

ActivForce

Terms of Service



ACTIVFORCE
by ACTIVBODY™

Activbody, Inc. (“Activbody,” “us,” “we”) designs products and devices that enable every day mobile fitness and exercise. These Terms of Service (the “Terms”) govern your use of Activbody’s personal fitness and electronic body monitoring products, our websites, including www.activbody.com and www.activ5.com and other subdomains of the activbody.com or activ5.com, the software embedded in our devices, our mobile applications, memberships and other Activbody services (collectively, the “Activbody Services”).

You must accept these Terms to create an Activbody account and to use the Activbody Services. If you do not have an account, you accept these Terms by visiting www.activbody.com or www.activ5.com, or using any part of the Activbody Services.

IF YOU DO NOT ACCEPT THESE TERMS, DO NOT CREATE AN ACCOUNT, DO NOT VISIT WWW.ACTIVBODY.COM OR WWW.ACTIV5.COM AND DO NOT USE THE ACTIVBODY SERVICES.

These Terms of Service have the following sections:

General Terms as to the usage of our products and services; and Data protection clauses that regulate our commitment to your privacy and data protection. The protection clauses describe our obligations as data processors and your role as a data controller for the data that you provide to us.

PART 1: GENERAL TERMS AND CONDITIONS

1. Terms May Change

These Terms will change over time. If we make minor changes to the Terms without materially changing your rights, we will post the modified Terms on www.activbody.com and/or www.activ5.com. We will notify you by email, through the Activbody Services, or by presenting you with a new Terms of Service to accept if we make a modification that materially changes your rights. Your use of the Activbody Services after a modification is posted is your acceptance of the modified Terms of Service.

2. Read Our Privacy Policy

Any information that Activbody collects through your use of the Activbody Services is subject to Activbody's Privacy Policy, which is incorporated and made part of these Terms.

3. Who Can Use Activbody?

An Activbody account can only be opened by an Adult. You are solely responsible whether and how your child or children use the Activbody Services, as well as whom, if anyone can view your child's or children's progress using Activbody Services.

PLEASE NOTE THAT: Activbody Services are not suitable for children under the age of 6 and children under the age of 16 need adult supervision. You must be 18 years old or older to purchase products or services from Activbody, Inc.

You may connect to the Activbody Services using a device that is manufactured, distributed, or sold by or on behalf of Activbody; the Activbody mobile applications; approved third-party applications; or www.activbody.com or www.activ5.com ("Authorized Connections").

You may not connect to the Activbody Services with: (i) any device that is not manufactured, distributed, or sold by or on behalf of Activbody (such as a knock off or counterfeit version of an Activbody device); or (ii) any unauthorized application or-third party connection. Any violation or attempted violation of this provision may result in the immediate termination of your Activbody account and your ability to access the Activbody Services. If you have questions about whether a product or application qualifies as an Authorized Connection, please contact service@activbody.com

4. Creating an Account

Full use of the Activbody Services requires that you create an account by providing us with a valid email address and strong password. You are responsible for all activity that occurs in association with your account. Activbody is not liable for any loss or damages caused by your failure to maintain the confidentiality of your account credentials.

We may need to contact you about your use of the Activbody Services. These communications are part of the Activbody Services and you may not opt-out from receiving them. You can manage and opt-out from receiving other communications and keep your email address up-to-date from your account settings.

5. Necessary Equipment

Full use of the Activbody Services is dependent upon your use of a computer with adequate software or a supported mobile device and Internet access. The maintenance and security of this equipment may influence the performance of the Activbody Services and it is your responsibility to ensure your equipment's functionality.

6. Posting Content on the Activbody Services

You may accumulate and post various content to the Activbody Services, including exercise regimens and data, photos, food logs, recipes, comments and other content ("Your Content"). You retain all rights to Your Content that you accumulate and post to the Activbody Services. By making Your Content available on or through the Activbody Services, you hereby grant to Activbody a non-exclusive, transferable, sublicensable, worldwide, royalty-free license to use, copy, modify, publicly display, publicly perform and distribute Your Content in connection with operating and providing the Activbody Services ("Your License").

You are responsible for Your Content. You represent and warrant that you own Your Content or that you have all rights necessary to grant us Your License. You also represent and warrant that Your Content and the use and provision of Your Content on the Activbody Services will not: (a) infringe, misappropriate or violate a third party's patent, copyright, trademark, trade secret, moral rights or other intellectual property rights, or rights of publicity or privacy; (b) violate, or encourage any conduct that would violate, any applicable law or regulation or would give rise to civil liability; (c) be fraudulent, false, misleading or deceptive; (d) be defamatory, obscene, pornographic, vulgar or offensive; (e) promote discrimination, bigotry, racism, hatred, harassment or harm against any individual or group; (f) be violent or threatening or promote violence or actions that are threatening to any person or entity; or (g) promote illegal or harmful activities or substances.

You also agree that Your Content will comply with the following Activbody Services guidelines:

Be respectful of the opinions of others. Even though you might not agree with someone, that doesn't mean they are wrong or deserve to be belittled.

Remember that what works for you may not work for everyone else. Give everyone the same courtesy you would expect in return.

Do not post profane or explicit content.

Do not post pictures that might be considered inappropriate.

Do not post communications that could be interpreted as threatening or harassing.

Do not post, advertise, or promote products or services commercially.

7. Activbody's Rights and Intellectual Property

For purposes of these Terms, "Activbody Content" means and includes any text, graphics, images, music, software, audio, video, works of authorship of any kind, and information or other materials that are posted, generated, provided or otherwise made available through the Activbody Services to you. Except for Your Content, the Activbody Content, the Activbody Services and its underlying technology are protected by copyright, trademark, patent, intellectual property and other laws of the United States and foreign countries. You agree not to remove, change or obscure any copyright, trademark, service mark or other proprietary rights notices incorporated in or accompanying the Activbody Services.

8. The Activbody Services

Activbody grants you a limited, non-exclusive, non-transferable, non-sublicensable license to: (1) access and view the Activbody Content; (2) access and use the software and mobile applications provided by the Activbody Services (subject to their license agreements); and (3) use the software that is embedded into Activbody devices as authorized in these Terms (subject to its license agreement). This license is provided solely for your personal use and enjoyment of the Activbody Services as permitted in these Terms.

You will not use, copy, adapt, modify, prepare derivative works based upon, distribute, license, sell, transfer, publicly display, publicly perform, transmit, broadcast or otherwise exploit the Activbody Content, Activbody Services or any portion thereof, except as expressly permitted in these Terms. No licenses or rights are granted to you by implication or otherwise under any intellectual property rights owned or controlled by Activbody or its licensors, except for the licenses and rights expressly granted in these Terms.

Except to the extent permitted by law, you may not perform, attempt to perform, or encourage or assist others in performing any of the following while accessing or using the Activbody Services:

- (1) use, display, mirror or frame the Activbody Services or any individual element within the Activbody Services, Activbody's name, any Activbody trademark, logo or other proprietary information, or the layout and design of any page or form contained on a page, without Activbody's express written consent;
- (2) access or tamper with non-public areas of the Activbody Services, Activbody's computer systems, or the technical delivery systems of Activbody's providers;
- (3) test the vulnerability of any Activbody system or breach any security or authentication measures;
- (4) circumvent any technological measure implemented by Activbody or any of Activbody's providers or any other third party (including another user) to protect the Activbody Services or Activbody Content;
- (5) access the Activbody Services or Activbody Content through the use of any mechanism other than through the use of an Authorized Connection, Activbody Services or Activbody API; or
- (6) modify, decompile, disassemble, reverse engineer, tamper with or otherwise attempt to derive the source code of any software that Activbody provides to you or any other part of the Activbody Services.

9. Enforcement Rights

We are not obligated to monitor access or use of the Activbody Services, Activbody Content, or Your Content or to review or edit any Activbody Content or Your Content, but we have the right to do so for the purpose of operating the Activbody Services, to ensure compliance with these Terms, and to comply with applicable law or other legal requirements. We may consult with and disclose unlawful conduct to law enforcement authorities; and pursuant to valid legal process, we may cooperate with law enforcement authorities to prosecute users who violate the law. We reserve the right (but are not required) to remove or disable access to the Activbody Services, any Activbody Content, or Your Content at any time and with or without notice, and at our sole discretion, if we determine that the Activbody Content, Your Content, or your use of the Activbody Services is objectionable or in violation of these Terms. We have the right to investigate violations of these Terms and any conduct that affects the Activbody Services.

10. The Activbody Services are Used at Your Own Risk

Our goal is to provide helpful and accurate information on the Activbody Services, but we make no endorsement, representation or warranty of any kind about any Activbody Content, information, services or recommendations. The information provided by Activbody Services, including the Activbody Content, is not to be interpreted as a recommendation for a specific treatment plan, product, or course of action. Activbody and Activbody Services do not provide specific medical advice, and is not engaged in providing medical services. Activbody Services does not replace consultation with qualified healthcare or medical professional who sees you in person, for the health and medical needs of yourself or any other person.

In addition, while Activbody Services frequently updates the content it provides, medical, health and fitness information changes rapidly, and therefore, some information may be out of date. Please see a physician or healthcare professional immediately if you suspect you may be ill or injured.

We are not responsible for the accuracy, reliability, effectiveness, or correct use of information you receive through the Activbody Services. If you rely on any Activbody Content or the Activbody Services, you do so solely at your own risk.

11. Consult Your Doctor Before Using Activbody Services

The Activbody Services are not intended to diagnose, treat, cure, or prevent any disease. If you have a medical or heart condition, consult your doctor before using the Activbody Services, engaging in an exercise program or changing your diet. If you experience a medical emergency, stop using the Activbody Services and consult with a medical professional. We are not responsible for any health problems that may result from training programs, consultations, products, or events you learn about through the Activbody Services. If you engage in any exercise program you receive or learn about through the Activbody Services, you agree that you do so at your own risk and are voluntarily participating in these activities.

Any use of the Activbody Services are subject to Activbody Disclaimers and Warnings, which are incorporated and made part of these Terms.

12. Use Common Sense

Use of the Activbody Services should not replace your good judgment and common sense. Please read and comply with all safety notices that accompany your Activbody device or service.

13. Digital Millennium Copyright Act – Copyright Policy

Activbody respects other parties intellectual property rights and copyright law, and expects its users to do the same. Activbody reserves the right, in its sole discretion, with or without notice, to terminate account holders who infringe the rights of copyright holders.

14. Product Orders

Activbody's Terms of Sale, Return Policy and Limited Warranty apply to all purchases from Activbody. All orders placed are subject to Activbody's acceptance. We may accept, decline, or place limits on your order for any reason in our sole discretion.

15. Idea Submissions

Activbody is always pleased to hear from its community. However, neither Activbody, nor any of its employees, may accept or consider any unsolicited ideas, including ideas for new or improved products or services, new marketing campaigns or product or service names. Therefore, please do not submit any such unsolicited ideas in any form to Activbody or any of its employees. This policy is necessary to avoid potential misunderstandings or disputes that may arise if our new products or services or marketing campaigns were to appear similar to an idea submitted by you.

If, despite our policy, you still submit an idea to us, then regardless of anything contained in your submission you agree that the following shall apply: (i) we shall have no obligation to review the submission; (ii) the submission and its contents shall automatically become the property of Activbody without any compensation to you; (iii) we may consider the submission and its contents to be non-confidential and non-proprietary; and (iv) we may redistribute or use (for

commercial purposes or otherwise) the submission and its contents for any purpose and in any way, without any compensation to you (collectively, the “Terms and Conditions”).

16. Feedback

If you or anyone else provides us (at our request or otherwise) a comment or suggestion regarding our products or services (including our mobile applications or any of our devices) through any means, the Terms and Conditions shall apply thereto.

17. Contests And Giveaways

Additional terms and conditions may apply to contests, giveaways and other promotions sponsored by Activbody and its partners. It is your responsibility to carefully review those terms and conditions

18. Alerts And Notifications

As part of your use of the Activbody Services, you may receive notifications, text messages, alerts, or emails. You agree to the receipt of these communications. You are responsible for any messaging or data fees you may be charged by your wireless carrier.

19. Third-Party Links on the Activbody Services

The Activbody Services may contain links to third-party websites, software applications, services and resources (collectively “Third-Party Services”) that are not under Activbody’s control. We provide these links only as a convenience and are not responsible for the content, products or services that are available from Third-Party Services. You acknowledge sole responsibility and assume all risk arising from your use of any Third-Party Services.

The Activbody Services may also provide the opportunity for you to link your Activbody account, Activbody data, or the Activbody Services with Third-Party Services. Although we offer this opportunity, you acknowledge that any Third-Party Services that you use in connection with the Activbody Services are not part of the Activbody Services. You acknowledge that these Terms and the Activbody Privacy Policy do not apply to any Third-Party Services. You are responsible for reading and understanding the terms and conditions and privacy policy that applies to your use of any Third-Party Services.

20. Changes to the Activbody Services

Activbody may change or discontinue, temporarily or permanently, any feature or component of the Activbody Services at any time without notice. Activbody is not liable to you or to any third party for any modification, suspension or discontinuance of any feature or component of the Activbody Services. We reserve the right to determine the timing and content of software updates, which may be automatically downloaded and installed by Activbody devices without prior notice to you.

21. Termination

If you violate these Terms, we reserve the right to terminate and/or deactivate your Activbody account and access to the Activbody Services, at our sole discretion, at any time and without notice or liability to you. Upon any such termination, we may delete Your Content and other information related to your account. You may cancel your account at any time by contacting Activbody customer support. Upon any termination, discontinuation or cancellation of the Activbody Services or your account, the following provisions of these Terms will survive:

THE ACTIVBODY SERVICES AND ACTIVBODY CONTENT ARE PROVIDED "AS IS," WITHOUT WARRANTY OF ANY KIND. WITHOUT LIMITING THE FOREGOING, WE EXPLICITLY DISCLAIM ANY 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.

We make no warranty that the Activbody Services or Activbody Content will meet your requirements or be available on an uninterrupted, secure, or error-free basis. We make no warranty regarding the quality, accuracy, timeliness, truthfulness, completeness or reliability of the Activbody Services or any Activbody Content. You acknowledge and agree that if you rely on any Activbody Content or the Activbody Services, you do so solely at your own risk.

22. Indemnity

You will indemnify and hold harmless Activbody and its officers, directors, employees and agents, from and against any claims, disputes, demands, liabilities, damages, losses, and costs and expenses, including, without limitation, reasonable attorneys' fees arising out of or in any way connected with: (i) your access to or use of the Activbody Services; (ii) Your Content; or (iii) your breach of any warranties made by you hereunder or your violation of any other provision of these Terms. We reserve the right to assume control of the defense of any third-party claim that is subject to indemnification by you, in which event you will cooperate with us in asserting any available defenses.

23. Limitation of Liability

NEITHER ACTIVBODY, ITS MANUFACTURERS and SUPPLIERS OR LICENSORS, NOR ANY OTHER PARTY INVOLVED IN CREATING, PRODUCING, OR DELIVERING THE ACTIVBODY SERVICES WILL BE LIABLE FOR ANY INCIDENTAL, SPECIAL,

EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING LOST PROFITS, LOSS OF DATA OR GOODWILL, SERVICE INTERRUPTION, COMPUTER DAMAGE OR SYSTEM FAILURE OR THE COST OF SUBSTITUTE SERVICES ARISING OUT OF OR IN CONNECTION WITH THESE TERMS OR FROM THE USE OF OR INABILITY TO USE THE ACTIVBODY SERVICES, WHETHER BASED ON WARRANTY, CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR ANY OTHER LEGAL THEORY, AND WHETHER OR NOT ACTIVBODY HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGE, EVEN IF A LIMITED REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. IN NO EVENT WILL ACTIVBODY'S TOTAL LIABILITY ARISING OUT OF OR IN CONNECTION WITH THESE TERMS OR FROM THE USE OF OR INABILITY TO USE THE ACTIVBODY SERVICES EXCEED THE AMOUNTS YOU HAVE PAID TO ACTIVBODY FOR USE OF THE ACTIVBODY SERVICES, OR ONE HUNDRED DOLLARS (\$100) IF YOU HAVE NOT HAD ANY PAYMENT OBLIGATIONS TO ACTIVBODY, AS APPLICABLE.

THE EXCLUSIONS AND LIMITATIONS OF DAMAGES SET FORTH ABOVE ARE FUNDAMENTAL ELEMENTS OF THE BASIS OF THE BARGAIN BETWEEN ACTIVBODY AND YOU.

24. Dispute Resolution

You agree that any dispute between you and Activbody arising out of or relating to these Terms, the Activbody Services, or any other Activbody products, devices or services (collectively, "Disputes") will be governed by the arbitration procedure outlined below.

Governing Law: These Terms and the resolution of any Disputes shall be governed by and construed in accordance with the laws of the State of California without regard to its conflict of laws principles.

Informal Dispute Resolution: We want to address your concerns without the need of a formal legal case. Before filing a claim against Activbody, you agree to try to resolve the Dispute informally by contacting service@activbody.com. We will try to resolve the Dispute informally by contacting you. If a dispute is not resolved within 30 days after submission, you or Activbody may bring a formal proceeding.

We Both Agree To Arbitrate: You and Activbody agree to resolve any Disputes through final and binding arbitration, except as set forth under Exceptions to Agreement to Arbitrate below.

Opt-out of Agreement to Arbitrate: You can decline this agreement to arbitrate by contacting service@activbody.com within 30 days of first accepting these Terms and stating that you (include your first and last name) decline this arbitration agreement.

Arbitration Procedures: The American Arbitration Association ("AAA") will administer the arbitration under its Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes. The arbitration will be held in Orange County, California, or any other location we agree to.

Arbitration Fees: The AAA rules will govern payment of all arbitration fees. Activbody will pay all arbitration fees for claims less than \$25,000. Activbody will not seek its attorneys' fees and costs in arbitration unless the arbitrator determines that your claim is frivolous.

Exceptions to Agreement to Arbitrate: Either you or Activbody may assert claims, if they qualify, in small claims court in Orange County, California. Either party may bring a lawsuit solely for injunctive relief to stop unauthorized use or abuse of the Activbody products, devices or the Activbody Services, or infringement of intellectual property rights (for example, trademark, trade secret, copyright or patent rights) without first engaging in arbitration or the informal dispute-resolution process described above.

No Class Actions: You may only resolve Disputes with Activbody on an individual basis, and may not bring a claim as a plaintiff or a class member in a class, consolidated, or representative action. Class arbitrations, class actions, private attorney general actions, and consolidation with other arbitrations aren't allowed under our agreement.

Judicial Forum for Disputes: In the event that the agreement to arbitrate is found not to apply to you or your claim, you and Activbody agree that any judicial proceeding will be brought in the federal or state courts of Orange County, California. Both you and Activbody consent to venue and personal jurisdiction there. We both agree to waive our right to a jury trial.

Limitation on Claims: Regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to your use of the Activbody devices or products or the Activbody Services must be filed within one (1) year after such claim or cause of action arose, or else that claim or cause of action will be barred forever.

25. General Terms

Except as otherwise stated herein, these Terms constitute the entire and exclusive understanding and agreement between Activbody and you regarding the Activbody Services, and these Terms supersede and replace any and all prior oral or written understandings or agreements between Activbody and you regarding the Activbody Services and Activbody Content. If for any reason a court of competent jurisdiction finds any provision of these Terms invalid or unenforceable, that provision will be enforced to the maximum extent permissible and the other provisions of these Terms will remain in full force and effect.

You may not assign or transfer these Terms, by operation of law or otherwise, without Activbody's prior written consent. Any attempt by you to assign or transfer these Terms, without such consent, will be null and void. Activbody may freely assign or transfer these Terms without restriction. Subject to the foregoing, these Terms will bind and inure to the benefit of the parties, their successors and permitted assigns.

Any notices or other communications provided by Activbody under these Terms, including those regarding modifications to these Terms, will be given: (i) via email; or (ii) by posting to the Activbody Services at www.activbody.com and/or www.activ5.com. For notices made by e-mail, the date of receipt on the message will be deemed the date on which such notice is transmitted.

Activbody's failure to enforce any right or provision of these Terms will not be considered a waiver of such right or provision. The waiver of any such right or provision will be effective only if in writing and signed by a duly authorized representative of Activbody. Except as expressly set forth in these Terms, the exercise by either party of any of its remedies under these Terms will be without prejudice to its other remedies under these Terms or otherwise.

26. Additional Terms May Apply

Additional terms may apply to certain Activbody devices, products or services. In the event that there is a conflict between these Terms and any additional terms, the additional terms will control.

PART 2: CONTRACTUAL CLAUSES RELATED TO THE PROCESSING OF PERSONAL DATA

Introductory Clauses

Both Parties agree on the following Contractual Clauses (the Clauses) in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the data exporter to the data importer of the personal data specified in Appendix 1.

1. Parties to these Clauses

For the purposes of this part of our Terms of Service, Activbody shall be referred to as Data Importer and You or the organization that you represent shall be referred to as Data Exporter or as Client. You and we may be referred to as Party or, together, as Parties.

Individuals to whom the Client provides services shall be referred to as Customers.

2. Conflicts between these Clauses with Part 1 of the Terms of Services

In case of discrepancies or conflicts between these Clauses and Part 1 of the Terms of Service, the Clauses shall prevail to the extent of such conflict or inconsistency.

3. Scope of the contractual clauses

These Clauses apply to situations where the Client uses the products or the services of Activbody to process the personal data of Customers, employees, or other individuals associated with the Client.

These Clauses have two appendices, which are integral part of them and to which you are bound by agreeing to these Terms of Service.

4. Data processor and data controller

Both Parties agree and acknowledge that the Client is the data controller for any personal data provided to Activbody and that Activbody is the data processor for such data.

Clause 1: Definitions

For the purposes of the Clauses:

- (a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;
- (b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;
- (c) 'personal data filing system' ('filing system') shall mean any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis;
- (d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;
- (e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;
- (f) 'third party' shall mean any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data;

(g) 'recipient' shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;

(h) 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.

Clause 2: Details of the transfer

The details of the transfer and in particular the special categories of personal data where applicable are specified in Appendix 1 which forms an integral part of the Clauses.

Clause 3: Third-party beneficiary clause

1. The data subject can enforce against the data exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.
2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.
3. The data subject can enforce against the sub-processor this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by

operation of law as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.

4. The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by national law.

Clause 4: Obligations of the data exporter

The data exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;
- (b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses;
- (c) that the data importer will provide sufficient guarantees in respect of the technical and organizational security measures specified in Appendix 2 to this contract;
- (d) that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing, and that these measures ensure a level of security appropriate to

the risks presented by the processing and the nature of the data to be protected having regard to the state of the art and the cost of their implementation;

(e) that it will ensure compliance with the security measures;

(f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive 95/46/EC;

(g) to forward any notification received from the data importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the data exporter decides to continue the transfer or to lift the suspension;

(h) to make available to the data subjects upon request a copy of the Clauses, with the exception of Appendix 2, and a summary description of the security measures, as well as a copy of any contract for sub-processing services which has to be made in accordance with the Clauses, unless the Clauses or the contract contain commercial information, in which case it may remove such commercial information;

(i) that, in the event of sub-processing, the processing activity is carried out in accordance with Clause 11 by a sub-processor providing at least the same level of protection for the personal data and the rights of data subject as the data importer under the Clauses; and

(j) that it will ensure compliance with Clause 4(a) to (i).

Clause 5: Obligations of the data importer

The data importer agrees and warrants:

(a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data

exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

(b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

(c) that it has implemented the technical and organizational security measures specified in Appendix 2 before processing the personal data transferred;

(d) that it will promptly notify the data exporter about:

(i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;

(ii) any accidental or unauthorized access; and

(iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorized to do so;

(e) to deal promptly and properly with all inquiries from the data exporter relating to its processing of the personal data subject to the transfer and to abide by the advice of the supervisory authority with regard to the processing of the data transferred;

(f) at the request of the data exporter to submit its data-processing facilities for audit of the processing activities covered by the Clauses which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the data exporter, where applicable, in agreement with the supervisory authority;

(g) to make available to the data subject upon request a copy of the Clauses, or

any existing contract for sub-processing, unless the Clauses or contract contain commercial information, in which case it may remove such commercial information, with the exception of Appendix 2 which shall be replaced by a summary description of the security measures in those cases where the data subject is unable to obtain a copy from the data exporter;

(h) that, in the event of sub-processing, it has previously informed the data exporter and obtained its prior written consent;

(i) that the processing services by the sub-processor will be carried out in accordance with Clause 11;

(j) to send promptly a copy of any sub-processor agreement it concludes under the Clauses to the data exporter.

Clause 6: Liability

1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the data exporter for the damage suffered.

2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, in which case the data subject can enforce its rights against such entity.

The data importer may not rely on a breach by a sub-processor of its obligations in order to avoid its own liabilities.

3. If a data subject is not able to bring a claim against the data exporter or the

data importer referred to in paragraphs 1 and 2, arising out of a breach by the sub-processor of any of their obligations referred to in Clause 3 or in Clause 11 because both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, the sub-processor agrees that the data subject may issue a claim against the data sub-processor with regard to its own processing operations under the Clauses as if it were the data exporter or the data importer, unless any successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The liability of the sub-processor shall be limited to its own processing operations under the Clauses.

Clause 7: Mediation and jurisdiction

1. The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the data importer will accept the decision of the data subject:

- (a) to refer the dispute to mediation, by an independent person or, where applicable, by the supervisory authority;
- (b) to refer the dispute to the courts in the Member State in which the data exporter is established.

2. The parties agree that the choice made by the data subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

Clause 8: Cooperation with supervisory authorities

1. The data exporter agrees to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under the applicable data protection law.
2. The parties agree that the supervisory authority has the right to conduct an

audit of the data importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.

3. The data importer shall promptly inform the data exporter about the existence of legislation applicable to it or any sub-processor preventing the conduct of an audit of the data importer, or any sub-processor, pursuant to paragraph 2. In such a case the data exporter shall be entitled to take the measures foreseen in Clause 5(b).

Clause 9: Governing law

The Clauses shall be governed by the law of the Member State in which the data exporter is established.

Clause 10: Variation of the contract

The parties undertake not to vary or modify the Clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Clause.

Clause 11: Sub-processing

1. The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Clauses. Where the sub-processor fails to fulfil its data protection obligations under such written agreement the data importer shall remain fully liable to the data exporter for the performance of the sub-processor's obligations under such agreement.

2. The prior written contract between the data importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.

3. The provisions relating to data protection aspects for sub-processing of the contract referred to in paragraph 1 shall be governed by the law of the Member State in which the data exporter is established.

4. The data exporter shall keep a list of sub-processing agreements concluded under the Clauses and notified by the data importer pursuant to Clause 5(j), which shall be updated at least once a year. The list shall be available to the data exporter's data protection supervisory authority.

Clause 12: Obligation after the termination of personal data-processing services

1. The parties agree that on the termination of the provision of data-processing services, the data importer and the sub-processor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. In that case, the data importer warrants that it will guarantee the confidentiality of the personal data transferred and will not actively process the personal data transferred anymore.

2. The data importer and the sub-processor warrant that upon request of the data exporter and/or of the supervisory authority, it will submit its data-processing facilities for an audit of the measures referred to in paragraph 1.

Appendix 1:**Data Exporter**

The data exporter is an organization or a professional that uses Activbody's services or products to process the personal data of customers, employees, agents, representatives, or other individuals associated with the Client, as may be the case.

Data Importer

The data importer is Activbody, Inc., a consumer electronics and software-driven company developing training and wellness solutions. Activbody provides functionalities such as physical performance measurement, muscle force, goal tracking for recovery, etc. to end-customers, organizations, and professionals. For the purpose of using the full potential of our applications, users may need to provide Activbody with personal data as described herein.

Data subjects

The data subjects include employees, customers, agents, representatives, the Data Exporter himself (where the Data Exporter is an individual) or other individuals, whose personal data the Data Exporter inputs into Activbody's products.

Since the Data Importer has no control over the categories of data subjects, whose personal data is uploaded to the products, the list of data subjects provided herein is necessarily only indicative. The actual categories of data subjects depend on the specific use of Activbody's products by the Data Exporter.

Categories of data

The categories of personal data processed cover fitness data and physical condition data such as gender, weight, height, age, types of exercises, the time spent doing each exercise, the intensity of each exercise, the frequency of each exercise, a recovery plan, recovery progress, physical performance measurement, muscle force, etc.

Special categories of data

The data on physical health status, recovery, strength, range of motion, etc. may be classified as special categories of data.

Processing operations

The personal data transferred will be subject to the following basic processing activities:

storage of personal data - unless otherwise instructed in writing, the Data Importer is hereby requested to store the personal data until the Data Exporter (or its employees, agents, representatives, or customers, as may be the case) maintains an account with the Data Importer and up to 15 years thereafter ;
retrieving personal data, so that the Data Exporter can view, analyze, export or otherwise process such data;

sending information to Data Exporter's organization and / or employees (or to the Data Exporter if the Data Exporter is an individual) as to the products, services, prices, and opportunities offered by the Data Importer;

creation of profile that identifies the Data Exporter (or its employees, agents, representatives, or customers, as may be the case) and allows for access to its in-app activities;

analysis and aggregation of anonymous data - unless otherwise instructed in writing, the Data Importer may anonymize the personal data provided to it for the purpose of providing general suggestions as to the proper use of the product;

transfer of personal data to third parties as may be necessary for the performance of the services.

The personal data shall be stored in facilities in the United States of America or in the European Economic Area.

The fact that a certain processing operation is included in this section is considered as an instruction issued by the Data Exporter to Activbody on the basis of which Activbody is obliged to perform these processing operations by

using the most suitable technical and organizational parameters of the processing in order to serve the Controller's interests and process personal data in accordance with its instruction.

Appendix 2

Description of the technical and organizational security measures

implemented by the data importer in accordance with Clauses 4(d) and 5(c):

1. The Data Importer shall ensure that employees, agents or other persons of the Data Importer to whom it provides access to personal data are required to keep personal data confidential.
2. The Data Importer shall establish, implement and maintain documented security processes and plans which shall ensure the confidentiality and security of the personal data in accordance with good industry practice, the requirements set out in the applicable legislation.
3. The Data Importer shall perform security tests of its networks and systems in a manner and frequency expected in accordance with good industry practice to ensure the Data Importer is effectively securing personal data.
4. The Data Importer shall implement and maintain:
 1. encryption technologies to protect personal data during transmission and storage and where appropriate, the pseudonymization and/or anonymization of personal data;
 2. encryption technologies upon portable devices such as laptops, PDAs and smartphones;
 3. measures to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident (including, without limitation, measures relating to business continuity and disaster recovery); and
 4. measures to ensure the ongoing confidentiality, integrity, availability and resilience of the Data Importer's systems and services.
5. The Data Importer shall have anti-virus software installed and operational on the relevant devices.