



SizeUp Local Business Intelligence (Software As A Service) Agreement

This SizeUp Local Business Intelligence (Software As A Service) Agreement, effective as of June 27, 2019 is entered into by and between SizeUp, Inc. and the City of Costa Mesa, located in Costa Mesa, CA. In consideration of the mutual promises and upon the terms and conditions below, the parties agree as follows:

1. **License.** Subject to the terms and conditions of this Agreement, SizeUp will provide Client with online access to the SizeUp Local Business Intelligence software for use as described in Exhibit A attached hereto (or a product with identical functionality even if marketed under a different product name), including updates, bug fixes, or other minor enhancements or improvements that are made generally available by SizeUp for users of SizeUp Local Business Intelligence software (hereafter the "Services"). Subject to the terms and conditions of this Agreement, and upon payment in full to SizeUp, SizeUp grants to Client a personal, nontransferable, nonsublicensable, nonexclusive limited license to use the Services for Clients' own use, in accordance with any documentation provided by SizeUp, to allow Client's web site users to use SizeUp Local Business Intelligence services as provided by SizeUp. Subject to the terms and conditions of this Agreement, and upon payment in full to SizeUp, SizeUp also grants to Client a personal, nontransferable, nonsublicensable, nonexclusive limited license to download and embed the SizeUp Local Business Intelligence widget software ("Widget Software") on Client's website solely, in accordance with any documentation provided by SizeUp, for the purpose of providing users of Client's website the ability to use SizeUp services as provided by SizeUp. Client agrees that it shall not: i) distribute, rent, sell, lease, license, assign or otherwise transfer all or any part of the Services or Widget Software (including any associated documentation) and Client's rights to use such Services, except for use by web site end-users as described herein, ii) reverse engineer or otherwise attempt to discover source code or underlying ideas or algorithms of the Services or Widget Software, or iii) modify or create derivative works based on the Services or Widget Software, including any modification to the text, layout, marks, logos or designs that appear in the SizeUp Widget. If Client does modify or create derivative works, Client agrees to assign, and hereby does assign to SizeUp, all right, title and interest in and to all and any modifications and derivative works of the Services or Widget Software created by Client. For the sake of clarity, this Agreement does not grant Client any rights in the Widget Software, except for the right to embed the Widget Software on its website in accordance with the license granted above. SizeUp retains the sole and exclusive right to control and direct the manner or means by which Services are performed, and may employ or subcontract others with respect to such services. Nothing herein entitles Client to actual possession of any software other than as to the license for the Widget Software.

2. **Client's Duties and Responsibilities; Data.** Client must follow SizeUp's instructions how to add the Services or Widget Software to Client's website, including updated instructions, modifications, additions or deletions to the Widget Software, as may be updated and provided by SizeUp. Services are offered as or through an embedded tool. Data provided through the Services comes from a variety of sources and is provided on an "as is" basis. SizeUp makes no guarantee or representation about the accuracy or completeness of the information, and disclaims all warranties, express or implied, including but not limited to warranties of merchantability, fitness for a particular purpose and non-infringement. See Section 6. SizeUp is not responsible for any damages arising from the use of Services. It is the responsibility of anyone using Services to independently investigate the information's accuracy and completeness, and to determine to their satisfaction the suitability of the information for any needs. Any projections, opinions, assumptions or estimates used are for example only and do not represent the current or future performance of any business.

3. **Fees and Payment.**

3.1 **Fees.** The fees for the Services and Widget Software are specified in Exhibit A. Client shall pay SizeUp the fees upon entering into this Agreement. Renewal fees as set forth in Exhibit A, if any, shall be paid thirty (30) days prior to the end of the then current term. The renewal fees are subject to change. SizeUp may cease provision of Services at any time if payment is not timely made and/or suspend or terminate the licenses granted herein. In addition, Client shall pay SizeUp one and one-half

percent (1.5%) interest per month on the outstanding balance of any fees or approved expenses not paid within thirty (30) days of the due date.

3.2 **Taxes.** If Client is not a tax-exempt entity, Client shall pay or reimburse any and all federal, state, dominion, provincial or local sales, use, personal property, excise, or other taxes, fees or duties arising from or related to this Agreement (other than taxes based on SizeUp's net income).

4. **Ownership.** Client acknowledges that, as between SizeUp and Client, all right, title and interest in the Services and Widget Software including SizeUp Local Business Intelligence, and any other SizeUp materials furnished or made available hereunder, and all modifications, enhancements and improvements thereof, including all rights under copyright and patent and other intellectual property rights, belong to and are retained solely by SizeUp, or SizeUp's licensors and providers, if any. There are no implied rights. Any rights not granted under this Agreement are reserved by SizeUp.

5. **Confidential Information.** To the extent permitted by law, Client agrees to keep confidential and not disclose or use except in performance of its obligations under this Agreement, confidential or proprietary information related to SizeUp's technology or business, including, but not limited to: information relating to products or technology of SizeUp or the properties, composition, structure, use or processing thereof, computer programs, code, algorithms, schematics, data, know-how, processes, ideas, inventions, and other technical, business, financial, and product development plans, forecasts, strategies and information (all of the foregoing, "Confidential Information"). Client shall use reasonable precautions to protect SizeUp's Confidential Information. Confidential Information shall not include information that (a) is in or enters the public domain including in reasonably available public or government databases through no improper action or inaction by Client; (b) was rightfully in the Client's possession or known by it prior to receipt from SizeUp; (c) was rightfully disclosed to the Client by another person without restriction; or (d) was independently developed by Client by persons without access to such information and without use of any Confidential Information of SizeUp. Client may disclose Confidential Information that is required to be disclosed by a court or other adjudicative body provided that reasonable measures are taken to minimize disclosure and guard against further disclosure, and also provided that Client gives SizeUp prior written notice of the proposed disclosure to allow SizeUp to seek protection for the Confidential Information. In no event shall Client's liability for a breach of any of the provisions of this Agreement, including, but not limited to those set forth in this Paragraph 5, Confidential Information, exceed the value of the initial term fee set forth in Exhibit A.

6. **Warranty Disclaimer; Limitation of Liability.** SIZEUP FOR ITSELF AND ITS LICENSORS IF ANY, MAKES, AND CLIENT RECEIVES, NO WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, ARISING IN ANY WAY OUT OF, RELATED TO, OR UNDER THIS AGREEMENT OR THE PROVISION OF MATERIALS OR SERVICES THEREUNDER, AND SIZEUP SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN ADDITION, CLIENT AGREES THAT SIZEUP'S LIABILITY UNDER THIS AGREEMENT IS LIMITED TO THE AMOUNT PAID FOR THE SERVICES AND SOFTWARE BY CLIENT. IN NO EVENT SHALL SIZEUP HAVE ANY LIABILITY FOR ANY SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, LOSS OF DATA OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, ARISING IN ANY WAY OUT OF THIS AGREEMENT UNDER ANY CAUSE OF ACTION.

7. **Term and Termination.** This Agreement will take effect on the Effective Date and will remain in effect, unless earlier terminated in accordance herein, for the term specified in Exhibit A. At the end of each term, this Agreement shall renew automatically for additional one (1) year terms for up to four (4) renewal terms unless either party provides written notice of termination to the other at least thirty (30) days before the end of the then current term. Any such renewal shall be subject to the same terms and conditions of this Agreement, except for the renewal fee which may change after the initial term. Notwithstanding the foregoing, SizeUp may immediately terminate this Agreement if SizeUp determines that Client has failed to materially comply with any of the terms and conditions of this Agreement, or may terminate for convenience provided that SizeUp offers Client a pro-rata reimbursement for the time period that the Services are not provided due to such termination for convenience. This Agreement may be

terminated by either party if the other party (i) fails to pay any amount due under this Agreement within ten (10) days after written notice of such nonpayment, or (ii) commits a material breach of this Agreement, which breach, if capable of being cured, is not cured within thirty (30) days of written notice of termination. Termination by any means will not affect the provisions of this Agreement relating to the payment of amounts due, or the provisions of Sections 4 (Ownership), 5 (Confidential Information), 6 (Warranty Disclaimer; Limitation of Liability), 9 (Reference) and 10 (General Provisions) of this Agreement, all of which will survive termination of this Agreement, regardless of the reason for termination. Upon termination, all licenses and rights to the Services and Widget Software that are granted hereunder shall terminate, and Client shall immediately return to SizeUp, SizeUp's proprietary and confidential information, and documentation regarding use of the Services and Widget Software, if any, along with a signed, written statement certifying that Client has returned to SizeUp, and is no longer in possession of the foregoing items.

8. Government Use. If Client is a unit or agency of the government, or licensing use of the Services by payment with government funds, the Services are provided subject to SizeUp's standard commercial terms, set forth in this Agreement.

9. Reference: Client agrees that SizeUp may identify Client as a customer on its brochures, websites, and other marketing materials, and describe the project and the Services provided by SizeUp to Client. Nothing herein constitutes an endorsement of SizeUp by Client.

10. General Provisions. This Agreement is not assignable or transferable by Client, and any such attempted assignment or transfer shall be void and without effect. Each party will be and act as an independent contractor and not as an agent or partner of, or joint venturer with, the other party for any purpose related to this Agreement or the transactions contemplated by this Agreement, and neither party by virtue of this Agreement will have any right, power or authority to act or create any obligation, expressed or implied, on behalf of the other party. This Agreement shall be governed by and construed in accordance with the laws of the State of California or applicable federal law without regard to the conflicts of law provisions thereof and without regard to the United Nations Convention on the International Sales of Goods. The parties agree that any dispute relating to this Agreement shall be heard in the courts located in California, Orange County, and the parties consent to jurisdiction and venue therein. In any action to enforce this Agreement the prevailing party will be entitled to costs and attorneys' fees. The waiver by either party of a breach of this Agreement or any right hereunder shall not constitute a waiver of any subsequent breach of this Agreement; nor shall any delay by either party to exercise any right under this Agreement operate as a waiver of any such right. If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable. This Agreement constitutes the entire agreement between the parties hereto related to the subject matter hereof, and any and all written or oral agreements are expressly cancelled. Any modifications of this Agreement must be in writing and signed by both parties hereto. Pre-printed purchase order terms and any other additional terms, and any terms in conflict with this Agreement, shall be void and of no effect.

11. Indemnification. Client shall defend, indemnify and hold SizeUp harmless from any and all claims, injuries, damages, losses or suits arising out of a claim (i) of any breach of this Agreement by Client, its affiliates, employees agents, successors and assigns; and (ii) relating to or based on the activities conducted by Client, its employees, contractors and agents, using or that used the Services; and Client shall pay any final judgment entered against SizeUp in any such proceeding or agreed to in settlement. Client shall be released from the above indemnification obligation unless SizeUp provides Client with: i) reasonably prompt written notification of the claim or action; ii) sole control and authority over the defense or settlement thereof; and iii) at no cost to Client, all reasonably available information and assistance reasonably necessary to settle or defend any such claim or action. In no event shall Client's duty to defend, indemnify and/or hold SizeUp harmless exceed the value of the initial term fee set forth in Exhibit A.

SizeUp, Inc.

By: Anatalio Ubalde
Name (print): Anatalio Ubalde
Title: Co-Founder

City of Costa Mesa, CA

By: Lori Ann Elk
Name (print): Lori Ann Elk
Title: City Manager

APPROVED AS TO FORM:

Kimberly Hall Barlow
Kimberly Hall Barlow
City Attorney

EXHIBIT A

1. Fees

Initial Term Fee: \$4,995

Initial Term: 1 year

2. Services (Software As A Service)

The Services shall be the provision of SizeUp Local Business Intelligence software functionality (or a product with identical functionality even if marketed under a different product name); references to Services below shall refer to SizeUp Local Business Intelligence or SizeUp LBI as provided to end users) on an online basis via the Internet. SizeUp LBI will be hosted on servers with an Internet service provider or hosting facility that SizeUp owns or uses. SizeUp provides no client or customer service support, other than providing documentation on installing the Widget Software by Client. The functionality of the Services will include the following features:

- Industry Benchmarking - Website users of the Services as provided through Licensee's Website will be able to enter certain data about their business to receive industry benchmarking of their business to other businesses in the same or similar industry. The information will be presented through graphs and/or maps at varying geographic levels.
- Market mapping – Website users of the Services as provided through Licensee's Website will be able to view companies within the same/similar industry on a map. Users will also be able to select businesses in industries they sell to or buy from and these will also be displayed on the map. This tool helps enable businesses to spatially see the distribution of potential business competitors, customers, and suppliers.
- Locations to advertise – Website users of the Services as provided through Licensee's Website will be able to enter their industry and city to see geographic locations to advertise based on a variety of measurements and filters.
- Demographic analysis – Website users of the Services will be able to access demographic reports and analysis in the Project Geography including demographic, consumer expenditures, and labor force.
- Limited Industries and Geographies. The parties agree that provision of the Services through Licensee's Website will limit users to only being able to select from pre-defined industries and geographies available through the Services. If SizeUp does not include data for a unique industry, location, or combination of location and industry, SizeUp is not obligated to provide reports in any of these situations.

Product evolution. The parties agree that the Services may change over time including the addition or subtraction of features.

"Web site users" refers to end users accessing Client's website who have the necessary and adequate hardware, software and Internet connection services to access and use most commercial Internet sites.