agents, and representatives shall use the Services for lawful purposes, and in a manner that complies with all applicable federal, state, and local laws, regulations, and this Agreement. With respect to those employees or authorized users that will be using the Services in connection with driving a vehicle, you acknowledge and understand that none shall use the Services in any manner which may affect the ability of the driver to comply with all local laws and regulations. In the event any such driver causes any loss or damage due to his or her acts or omissions while driving, you agree that you, and not Carmine, will be solely responsible for any such loss or damage caused thereby.

4.4 You acknowledge and agree that you, your employees, authorized users, agents, and representatives shall not commit any of the following acts in connection with the Services: (i) access or log in to, or attempt to access or log in to, any account or data that is not associated with your account or use of the Services; (ii) use any data obtained through your use of the Services for any unlawful purpose or in violation of any federal, state, or local law, regulation, or term or condition of this Agreement; (iii) track or monitor any individual without said individual's prior express consent; (iv) willfully tamper or interfere with, or breach or attempt to breach, any of Carmine's security or authentication measures; (v) willfully tamper or interfere with any of the Services; (vi) copy, rent, lease, sell, reproduce, assign, license, or sublicense any of the Services or License, or attempt to copy, rent, lease, sell, reproduce, assign, license, or sublicense any of the Services or License; (vii) remove, alter, conceal, or tamper with any copyright, trademark, or other form of intellectual property belonging to Carmine; (viii) use, reproduce, republish, transmit, or distribute the name of Carmine or any of its proprietary rights without obtaining Carmine's express prior written consent; or (ix) attempt to modify, translate, reverse engineer, disassemble, decompile, or otherwise try to discover any of the underlying ideas of any portion of the Services.

4.5 You represent and warrant that you are not a "consumer" as defined in California Business and Professions Code Section 17601(d), which defines a "consumer" as any individual who seeks or acquires, by purchase or lease, any goods, services, money or credit for personal,

family, or household purposes. You further warrant that Carmine may detrimentally rely on your representation that you are not a “consumer” receiving Services for personal, family or household purposes.

## 5. DELIVERY AND PAYMENT

5.1 You agree to provide Carmine with your accurate payment information, including a current, valid credit card number, the expiration date, and other information relating to payment. By providing your payment information on Carmine Portal, you hereby authorize Carmine to automatically charge your credit card with all charges applicable to your use of Carmine’s Services. Upon cancellation or expiration of the credit card provided, you will immediately provide Carmine with a new or updated credit card number, expiration date, and other information relating to payment.

5.2 Upon your acceptance of this Agreement, order confirmation (*i.e.*, Carmine’s Welcome Email), and provision of payment information, Carmine will issue to you an invoice to evidence your payment to purchase each Device at the Monthly Cost as stated on your Special Offer (for example, if your Monthly Cost per vehicle is \$39.99, then the purchase price for each of your Device will be \$39.99) (“Purchase Price”). Sales tax will be applied to the purchase price in States where applicable. Carmine agrees to pay such sales tax only as to those Devices purchased under this Section 5.2. Carmine will ship the Device(s) to the address provided by you.

5.3 Upon your payment of Purchase Price, Carmine will provide you with your first thirty (30) days of Service free of charge, after which you will be charged a Monthly Cost per vehicle, as stated on your Special Offer. The “Monthly Cost” refers to the “Monthly Cost” per vehicle offered to you for each pricing tier as stated in your Special Offer.

5.4 All payments are nonrefundable. You will not be credited for any partially unused use periods in a given month in the event you elect to terminate the Agreement by providing a termination notice as specified in Section 6 below. You will continue to have access to and use of the Services until the end of the Subscription Term as defined below.

5.5 You agree to pay an activation fee of ninety-nine dollars (\$99.00) for each Device that Carmine ships to you, which will be due at the time of termination of this Agreement. Your credit card will be automatically charged at the time of your providing the notice to terminate this Agreement, unless (a) you notify Carmine of your intent to return all Devices to Carmine, (b) you return all Devices to Carmine within ten (10) days after termination, and (c) the Devices are not broken or otherwise damaged as determined by Carmine in its sole discretion. Pursuant to Section 8.1 below, upon meeting all conditions as set forth above, Carmine, at its sole discretion, may waive the activation fees for the Devices. Carmine will provide you with a shipping label and pay for the cost of its return shipping.

5.6 Pursuant to Section 6 below, Carmine reserves the right to terminate this Agreement in the event of late payment or your failure to make payment in accordance with the terms herein. Your reversal of charges for Monthly Cost is deemed to be a cause for immediate termination by Carmine. You understand and agree that should Carmine terminate this Agreement pursuant to Section 6 below, any payments for the remaining portion of the Subscription Term, including the per Device activation fee (unless waived per Section 5.5 above), will become due and must be paid immediately by you. Notwithstanding the foregoing, Carmine may agree to reactive your Services upon your full payment of any outstanding fees and costs incurred by Carmine to collect from you. In addition, you will be responsible for any reactivation fees charged by Carmine in connection with reactivating the Services.

5.7 Except as otherwise expressly set forth herein, you agree to pay when due any and all sales, use, and other taxes, fees, or charges required by applicable federal, state, and/or local laws relating to the Services provided under this Agreement.

5.8 Carmine reserves the right to change its service fees at any time and in any manner, with or without notice.

## 6. SUBSCRIPTION TERM AND TERMINATION

6.1 This Agreement commences as of the Effective Date and will continue for the Subscription Period as specified in the Special Offer, whether be month-to-month subscription or a twelve (12) month subscription (hereafter "Initial Subscription Period"), unless terminated earlier under the terms of hereof.

6.2 After the Initial Subscription Period, this Agreement will renew automatically for additional Subscription Period ("Renewal Subscription Period") (the Initial Subscription Period together with any Renewal Subscription Periods, collectively, the "Subscription Term"); provided, however, that this Agreement may be terminated at the end of the Initial Subscription Period, or at the end of any subsequent Renewal Subscription Period, if you provide a written notice to Carmine with your request to terminate at least thirty (30) days prior to the end of the Initial Subscription Period, or current Renewal Subscription Period as the case may be.

6.3 Each month during your Subscription Term, the Monthly Cost set forth in the Special Offer shall be automatically charged to your credit card on file as a prepayment for the subsequent month's use, unless and until you terminate the Services in accordance with the terms provided herein. For example, if the Effective Date is January 5<sup>th</sup>, then the Monthly Cost will be charged to your credit card on the 5<sup>th</sup> of every month during the Subscription Term.

6.4 Carmine may terminate this Agreement upon thirty (30) days prior written notice for your unremediated, material breach of any provision of this Agreement. If such breach is not curable (*e.g.*, the disclosure of Confidential Information, failure to provide current and valid payment information), the Carmine may terminate this Agreement immediately upon providing

written notice thereof to you, at which time you also forfeit your rights to the Devices in your possession. Notwithstanding the foregoing, the parties may mutually agree to terminate this Agreement and enter into a new agreement with a new Special Offer as negotiated by the parties.

6.5 This Agreement may be terminated by Carmine, which termination shall be effective without notice, upon the occurrence to you of any act, determination, filing, judgment, declaration, notice, appointment of receiver, liquidator, examiner or trustee, failure to pay debts or other events under any applicable laws of the jurisdiction indicating your insolvency or bankruptcy or Carmine receiving the notice of the same from you, your representative or any third parties.

6.6 Notwithstanding the foregoing, Carmine shall have the right to terminate this Agreement or the Services at any time with or without cause by giving you written notice of such termination, to be effective upon Carmine sending of such notice to your email address on Carmine's record.

6.7 Upon termination, your customer account will be deleted and any rights granted to you under this Agreement will be immediately revoked, including, but not limited to, your right to access any data produced in connection with your use of the Services in any manner, and you agree to promptly and permanently delete any and all copies of the Software that are in your possession or control, unless provided otherwise in writing by Carmine.

6.8 You must submit your written request to terminate this Agreement to Carmine at [SUPPORT@CARMINE.IO](mailto:SUPPORT@CARMINE.IO).

## 7. PRIVACY POLICY AND DISCLOSURES

7.1 Upon initial consultation, log in on our website, and during your use of the Services, Carmine may collect, use, process, and store certain personal, diagnostic, usage, and other related content or data from the devices which you use to access the Services. Carmine respects your privacy, and any such information shall be subject to our Privacy Policy, which can be viewed at [www.carmine.io](http://www.carmine.io). and is hereby incorporated by reference.

7.2 You agree to provide any and all required disclosures to each employee or other authorized user of any vehicle in which a Device has been installed and to take any and all such other actions as may be required by applicable laws in compliance with any applicable notification and disclosure requirements. Without limiting the foregoing, you agree that you will provide written notice to each such employee or other authorized user that their vehicle will be tracked upon installation of the Device, and obtain consent from each to such action.

## 8. OWNERSHIP

8.1 All rights and title of ownership in the Device shall be transferred to you upon your purchase of the Device. In the event you return the Device to Carmine in accordance with Section

5.5 above, all rights and title of ownership in the Device shall be irrevocably transferred back to Carmine in consideration of Carmine's waiver of the activation fee for each Device returned. For clarification purposes, all proprietary rights in and to the Device shall at all times belong to Carmine, including all copyrights, patents, trademarks, and other intellectual property rights.

8.2 With respect to the Software, all rights and title of ownership shall at all times remain the property of Carmine, and you acknowledge and agree that this Agreement does not grant you any right to copy, transfer, disclose, or own any or all portion of the Software. Carmine reserves sole and exclusive ownership of the Software and all proprietary rights therein, including all copyrights, patents, trademarks, and other intellectual property rights.

8.3 With respect to the geolocation data produced during your use of the Services, all such data shall belong to you and shall constitute your property. You agree that Carmine may use and disclose such data, whether in aggregated and anonymized form or otherwise, for purposes of performing its obligations under this Agreement and as otherwise required in connection with the operation, support, maintenance, improvement, or other use of the Services and any information, content, materials, applications, products or services made available on, through or in connection therewith. During the term of this Agreement, you will be able to access the data through your customer account, where you will be able to view, use, print, and save such data at your convenience. You understand that your customer account will be deleted upon termination of this Agreement, and that your right to access any data produced in connection with your use of the Services shall be immediately revoked upon termination. You acknowledge and agree that Carmine is not responsible for maintaining your data after termination of this Agreement, and that Carmine shall not be liable for any loss of data after termination.

8.4 At Carmine's request, you may be asked to provide a review or evaluation of the Device or Software for Carmine's internal use. You hereby acknowledge and agree that any comments or feedback relating to the Services will become the property of Carmine upon receipt and may be used by Carmine for business and/or related purposes.

## **9. LIMITED PRODUCT WARRANTY**

9.1 Carmine hereby warrants that the Device shall be free from defects in workmanship and materials for a period of twelve (12) months after your receipt of the Device (the "Limited Product Warranty"). This Limited Product Warranty shall apply only to the original purchaser of the Device, and shall not apply to normal wear and tear. The Limited Product Warranty shall not apply, and will not cover replacement of the Device, if the Device is broken or otherwise damaged due to any misuse, tampering, accident, abuse, neglect, improper installation, water damage, weather damage, sun or heat damage, misapplication, interference with, opening or attempted opening, alteration or modification of any kind, disaster, or defects caused by anyone other than Carmine, such damage to be determined in Carmine's sole discretion, or damage caused by reception, signal, or cable or antenna systems outside of the Device. REPLACEMENT OF A

DEFECTIVE DEVICE IS YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED PRODUCT WARRANTY.

9.2 In the event a replacement of the Device is covered by the Limited Product Warranty, you will comply with Carmine's Return Merchandise Authorization ("RMA") procedures including the following: (a) contact our customer service and obtain an RMA number, adequately package the defective Device and ship it back to Carmine at the address provided, and (b) identify the RMA number conspicuously on the outside of the shipping box or envelope. You understand and agree that in the event Carmine determines the Device is not defective and is in good working order, Carmine will charge you a testing fee at a flat rate of twenty-nine dollars (\$29.00) for each Device that is shipped to Carmine for testing. In such cases, Carmine will ship the Device back to the address provided by you, and you will be responsible for all return shipping and handling costs.

9.3 The Software is provided to you on an "AS IS" and "AS AVAILABLE" basis. You acknowledge that Carmine has no obligation whatsoever to provide any maintenance or support relating to the Software during the term of your use of the Services. OTHER THAN THAT LIMITED PRODUCT WARRANTY SET FORTH ABOVE IN SECTION 9.1, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, CARMINE DISCLAIMS ANY AND ALL WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, QUIET ENJOYMENT OR NON-INFRINGEMENT, AND ANY WARRANTIES ARISING OUT OF COURSE OF DEALING OR USAGE OF TRADE, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE.

9.4 IN ADDITION AND WITHOUT LIMITING THE FOREGOING, CARMINE MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND RELATING TO: (1) THE ACCURACY, ADEQUACY, CORRECTNESS, OR COMPLETENESS OF THE INFORMATION WITHIN THE SOFTWARE; OR (2) THE SECURITY, UNINTERRUPTION, AVAILABILITY, OR ERROR-FREE BASIS OF THE SOFTWARE, OR ABILITY TO MEET YOUR REQUIREMENTS, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE.

9.5 In the event a Device stops performing during your use of the Services, and the Device is not covered by the Limited Product Warranty described in Section 9.1, you may choose to purchase a replacement Device for one hundred forty-nine dollars (\$149.00), plus shipping and handling. If you lose a Device, you may also purchase a replacement Device for one hundred forty-nine dollars (\$149.00), plus shipping and handling. If a replacement Device is purchased, it will be subject to an activation fee of ninety-nine dollars (\$99.00) for each Device. However, Carmine's agreement to waive the activation fee, pursuant to Section 5.5, shall transfer and apply to the replacement Device.

## 10. PROPRIETARY RIGHTS

10.1 All copyrights, patents, trademarks, or other proprietary rights provided by Carmine or its affiliates in connection with its Services belong to Carmine or its affiliates, and such



proprietary rights are protected from unauthorized copying or dissemination by applicable copyright and trademark laws, international conventions, and other intellectual property laws. You understand that you may not use, reproduce, republish, transmit, or distribute the name of Carmine or any of its proprietary rights without obtaining Carmine's express prior written consent, and that you may not attempt to modify, translate, reverse engineer, disassemble, decompile, or otherwise try to discover any of the underlying ideas of any portion of the Services. All other rights in the Services not expressly granted herein are reserved.

10.2 Controlling over any contrary provisions herein, you acknowledge that any breach of any provision of this Section will cause immediate and irreparable injury to Carmine, and in the event of such breach, Carmine shall be entitled to seek injunctive relief in a court of law in addition to any and all other remedies available at law or in equity.

## 11. DISCLAIMERS AND LIMITATIONS OF LIABILITY

11.1 You acknowledge and understand that each Device is intended for use in a single vehicle, and that the removal and re-installation of a Device into more than one vehicle may subject the Device to suffer damage outside of normal wear and tear. You understand that Carmine strongly advises against removing and re-installing any Device in more than one (1) vehicle and that such actions do not constitute usage in the ordinary course of business. You further understand and agree that any damage that results to a Device due to these actions may render the Limited Product Warranty null and void, and that Carmine will not be responsible or liable for any Device not installed and used in accordance with this paragraph.

11.2 You understand that the Device is an electric device that, when installed in a vehicle, consumes power on a continual basis. The Services are designed and intended to minimize the amount of power that is consumed; however, the amount of consumption depends on a variety of factors such as the condition of the vehicle and vehicle components, and the frequency of use of the vehicle. Vehicles that are not in regular operation may experience more of a power drain, and Carmine strongly suggests that in the event you know or suspect that a vehicle will not be in regular operation, you disconnect the Device in order to prevent excess drainage. Carmine also suggests that you periodically recharge the vehicle battery in order to avoid the inoperability of the vehicle due to excess power drainage. You acknowledge and agree that Carmine shall not be liable or responsible for any outcomes that may result from any power drainage caused by, or associated with, your use of the Device.

11.3 You understand that each vehicle in which a Device is going to be installed must have a compatible and properly functioning electrical system in order for the Services to work. You understand that the Services may not operate as intended in the event the Device is damaged or improperly installed, or installed in a vehicle or combined with equipment that is incompatible with the Software. It is your responsibility to ensure the compatibility of each vehicle in which a Device will be installed. You acknowledge and agree that Carmine shall not be liable or responsible for any damages to any vehicles, including, but not limited to, interference with the vehicle's computer

or electrical systems, resulting from or otherwise connected to your installation of a Device in a vehicle that does not have a compatible and properly functioning electrical system.

11.4 You understand that access to your account and data is protected by a user name and password, which is chosen and can be changed by you. You understand and agree that you are entirely responsible for the recordation and control of your user name and password, and that you will be solely responsible for any use thereof. You agree that Carmine shall not be liable or responsible for the use or misuse of any user name or password, and that you are entirely responsible for maintaining confidentiality with respect to your user name, password, and account information, as well as any and all activities that occur within your account. If you suspect there has been a security breach or unauthorized use of your account, you agree that you will immediately notify Carmine. Carmine shall not be liable for any unauthorized access to your account or for any claims or actions associated therewith.

11.5 You acknowledge and understand that the Device receives signals from, and transmits signals to, a third party communication provider using Global Positioning System ("GPS") technology, in addition to other similar technologies. You understand that in order to transmit signals to the third party communication provider, the Device uses cellular telephone networks provided by one or more wireless carriers with whom Carmine has contracted. You further understand that the Services may be temporarily interrupted, or otherwise become inaccessible, inoperable, or delayed due to reasons beyond Carmine's control, including, but not limited to, the following: (i) lack of wireless network coverage in a geographic area or restrictions on wireless coverage; (ii) geographic, atmospheric, or terrain conditions, or other natural or artificial environmental conditions beyond Carmine's control, including, but not limited to, electrical storms, floods, fires, or power failures; (iii) equipment malfunctions or damage; (iv) network traffic or congestion; (v) interruptions in or unavailability of internet connection; (vi) modifications, upgrades, repairs, or other interference with or to the network transmissions or services; (vii) obstruction of satellite signal transmissions caused by buildings, overpasses, parking garages, underground tunnels or structures, or other large objects; (viii) lack of sufficient power or operating capability of the Device; (ix) government regulations or any changes in rules, regulations, or policies made by the Federal Communications Commission ("FCC") or other authorized or regulating governmental authorities; (x) any third party communication provider's unilateral decision to discontinue, suspend, or terminate its provision of communication services; or (xi) any other reason beyond Carmine's control. You understand that the Services are limited to usage within the United States, and may be further limited if outside the network coverage area provided by the wireless carriers. You agree that Carmine shall not have any responsibility with respect to the third party communication providers, GPS or similar technology, cellular telephone networks or wireless carriers, or any data transmitted thereby or therein. In addition, you acknowledge and agree that Carmine shall not, in any manner, be liable or responsible for any interruptions, disruptions, or delays in the Services for any reason whatsoever, or for any costs, losses, or damages, including indirect, consequential, punitive, special, or incidental or other damages, that may result for any such interruptions, disruptions, or delays in the Services. You further agree that you will not be entitled to any discounts or refunds as a result of any such interruptions in the Services.

11.6 You acknowledge and agree that Carmine cannot warrant or guarantee the security of the wireless signal transmissions that are made to or from third party communications providers or the information transmitted therein, and that Carmine shall not be liable or responsible for any lack of security relating to your use of the Services.

11.7 Certain vehicles may come equipped with telematics systems which provide for manual or automatic public safety response services through public safety answering points ("PSAP") in emergency circumstances. You understand that you are not a third party beneficiary to any existing contract between Carmine and any emergency service provider, if any, and that this Agreement does not create any relationship with any emergency service provider. You understand and agree that in no event shall Carmine be held responsible or liable for any damages, losses, claims, or causes of action of any kind arising out of, resulting from, or otherwise connected with your use or attempted use of such telematics systems or other emergency services (e.g. 911 emergency services) during your use of the Services.

11.8 You acknowledge and agree that you are solely responsible for any risk that you take in subscribing to the Services. IN NO EVENT SHALL CARMINE, ITS AFFILIATES, SUBSIDIARIES, PARTNERS, LICENSORS, BRAND LICENSEES OR SUPPLIERS, OR ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, SHAREHOLDERS, LEGAL REPRESENTATIVES, AGENTS, SUCCESSORS, OR ASSIGNS, BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL, PUNITIVE, SPECIAL, OR INCIDENTAL OR OTHER DAMAGES, COSTS OF SUBSTITUTE GOODS OR SERVICES, OR LOSS OF PROFITS, DATA, GOODWILL, OR OTHER TANGIBLE LOSSES RESULTING FROM, ARISING OUT OF, OR IN CONNECTION WITH THE ACCESS, USE OF, OR INABILITY TO ACCESS OR USE THE DEVICE OR SOFTWARE OR THE CONTENT THEREIN, INCLUDING, BUT NOT LIMITED TO, THE INABILITY TO ACCESS OR USE THE SERVICES CAUSED BY INTERFERENCE, OBSTRUCTION, OR INTERRUPTION IN SERVICES, EVEN IF CARMINE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, COSTS, OR LOSSES.

11.9 NOTWITHSTANDING THE ABOVE, UNDER NO CIRCUMSTANCES WILL CARMINE'S MAXIMUM AGGREGATE LIABILITY, IN ANY FORM OF ACTION WHATSOEVER IN CONNECTION WITH THIS AGREEMENT OR THE USE OF THE SERVICES, EXCEED THE TOTAL PRICE PAID BY YOU FOR YOUR USE OF THE SERVICES, NOR SHALL ANY ACTION BE BROUGHT AGAINST CARMINE FOR ANY BREACH HEREOF MORE THAN TWELVE (12) MONTHS FOLLOWING THE ACCRUAL OF SUCH CAUSE OF ACTION.

## **12. INDEMNIFICATION**

You agree to defend, indemnify and hold harmless Carmine, its affiliates, subsidiaries, brand licensees, other partners and suppliers and each of their respective officers, directors, employees, shareholders, legal representatives, agents, successors, and assigns, from and against any demands, claims, damages, liabilities, costs, expenses (including reasonable attorneys' fees, expert fees, and litigation costs), or causes of action of any kind or character that arise out of,

result from, or are otherwise connected with your, your officers, directors, employees, agents, assigns, invitees, or other users of the Services, use of the Device or the Software, or any breach or violation of the terms of this Agreement. This provision and the obligations contained herein shall survive the termination of this Agreement.

### **13. CONFIDENTIALITY**

13.1 You acknowledge that the Device and Software contain proprietary and confidential information of Carmine, which Carmine considers to constitute valuable trade secrets. "Confidential Information" shall include the Device and Software, any data, features, results, graphs, systems, designs, or output produced by, or other information relating to, the Software, any business or technical information of Carmine, and any trade secret or proprietary information concerning Carmine. You agree that you will keep and maintain all Confidential Information of Carmine in strict confidence, using such degree of care as you would use to protect your own confidential information, that you will not use any such Confidential Information for your own purposes, and that you will not use or disclose any Confidential Information of Carmine to any third party unless you obtain the prior written consent of Carmine. If you are a company or other organization, you are permitted to disclose Confidential Information only to those individuals within your company or organization who have a need to know such information in order to perform their job functions; provided, however, that you agree to be responsible for all such individuals' compliance with the terms of this Agreement.

13.2 "Confidential Information" shall not include any information that is lawfully in your possession at the time of disclosure, is or later becomes generally known to the public through no fault of your own or breach of this Agreement, is independently developed by you without reference to any Confidential Information provided by Carmine, or is lawfully obtained from a third party who is not in breach of any confidentiality obligations owed to Carmine. If you are required to disclose Confidential Information pursuant to law or legal order, you agree to promptly provide Carmine with written notification of such requirement, and cooperate with Carmine such that it will be able to take appropriate action to protect its Confidential Information.

### **14. DISPUTE RESOLUTION**

The parties agree that any and all disputes, disagreements, controversies, claims, or other causes of action which may arise between the parties in relation to or in connection with this Agreement shall be submitted to arbitration in accordance with the Arbitration Rules of the American Arbitration Association ("AAA") in Orange County, California, before a single arbitrator. AAA shall provide the parties with a list of at least three (3) neutral arbitrators from which the parties shall mutually select the arbitrator. Should the parties fail to agree upon an arbitrator, AAA shall make the selection for them. Arbitration shall be held and conducted before the selected arbitrator, whose decision shall be final and binding upon both parties. The costs and fees of the arbitrator shall be borne equally between the parties, and the parties agree that the prevailing party in the arbitration may collect all or a portion of its reasonable attorneys' fees

at the discretion of the arbitrator. Any arbitration proceeding shall be completed expeditiously and without undue delay or expense. In no event shall the demand for arbitration be made after the date upon which the institution of legal or equitable proceedings based upon the dispute, disagreement, controversy, claim, or other cause of action giving rise to the arbitration proceeding would be barred by the applicable statute of limitations. In the event either party commences litigation regarding any matter arising out of or in connection with this Agreement, the other party shall have the absolute right to have such litigation dismissed, and shall have the right to either request that the court refer the matter to arbitration or institute an arbitration proceeding which shall supersede and take precedence over any court proceedings. All attorneys' fees and costs incurred by either party in opposing and/or obtaining a dismissal of such non-arbitration proceedings shall be recoverable against the party initiating such proceedings.

## 15. GENERAL TERMS

15.1 Waiver. No failure on the part of Carmine to enforce any part of this Agreement shall constitute a waiver of any of Carmine's rights herein, whether for past or future actions on the part of any person. Neither the receipt of any funds by Carmine nor the reliance of any person on Carmine's actions shall be deemed to constitute a waiver of any part of this Agreement. No waiver of this Agreement will be deemed effective or enforceable unless in a writing signed by the party to be bound by the waiver.

15.2 Assignment. You may not assign this Agreement, in whole or in part, without Carmine's prior written consent which consent may be withheld by Carmine in its sole and absolute discretion. Any attempt to assign or delegate any rights, duties or obligations arising under this Agreement in contravention of the above shall be deemed null and void. Notwithstanding the foregoing, this Agreement, or any portion thereof, is fully assignable or transferable by Carmine to any person or entity and shall inure to the benefit of such assignee or successor.

15.3 Severability. In the event that any provision in this Agreement is held to be invalid or unenforceable, the invalid or unenforceable provision will be replaced by a valid, enforceable provision that most closely matches the intent of the original provision, and the remaining provisions shall remain in full force and effect.

15.4 Governing Law; Forum Selection. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to conflict of laws principles. The parties agree to the exclusive jurisdiction of, and venue in, the state or federal courts located in Orange County, California, with respect to any disputes, claims, or causes of action arising out of, relating to, or in connection with this Agreement or your use of the Services, including any disputes relating to the existence or validity of the terms of this Agreement.

15.5 Headings. The headings of the sections contained herein are inserted for convenience only, and shall not constitute a part hereof or affect in any way the meaning or interpretation of the terms of this Agreement.

15.6 Survival. All provisions hereof relating to restrictions on use and representation (Section 4), payment obligations (Section 5), privacy policy and disclosures (Section 7), ownership (Section 8), proprietary rights (Section 10), limitation of liability (Section 11), indemnification (Section 12), confidentiality (Section 13), dispute resolution (Section 14), and general terms (Section 15) shall survive the termination of this Agreement.

15.7 Entire Agreement. This Agreement, Privacy Policy and Special Offer as incorporated herein, constitutes the entire agreement between you and Carmine regarding your use of the Services, and supersedes and replaces any prior or contemporaneous agreements and understandings regarding the subject matter hereof, whether written or oral.

15.8 Force Majeure. Without limiting the limitation of liabilities set forth in this Agreement, in no event shall Carmine be responsible for any damage, loss, injury or harm resulting from matters beyond Carmine's reasonable control including but not limited to strike, lockout or labor dispute, lack or failure of customary sources of supply of fuel, labor and materials, national emergency, any law or governmental rule, order or regulation, war, civil commotion, riot, interference by civil or military authorities, fire, weather conditions, utility interruptions, other casualty or act of God.

15.9 Attorneys' Fees. If any legal action is necessary in order to enforce any of the terms or conditions of this Agreement or otherwise results from the relationship between you and Carmine, the prevailing party in any such action shall be entitled to recover its reasonable attorneys' fees and costs from the non-prevailing party.

## 16. ACKNOWLEDGEMENT

BY ACCEPTING THIS AGREEMENT, YOU ARE REPRESENTING TO CARMINE THAT YOU HAVE FULLY READ AND UNDERSTOOD ALL OF THE TERMS AND CONDITIONS OF THIS AGREEMENT, AND YOU ACKNOWLEDGE AND AGREE TO BE LEGALLY BOUND BY THIS AGREEMENT AND ALL SUCH TERMS AND CONDITIONS CONTAINED HEREIN.

IN ADDITION AND WITHOUT LIMITING THE FOREGOING, YOU FURTHER REPRESENT THAT YOU HAVE FULLY READ AND UNDERSTOOD THOSE TERMS AND CONDITIONS RELATING TO AUTOMATIC RENEWAL OF THE SUBSCRIPTION PERIOD CONTAINED IN SECTION 6, AND AGREE TO BE LEGALLY BOUND BY SUCH AUTOMATIC RENEWAL TERMS.