



MILTENYI BIOTEC, INC.

**TERMS AND CONDITIONS OF SALE
FOR PRODUCTS AND SERVICES**

Last updated and effective as of July 20, 2020. Replaces any prior version in its entirety.

1. Agreement. The sale by Miltenyi Biotec, Inc. ("**Miltenyi**") of the Miltenyi products ("**Products**") and services ("**Services**") specified in the Miltenyi quotation to which these Terms and Conditions are attached ("**Quotation**") to the customer named in the Quotation ("**Customer**") is governed exclusively by the following (collectively, the "**Agreement**"):

(a) the Quotation;

(b) these Miltenyi Biotec, Inc. Terms and Conditions ("**Terms and Conditions**"); and

(c) if the Products covered by the Quotation include Miltenyi research use only (RUO) reagents for use in the manufacture of Customer's RUO products ("**Miltenyi OEM Reagents**"), the Authorized Customer Product Addendum attached to the Quotation as Attachment 2 (the "**Addendum**").

The Quotation constitutes an offer and is expressly limited to the terms and conditions of the Agreement. By accepting delivery of any of the Products or performance of any of the Services specified in the Quotation, Customer accepts the terms and conditions of the Agreement. The Agreement constitutes the entire understanding of the parties pertaining to the sale by Miltenyi to Customer of Products and/or the performance by Miltenyi of Services, and any prior understandings, agreements and representations, oral or written, are superseded by the Agreement. Any terms or conditions in any purchase order, acknowledgment, confirmation or other document provided by Customer to Miltenyi that are different from or in addition to those set forth in the Agreement are expressly objected to and rejected by Miltenyi and shall be of no effect, even if signed and returned, and even if Miltenyi delivers the Products or performs the Services ordered by Customer.

2. Prices. Except as otherwise expressly stated in the Quotation, all prices are subject to change without prior notice.

3. Purchase Orders. All purchase orders are non-cancelable. Purchase orders must be submitted in accordance with Miltenyi's then-current ordering procedures and must include all information required by Miltenyi. The current ordering procedures and order information requirements may be obtained from Miltenyi. Miltenyi reserves the right to reject any purchase order submitted by Customer for any reason. Miltenyi will be deemed to have accepted a purchase order only upon Miltenyi's delivery of an order acknowledgement or confirmation to Customer or, in the absence of such acknowledgment or confirmation, upon Miltenyi's delivery to Customer of the Products and/or the results of performance of the Services (as applicable) specified in such purchase order. Any terms or conditions in any purchase order, invoice, acknowledgment, confirmation or other document provided by either party to the other party that are different from or in addition to those set forth in the Agreement are expressly objected to and rejected by Miltenyi and shall be of no effect, even if signed and returned, and even if Miltenyi delivers the Products or performs the Services ordered by Customer.

4. Payment. Miltenyi shall issue written invoices to Customer for the price of Products and Services ordered by Customer. Prices quoted by Miltenyi for Products and Services do not include sales, excise, use or other taxes, value-added or similar taxes, customs duties, imposts or other assessments of any kind, and Customer shall bear and be solely responsible for payment of any and all such taxes, duties or other assessments. If Miltenyi has the legal obligation to collect any such taxes, duties or other assessments, the appropriate amount shall be added to Miltenyi invoice to Customer and paid by Customer. If, for whatever reason, Miltenyi does not collect any such amount from Customer and Miltenyi becomes liable to pay any such taxes, duties or other assessments or any penalties related thereto, Customer shall promptly pay such amounts directly to the appropriate governmental authority or, if Miltenyi is required to pay or has paid such amounts, shall pay such amounts to Miltenyi. All invoiced amounts for Products or Services hereunder shall be paid net 30 days from the date of invoice. All payments due hereunder shall be made in U.S. dollars or in equivalent Canadian dollars, converted at the prevailing daily exchange rate quoted in the latest edition of the Wall Street Journal (New York Edition) available before the date of actual payment when due. Any check or remittance received from or for the account of Customer may be accepted and applied by Miltenyi against any indebtedness owing by Customer, without prejudice to, or the discharge of, the remainder of any such indebtedness, and regardless of any condition, provision, statement, legend or notation appearing on, referring to or accompanying any check or remittance. Miltenyi reserves the right to assess a late fee equal to 2% per month or, if lower, the maximum amount permitted by applicable law, on all amounts not paid when due, calculated on a daily basis beginning with the first day following the invoice due date, without prejudice to any other remedies that may be available to Miltenyi. Shipment shall at all times be subject to the approval of Miltenyi's credit department. Miltenyi may at any time and in its sole discretion limit or cancel the credit of Customer as to time and amount, and, as a consequence, may demand payment in cash before delivery of any unfilled portion of any outstanding purchase order and may demand assurance of Customer's due performance. In the event of bankruptcy or insolvency of Customer or in the event any

proceeding is brought by or against Customer under any bankruptcy or insolvency laws or their equivalent, Miltenyi may cancel any order then outstanding without liability to Customer.

5. Shipment.

(a) Miltenyi shall package and ship Products in accordance with Miltenyi's SOPs and any applicable specifications for such Products to the delivery address specified in the applicable purchase order. Unless Customer specifies a particular carrier in its shipping instructions under a purchase order, Miltenyi shall ship Products using a carrier designated by Miltenyi. All shipments shall be FCA (Incoterms 2020) Miltenyi's facility. Customer shall be responsible for insuring all shipments of Products upon Miltenyi's delivery thereof to the carrier at Miltenyi's facility. All shipments will be subject to the standard terms and conditions of the designated carrier, and Miltenyi shall have no liability to Customer for any loss, damage or delay in a shipment attributable to the designated carrier or to events occurring during shipment. All freight, handling, insurance, duties, taxes and shipping expense will be borne by Purchaser. Miltenyi may make delivery in installments and may render a separate invoice for each installment. Customer shall pay all invoices for shipping charges upon receipt. Customer shall give written notice to Miltenyi of discrepancies between type or quantity of the Products ordered and that of the Products delivered within 10 business days after delivery of the Products to Customer. In the absence of such notice, Customer shall be deemed to have accepted the Products.

(b) For shipments to Canada, Miltenyi will provide necessary shipping documents to the importer of record or Customer's designated customs broker for clearance with the Canadian Border and Security Administration (CBSA). Miltenyi will not be responsible for replacing items if the importer or customs broker does not release temperature sensitive products in a timely manner. If Customer does not provide Miltenyi with Customer's current broker and shipping account designee at the time of ordering, Miltenyi will ship products through Miltenyi's designated broker. GST and shipping/brokerage fees will be charged totaling 12% of the total order amount.

6. Returns; Refunds

(a) All returns of Products must be made freight prepaid by the Customer and will not be accepted without a return Products authorization (RGA) from Miltenyi. The Products must be returned in their original packaging and, except in the case of Products not conforming to the limited warranty set forth in Section 8(a), in resalable condition. Special orders or non-stocked items may not be returned unless defective. Discontinued Products may not be returned.

(b) If Miltenyi determines (e.g., after inspection of the returned Products) that the requirements for a refund have been met, the refund is initiated immediately. The way Customer's refund is processed depends on the original payment method. If Customer paid by credit or debit card, refunds will be sent to the card-issuing bank within 5 business days of receipt of the returned item. Customer will be notified via email at the address listed on Customer's account when this transaction has taken place. Please note that Customer's card-issuing bank may require additional days to process and post this transaction to Customer's account once they have received the information from Miltenyi. Please contact your banking institution with questions about when the credit will be posted to your account. Allow up to two billing cycles for a refund to appear on your credit card statement.

7. Authorized Use of Products. Except as expressly set forth in Section 11 in the case of Miltenyi OEM Reagents, the purchase of Products only conveys to Customer the non-transferable right to use the quantity of Products purchased solely for Customer's internal research purposes and in compliance with any applicable intended use statement, limited use statement or limited label license specific to such Products. Except as expressly set forth in Section 11, no right to resell the Products, or any portion of them (including as components of other products), is conveyed.

8. Limited Warranty.

(a) Subject to the limitations set forth in this Section 8 and in Section 9 below, Miltenyi warrants to Customer that its Products and Services deliverables ("Deliverables") shall substantially conform to Miltenyi's published specifications for such Products and Deliverables in effect at the time of order acceptance.

(b) Promptly upon receipt of Products or Deliverables hereunder, Customer shall examine such Products or Deliverables for any defect or damage, including non-conformity to the warranty set forth in Section 8(a). All claims, including without limitation for non-conforming Products or Service deliverables, shortage or any other cause whatsoever, shall be deemed waived unless made in writing and received by Miltenyi within 10 business days after Customer's receipt of the Products or Service deliverables. Customer's failure to give notice of any claim within such period shall be deemed an irrevocable and unconditional waiver of such claim.

(c) As Miltenyi's sole liability, and Customer's sole and exclusive remedy, for the failure of any Product or Deliverable provided under the Agreement to conform to the warranty set forth in Section 8(a), Miltenyi shall, at Miltenyi's option: (i) as applicable, replace such non-conforming Product and/or re-perform the Services that resulted in such non-conforming Deliverables at no additional cost to Customer within a reasonable period of time; or (ii) refund the price paid by Customer for such non-conforming Product or the Services that resulted in such non-conforming Deliverable.

(d) This warranty does not apply to any non-Miltenyi manufactured products, even if packaged or sold with Miltenyi Products or provided through Miltenyi Services. Such other manufacturers may provide their own warranties or guarantees to Customer. Miltenyi only sells its Products and Services subject to the limited warranty set forth herein. As to any products or parts not manufactured by Miltenyi, Miltenyi will undertake, when possible, to pass on to Customer the benefit of any other manufacturer's warranty or guarantee provided to Customer or Miltenyi but Miltenyi shall not be responsible for ensuring the satisfaction of any such warranty or guarantee.

(e) This warranty shall not apply: (i) to any defect or damage caused by force majeure or other outside impact not attributable to Miltenyi; (ii) any non-conformance resulting from inappropriate treatment, excess usage, misuse, neglect, improper storage, disregard of operating and safety procedures or recommended maintenance intervals, or normal wear and tear; and in particular if the non-conforming Products or Deliverables have been handled, used or operated by untrained users, submitted to abnormal conditions (including, but not limited to, mechanical, electrical or thermal) during storage, installation or use, or serviced, repaired or altered except as set forth in the user manual or otherwise expressly authorized by Miltenyi, or otherwise interfered with by the Customer and/or by unauthorized third parties; (iii) if the non-conformance results from the use of replacement parts, consumables, accessories and/or expendable materials (in particular, reagents) other than those expressly approved by Miltenyi (e.g., in the user manual or otherwise in writing); or (iv) to Products and Deliverables supplied at Customer's request which Miltenyi has indicated may not conform to applicable specifications or which constitute experimental, developmental or, subgrade, sample, beta testing, prototype, pre-production and/or non-qualified products; or (v) if a defect results from the design, specifications or instructions of Customer and/or its representatives, or a third party supplier of Customer, for such Products or Deliverables, or utilizing the intellectual property of Customer and/or its affiliates, or such third party supplier, including process and/or product technology.

(f) THE LIMITED WARRANTY IN SECTION 8(a) ABOVE IS EXPRESSLY IN LIEU OF ANY AND ALL OTHER WARRANTIES. EXCEPT FOR THE LIMITED WARRANTY EXPRESSLY GRANTED IN SECTION 8(a) ABOVE, MILTENYI HEREBY DISCLAIMS ANY AND ALL WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO PRODUCTS DELIVERED AND SERVICES PERFORMED UNDER THE AGREEMENT, INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF DESIGN, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OF THE INTELLECTUAL PROPERTY RIGHTS OF THIRD PARTIES, OR ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICES.

9. Limitation of Liability.

(a) CUSTOMER ACKNOWLEDGES AND AGREES THAT THE AMOUNTS WHICH MILTENYI IS CHARGING HEREUNDER DO NOT INCLUDE ANY CONSIDERATION FOR MILTENYI'S ASSUMPTION OF THE RISK OF INCIDENTAL OR CONSEQUENTIAL DAMAGES WHICH MAY ARISE IN CONNECTION WITH USE OF THE PRODUCTS OR SERVICES BY CUSTOMER. ACCORDINGLY, CUSTOMER AGREES THAT MILTENYI SHALL NOT IN ANY EVENT BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, INCLUDING, WITHOUT LIMITATION, FOR PERSONAL INJURY, PROPERTY DAMAGE, LOST PROFITS OR OTHER ECONOMIC LOSS, ARISING IN CONNECTION WITH CUSTOMER'S USE OF OR INABILITY TO USE THE PRODUCTS OR SERVICES. THIS LIMITATION OF LIABILITY WILL APPLY REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT OR TORT, INCLUDING NEGLIGENCE AND INDEPENDENT OF ANY FAILURE OF ESSENTIAL PURPOSE OF THE LIMITED WARRANTY AND REMEDIES PROVIDED HEREUNDER.

(b) In no event shall Miltenyi's aggregate liability to Customer arising out of or relating to the Agreement exceed the total amounts paid by Customer to Miltenyi for Products supplied and Services performed hereunder during the preceding 12-month period. Miltenyi shall have no liability whatsoever to Customer or its affiliates arising out of or in connection with (i) Customer's use or exploitation of any Products supplied hereunder, (ii) Customer's use or exploitation of, or reliance upon, the results or other deliverables of any Services performed hereunder, or (iii) the research, development, manufacture, use, handling, storage, sale, distribution or other disposition of any Authorized Customer Product (defined below) by or on behalf of Purchaser, any of its affiliates or any of its or their respective third party distributors or marketing partners. The parties acknowledge that the limitations set forth in this Section 9 and in Section 8(c) are integral to the prices charged under the Agreement and that, were Miltenyi to assume any further liability other than as set forth in the Agreement, such prices would of necessity be substantially higher.

(c) Without limiting the generality of Sections 9(a) and 9(b), Miltenyi shall not be liable for any damage or loss caused by the improper or unapproved use of the Products. The Products are for research use only and are not to be used for human diagnostic or therapeutic purposes unless expressly approved for such purposes by the Food and Drug Administration in the U.S. or the appropriate regulatory agency in other countries. In the United States, CliniMACS® Reagents are available for use only under an approved Investigational New Drug (IND) application or Investigational Device Exemption (IDE). Without limitation to the generality of the foregoing, Customer shall handle and use the Products in accordance with good laboratory practice and in compliance with all applicable laws and regulations, guidelines and decisions of judicial or regulatory bodies.

10. Indemnification. Customer hereby agrees to save, defend, indemnify, and hold harmless Miltenyi, its affiliates and its and their respective officers, directors, employees, consultants, and agents (each, a "Miltenyi Indemnatee") from and against any and all losses, damages, liabilities, expenses, and costs, including reasonable legal expense and attorneys' fees (collectively, "Losses"), to which any Miltenyi Indemnatee may become subject as a result of any claim, demand, action, or other proceeding by any third party to the extent

such Losses arise directly or indirectly out of: (a) Customer's use, handling or exploitation of any Products supplied hereunder; (b) Customer's use or exploitation of, or reliance upon, any Service deliverables or other results of the Services performed hereunder; or (c) the use, manufacture, handling, storage, sale, marketing, promotion, distribution or other disposition by or on behalf of Customer, or any of its affiliates or third party distributors or marketing partners, of any Authorized Customer Product.

11. Miltenyi OEM Reagents.

(a) The terms and conditions of this Section 11 shall apply only if and to the extent that the Products covered by the Quotation include Miltenyi OEM Reagents. For purposes hereof, "**Authorized Customer Product**" shall mean any of Customer's research use only (RUO) products described in the Addendum that (i) contains or incorporates, or is packaged together with, any Miltenyi OEM Reagent supplied hereunder, (ii) is offered and sold for a single purchase price, and (iii) is labeled and marketed for research use only. For clarity, "Authorized Customer Products" exclude any Miltenyi OEM Reagent offered or sold by or on behalf of Customer on a stand-alone basis.

(b) **Authorized Use of Miltenyi OEM Reagents.** Customer shall use all Miltenyi OEM Reagents supplied under the Agreement solely for the purposes of (i) manufacture, sale and distribution by or on behalf of Customer of Authorized Customer Products (specifically excluding manufacture of any Miltenyi OEM Reagent) and (ii) Customer's internal research use (collectively, the "**Authorized Purposes**"). For the avoidance of doubt, Customer is prohibited from selling, reselling, transferring or distributing, and hereby covenants not to sell, resell, transfer or distribute, any Miltenyi OEM Reagent except as part of an Authorized Customer Product. Without limiting the generality of the foregoing, Customer covenants, on behalf of itself and its affiliates: (A) not to use any Miltenyi OEM Reagent supplied hereunder for any purpose other than the Authorized Purposes; (B) not to modify or create derivatives of any Miltenyi OEM Reagent, not to attempt to reverse engineer, deconstruct or in any way determine the structure or composition of any Miltenyi OEM Reagent, and not to make or have made any Miltenyi OEM Reagent; (C) not to sell, resell, transfer or distribute any Miltenyi OEM Reagent supplied hereunder as a stand-alone product, whether in the form supplied by Miltenyi or as repackaged by or on behalf of Customer; (D) not to use, label, sell, market or distribute any Miltenyi OEM Reagent or Authorized Customer Product for testing in or treatment of humans, or for the prediction, diagnosis or monitoring of a disease or measurable state in humans, or for making any decision regarding the treatment of any human subject; and (E) not to cause or permit any third party to engage in any of the activities described in the preceding clauses (A) through (D). Customer hereby agrees to use, and to require its affiliates and any of their respective third party contractors (including, without limitation, any third party distributor, marketing partner, manufacturer or other service provider) to use, the Miltenyi OEM Reagents in compliance with all applicable laws, rules and regulations, including, but not limited to, any laws, rules or regulations relating to the research, testing, production, storage, transportation, export, packaging, labeling or other authorized use of the Miltenyi OEM Reagents or Authorized Customer Products. As between the parties, Customer shall be solely responsible for the manufacture of Authorized Customer Products (other than the manufacture of the Miltenyi OEM Reagent included therein), and for the commercialization of Authorized Customer Products, including, without limitation, the sale, marketing, distribution and support of Authorized Customer Products.

(c) **Insurance.** Customer, at its own expense, shall procure and maintain, during the period for which Authorized Customer Products are offered for sale and for one (1) year thereafter, product liability insurance and commercial general liability insurance in amounts consistent with sound business practice of companies engaged in the development and commercialization of research products and commercially reasonable in light of the nature of the Authorized Customer Products. It is understood that such insurance shall not be construed to create a limit of Customer's liability with respect to its indemnification obligations. Customer shall provide Miltenyi with written evidence of such insurance upon request.

(d) **Additional Disclaimer.** Without limiting the generality of Section 8(e), Customer acknowledges and agrees that Miltenyi does not make, and that Miltenyi hereby disclaims, any representation or warranty: (i) as to the safety or usefulness for any purpose of any Miltenyi OEM Reagent, including, without limitation, the usefulness of any Miltenyi OEM Reagent as part of an Authorized Customer Product; or (ii) that Customer will be able to market, sell or otherwise exploit any Authorized Customer Product.

12. Miscellaneous.

(a) Customer shall maintain in confidence, shall not disclose to any third party, and shall not use for any purpose not expressly contemplated by the Agreement, any and all non-public, confidential or proprietary information of Miltenyi regarding any Products or Services, including but not limited to specifications, samples, designs, plans, drawings, documents, data, and any information regarding pricing, discounts or rebates, that is disclosed by Miltenyi to Customer, whether disclosed orally or disclosed or accessed in written, electronic or other form or media, and whether or not marked, designated or otherwise identified as "confidential." Upon request, Customer shall promptly return all documents and other materials embodying any such information received from Miltenyi (except to the extent embodied in Products or Service deliverables delivered to, and purchased and paid for by, Customer). Miltenyi shall be entitled to injunctive relief for any violation of this Section. This Section does not apply to information that Customer can demonstrate by competent evidence is: (i) in the public domain; (ii) known to Customer at the time of disclosure; or (iii) rightfully obtained by Customer on a non-confidential basis from a third party.

(b) Customer acknowledges that: (i) all right, title, and interest in and to all patents, copyrights, trademarks, trade secrets, and all other intellectual property and proprietary rights (collectively, "**IP**") subsisting in or related to the Products and Service deliverables

belong solely to Miltenyi; (ii) no transfer of any ownership interest in, or title to, any such IP is made to Customer; (iii) no license or other right under such IP is granted by Miltenyi to Customer, except for the right to use the Products and Service deliverables in compliance with all applicable terms and conditions of the Agreement; and (iv) except to the extent expressly provided in Section 10 in the case of Miltenyi OEM Reagents, such right to use the Products and Service deliverables explicitly does not include the right to modify, enhance, or improve the Products or Service deliverables or to transfer the Products or Service deliverables to any third party. Any and all comments, feedback, or suggestions from the Customer related to the Products and Services, in written or oral form, shall be the sole and exclusive property of Miltenyi.

(c) Miltenyi and Customer intend and agree that all software provided hereunder (whether on a stand-alone basis or as incorporated in any Products) is being licensed and not sold to Customer; and that the words "purchase," "sell," or similar or derivative words when used in relation to any such software are understood and agreed to mean "license." Notwithstanding anything to the contrary contained in the Agreement, Miltenyi or its licensor(s), as the case may be, retains ownership of and all rights, title and interest in and to the software. Customer shall use all software provided hereunder in accordance with the related documentation provided by Miltenyi with such software (or with the Products incorporating such software). Miltenyi shall be considered the sole owner of the software and related documentation provided hereunder and any copies thereof, and of all copyright, trade secret, patent, trademark and other intellectual property rights therein. Customer agrees not to sell, transfer, license, loan, or otherwise make available to third parties any software or related documentation provided hereunder. Customer shall not modify, enhance, or otherwise change or supplement any software provided hereunder. The source code for the software will not be disclosed to the Customer, and Customer shall not disassemble, decompile, or reverse engineer any software supplied hereunder.

(d) Notices and other communications required or contemplated by the Agreement shall only be effective if delivered in writing to the party for whom intended at its address set forth in the Quotation (or at such other address as such party may designate by written notice to the other party), either by (i) personal delivery, (ii) postage prepaid, return receipt requested, registered or certified mail, (iii) nationally recognized, overnight courier, such as Federal Express or UPS, or (iv) facsimile with a confirmation copy sent simultaneously by any of the other methods described above. Notice by registered or certified mail shall be effective on the date officially recorded as delivered to the intended recipient by return receipt or equivalent, and in the absence of such record of delivery, the effective date shall be presumed to have been the fifth (5th) business day after deposit in the mail. Notices delivered in person or sent by courier shall be effective on the date of personal delivery. Notices delivered by facsimile shall be deemed to be effective on the date sent.

(e) Except for the obligation to make payment when due, each party shall be excused from liability for the failure or delay in performance of any obligation under this Agreement by reason of any event beyond such party's reasonable control including but not limited to Acts of God, fire, flood, explosion, earthquake, or other natural forces, war, civil unrest, acts of terrorism, accident, destruction, or other casualty, any lack or failure of transportation facilities, any lack or failure of supply of raw materials, any strike or labor disturbance, or any other event similar to those enumerated above. Such excuse from liability shall be effective only to the extent and duration of the event(s) causing the failure or delay in performance and provided that the party has not caused such event(s) to occur.

(f) No rights or obligations hereunder may be assigned by Customer without the prior written consent of Miltenyi, and any attempted assignment or delegation without such consent shall be void.

(g) The Agreement is made in, and shall be governed by and construed in accordance with the laws of, the State of California applicable to contracts entered into and performed in California, without regard to its conflicts of laws rules. The United Nations Convention on Agreements for the International Sale of Goods shall not apply to the Agreement.

(h) If the Products or Services are to be used in the performance of a U.S. Government contract or subcontract, Customer shall notify Miltenyi of the U.S. Government contract number and furnish Miltenyi with copies of all applicable U.S. Government procurement regulations. Customer agrees to hold Miltenyi harmless from all losses, claims and expenses (including attorney's fees, expenses and court costs) in connection with any actual or asserted violation of such procurement regulations where Customer has failed to notify Miltenyi of their applicability in the manner provided in this Section.

(i) The failure by either party to exercise any of its rights under the Agreement on one occasion shall not be deemed a waiver of such right or any other right on that or any other occasion.

(j) If any provision of the Agreement is determined to be invalid or unenforceable under applicable law, such provision shall be ineffective to the extent of such invalidity or unenforceability, and the balance of the Agreement shall be interpreted as if such provision were so excluded.

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