|  |  |
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| Agreement | |
| Terms of Service   Last Updated: 10 March 2022 | |
| Sendmarc | |
| 1 Sturdee Avenue, Rosebank  Johannesburg  South Africa | www.sendmarc.com  +27 10 900 0972  info@sendmarc.com |



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**NB:**  This document does not need to be completed unless specific alteration are required and agreed

# AGREEMENT

between

Sendmarc (Pty) Ltd

Registration Number: 2018/336082/07

And

|  |  |
| --- | --- |
| Organisation: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Registration Number: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

# SIGNATURE

Signed By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ At \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For: the Organisation

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signed By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ At \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For: Sendmarc Pty Ltd

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Definitions

The definitions and rules of interpretation in this clause apply in the Agreement.

1. **Agreement:** his agreement between the End User and Sendmarc.
2. **Authorised Users:** those employees, agents and independent contractors of the End User who are authorised by the End User to use the Services.
3. **Business Day:** a day other than a Saturday, Sunday or public holiday in South Africa.
4. **Channel Partner:** any authorised reseller of the Services.
5. **Confidential Information:** information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in clause 9
6. **Customer:** the customer purchasing the Services from Sendmarc.
7. **Customer Data:** the data inputted by the End User, or by its Authorised Users, the Channel Partner or Sendmarc on the End User's behalf for the purpose of using the Services or facilitating the End User's use of the Services.
8. **Documentation:** any documents made available to the End User by or on behalf of Sendmarc which sets out a description of the Services and the user instructions for the Services.
9. **Effective Date:** shall be the date on which the End User’s account is marked active within the Sendmarc environment.
10. **Order:** The End User's order for the Services on the Sendmarc website or otherwise submitted by a Channel Partner.
11. **Platform:** The online software applications provided by Sendmarc as part of the Services also call the Software.
12. **Sendmarc:** Sendmarc Pty (Ltd), a company registered in South Africa with company number 2018/336082/07 whose registered office is at 1 Sturdee Avenue, Rosebank, 2196, Johannesburg, South Africa.
13. **Services:** the subscription services provided by Sendmarc to the End User under the Agreement, as more particularly described in the Documentation.
14. **Software:** the online software applications provided by Sendmarc as part of the Services.
15. **Subscription:** the online software application as a service (SaaS) subscribed for by each End User.
16. **Subscription Fees:** the subscription fees payable by the End User to Sendmarc or to a Channel Partner, as set out in the Order.
17. **Term:** the period during which the Services will be provided as specified in the Order.

In the Agreement a reference to one gender shall include reference to every gender; words denoting a singular number include the plural and vice versa; references to persons shall include firms, companies and other organisations; a reference to a statutory provision includes a reference to the same as modified, re-enacted or replaced from time to time and any subordinate legislation made under it; a reference to a legal or regulatory body includes a reference to any successor body or bodies to it; headings shall not affect the interpretation of the Agreement; the words "include", "includes", "including" and "in particular" shall be construed as if they were followed by the words "without limitation". Except as expressly provided in the Agreement, the rights and remedies provided under the Agreement are in addition to, and not exclusive of, any other rights or remedies, whether under the Agreement or provided by law.

# Terms of Services

2.1 This Agreement is subject to the Sendmarc License Agreement. All Clauses of the Sendmarc License Agreement are incorporated herein as if specifically included, and where applicable any reference to End User in the Sendmarc License Agreement shall, in this Agreement, be read as “the Customer”. Over and above the Sendmarc License Agreement the following terms apply to the Customer and bind the relationship between the Customer and Sendmarc.

2.2 The Customer shall not be entitled to assign or sub-contract any of its rights or obligations under this Agreement or appoint any agent to perform such obligations,

2.4 The Customer represents and warrants to Sendmarc that it has the ability and experience to carry out the obligations assumed by it under this Agreement and that by virtue of entering into this Agreement it is not and will not be in breach of any express or implied obligation to any third party.

2.5 The Customer shall not:

1. not participate in any practices which would be objectively considered illegal, deceptive, or misleading including, but not limited to, disparagement of the Service offering or Sendmarc or other practices which may be reasonably considered to be detrimental to Sendmarc or the public interest;
2. not alter, obscure, remove, interfere with, add or change the style of Sendmarc's trademarks, trading names and logos or use them in connection with any other products or services or as part of the corporate or any trade name of the Customer except as expressly agreed in writing.

2.6 Sendmarc shall give the Customer advanced notification of any relevant changes or additions to the Services or related fees.

# Customer and End-User Data

3.1 Sendmarc processes a Customers’ DMARC data and has no access to any other sorts of data, including direct email flow or any of it’s contents. For a detailed analysis of Sendmarc’s data processing policy, please refer to the Sendmarc Information Security Policy.

# Charges and Payment

4.1 The Customer shall pay the Subscription Fees to Sendmarc in accordance with the Order and this clause 7.

4.2 The Customer shall on the Effective Date provide to Sendmarc valid, up-to-date and complete credit card details or approved purchase order information acceptable to Sendmarc and any other relevant valid, up-to-date and complete contact and billing details and, if the Customer provides:

1. its credit card details to Sendmarc, the Customer hereby authorises Sendmarc to bill such credit card as specified in the Order;
2. its approved purchase order information to Sendmarc, Sendmarc shall invoice the Customer and the Customer shall pay each invoice in accordance with the Order.

4.3 If Sendmarc has not received payment within 30 days after the due date, and without prejudice to any other rights and remedies of Sendmarc:

1. Sendmarc may, without liability to the Customer, disable the Customer's account and access to all or part of the Services and Sendmarc shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
2. interest shall accrue on a monthly basis on such due amounts at an annual rate equal to 2% over the then current Prime Rate from time to time, commencing on the due date and continuing until fully paid, whether before or after judgment.

4.4 All amounts and fees stated or referred to in the Agreement:

1. shall be payable in currency represented on your invoice;
2. are non-cancellable and non-refundable;
3. are exclusive of value-added tax, which shall be added to the invoice(s) at the appropriate rate.

# Limitation of Liability

5.1. Subject to clause 5.2 below, Sendmarc shall have no liability under this Agreement and/or the End User’s use of the Software and Services in the event that:

1. the Software is not used in accordance with the Documentation; or
2. the defect or liability is caused by End User or Partner; or
3. the Services and Software are used in conjunction with any third party software for which the End User lacks sufficient rights from the third party vendor for such use; or
4. for any End User activities not permitted under this Agreement.

Under no circumstances and regardless of the nature of any claim will Sendmarc, its licensors or end user be liable to each other or any other person or entity for in any amount for special, incidental, consequential, or indirect damages, loss of good will or profits, work stoppage, data loss, computer failure or malfunction, attorneys’ fees, court costs, interest or exemplary or punitive damages.

5.2. Subject to clauses 5.1 above, but notwithstanding any other provision of this Agreement, Sendmarc’s maximum aggregate liability to Customer, whether in contract, delict (including negligence), breach of statutory duty or otherwise, arising under or in connection with this Agreement, shall be limited to the lower of:-

1. a sum equal to the total Fees paid to Sendmarc under this Agreement in a twelve-month period; or
2. that proportion of the loss or damage (including interest and costs) suffered by the Client, which is ascribed to Sendmarc by a Court of competent jurisdiction or Arbitrator allocating a proportionate responsibility to the Client having regard to the contribution to the loss or damage in question by the Client or any other person based upon relative degrees of fault; it being a term of this Agreement that the provisions of Section 1 of the Apportionment of Damages Act, 1956 will apply to all claims between the Parties and “fault” and “loss or damage” as used herein shall respectively be deemed to fall within the meanings of “fault” and “damage” as contained in Section 1 of the Apportionment of Damages Act, 1956.

5.3 For the avoidance of doubt, any reference in this Clause 5.2 to "arising under or in connection with this Agreement" (or any similar expression) shall include a reference to all Orders made under or in connection with this Agreement.

5.4 Sendmarc and Customer shall each use commercially reasonable efforts to mitigate any Losses or other liabilities they may suffer or incur arising under or in connection with this Agreement.

# Breach and Dispute Resolution

6.1 Should any Party to this Agreement commit a breach of any of the terms and conditions hereof, and remain in default for a period of seven (7) days after receipt by it of written notice from the other Party/Parties calling for such breach to be remedied, without prejudice to any other rights they may have hereunder or in law, to terminate this Agreement by written notice to that effect given to the defaulting Party.

6.2 Either Party may summarily terminate this Agreement, at any time, by providing to the other ("the defaulting Party") notice of such termination if:

1. the defaulting Party is, other than for the purposes of reconstruction or amalgamation, placed under voluntary or compulsory winding up order, business rescue or under receivership or under the equivalent of any of the foregoing; or
2. the defaulting Party makes any arrangement or composition with its creditors generally, or ceases or threatens to cease to carry on business;

6.3 In the event that this Agreement is terminated, as described herein, each Party shall forthwith return to the other all papers, materials, and other properties of the other then in its possession.

6.4 Any dispute which arises shall be referred to a committee consisting of one (1) member appointed by each of the Parties, or alternates appointed by them, who will use their best efforts to resolve the dispute within fourteen (14) calendar days of the dispute having been referred to them.

6.5 Should the committee be unable to resolve a dispute in accordance with clause 6.4 above, then such dispute may be submitted to and decided by litigation in terms of clause 19 below.

# Variation

7.1 No variation of the Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

# Waiver

8.1 No failure or delay by a party to exercise any right or remedy provided under the Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

# Rights and Remedies

9.1 Except as expressly provided in the Agreement, the rights and remedies provided under the Agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

# Assignment

10.1 The Customer shall not, without the prior written consent of Sendmarc, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Agreement.

10.2 Sendmarc may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Agreement.

# No Partnership or Agency

11.1 Nothing in the Agreement is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

# Notices

12.1 Any notice required to be given under the Agreement shall be in writing and shall be delivered by hand or sent by email. Sendmarc's email address is info@sendmarc.com.

12.2 A notice delivered by hand or email shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9 am on the first business day following delivery).

# Severance

13.1 If any provision (or part of a provision) of the Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

13.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

# Entire Agreement

14.1 This Agreement and the Sendmarc License Agreement - <https://sendmarc.com/license>, constitutes the whole agreement between the parties and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter they cover.

14.2 Each of the parties acknowledges and agrees that in entering into the Agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this Agreement or not) relating to the subject matter of this Agreement, other than as expressly set out in the Agreement.

# Third Party Rights

15.1 The Agreement does not confer any rights on any person or party (other than the parties to the Agreement and, where applicable, their successors and permitted assigns).

# Jurisdiction

16.1 Each party irrevocably agrees that the Magistrates Courts of Johannesburg, South Africa shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

# Governing Law

17.1 The Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of South Africa.