

## Download Agreement

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE DOWNLOADING, INSTALLING, OR OTHERWISE USING ANY CONTENT (**AS DEFINED BELOW**) FROM THIS WEB SITE. BY CLICKING ON THE “**YES**” OR “**ACCEPT**” BUTTON, OR OTHERWISE DOWNLOADING OR ACCESSING THE CONTENT, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS CONTAINED HEREIN. YOU SHOULD PRINT OUT A COPY OF THIS AGREEMENT FOR FUTURE REFERENCE. IF YOU DO NOT AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT, YOU SHOULD CLICK THE “**DO NOT ACCEPT**” OR “**DISAGREE**” BUTTON TO TERMINATE THE DOWNLOAD PROCESS. PUMPPOD (AS DEFINED BELOW) AGREES TO LICENSE THE CONTENT TO YOU ONLY IF YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS CONTAINED HEREIN.

**WARNING:** The images and text in PumpPod Trainers depict strenuous exercises performed by professionals. The exercises demonstrated may not be appropriate for all users. The information provided in PumpPod Trainers is designed to supplement the advice and counsel of your personal trainer, health care provider or other health professional. As with all strenuous physical endeavors, extreme caution is recommended while performing the exercises depicted in PumpPod Trainers.

### DEFINITIONS

The following terms used in this Agreement have the meanings set forth below:

#### a. Content

Means all materials downloadable from this web site, including, but not limited to all literary works, text, pictorial and graphical works, photographs, video and audio clips, motion pictures and other audio visual works, video games, music, soundtracks, button icons, streaming data, animation, images, compilations, .RAM files, .AVI files, or any other software files (in object code or source code format).

#### b. Content Provider

Means PumpPod.

#### a. License Grant

Subject to the terms and conditions of this Agreement, PumpPod hereby grants you a limited, non-transferable, non-assignable, worldwide, non-exclusive right to use the Content solely for your own internal non-commercial personal use. You may cache the Content onto the hard drive of a single computer for your personal, non-commercial internal use. The rights granted hereunder constitute a license, not a sale, of the applicable Content.

#### b. Restrictions on Use of Content

You agree that you will not, nor will you authorize or permit others to: **(1)** reverse engineer, decompile or disassemble the software elements of the Content or otherwise attempt to discover the source code of the software elements of the Content; **(2)** sell, rent, lease, license, sublicense, transfer, distribute, re-transmit, time-share, use or make available on a service bureau, or otherwise assign to any third party the Content or any of your rights to license the Content, **(3)** modify the Content or create any derivative works based on the Content; or **(4)** circumvent any encryption or other security tools used anywhere in the Content, or the web site.

#### c. Ownership

As between the parties, the Content and all patents, copyrights, trade secrets, trademarks, service marks, know-how and any other proprietary rights therein or thereto, is the sole and exclusive property of PumpPod (or PumpPod’s licensors), and you gain no right, title or interest in

and to the Content by virtue of this Agreement other than the limited licenses granted herein expressly in Section II (a) above.

**d. Notices**

You shall include such proprietary rights and other notices on each copy of the Content as may be provided by Content Provider to you from time to time, or as may be generated automatically by the Content. You shall not remove or obscure any such notices.

**e. Remedy for Breach of License**

In addition to all other rights and remedies available to Content Provider at law or in equity, any violation of the licensing provisions of this Section II by you (or any third party to whom you have provided access to the Content) shall constitute a material breach of this Agreement and PumpPod shall have the immediate right to terminate this Agreement and all licenses granted hereunder, and PumpPod may seek any and all appropriate remedies, including but not limited to injunctive relief for patent, copyright, or any other theory, as applicable

**III. FEES**

**a. Fees**

You agree to pay Content Provider all fees required for you to download the Content, as provided as part of the download/installation process, or otherwise as part of your membership to the web site (as applicable). All payments shall be in United States Dollars. You agree to pay all fees when due. Any unpaid fees shall accrue interest at an annual rate of 1.5%, or the highest legal rate, whichever is lower, of the unpaid balance until paid. Fees may be increased by PumpPod from time to time based on Content Provider's then-standard fees for the Content.

**b. Taxes**

All fees and other charges set forth in the download/installation process do not include any federal, state, or local sales, use, value-added, property, excise, withholding or other taxes, customs or duties now or hereafter levied which shall be for your account. Any taxes or amounts in lieu thereof paid or payable by Content Provider in respect of any such taxes on such fees or charges (excepting only taxes on net income) shall be added to your obligations as an additional charge, which shall be due within thirty (30) days after invoice therefore.

**IV. NO REPRESENTATIONS OR WARRANTIES**

**YOU EXPRESSLY AGREE THAT YOUR USE OF THE CONTENT IS AT YOUR DISCRETION AND AT YOUR OWN AND SOLE RISK. THE CONTENT IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, OR NON-INFRINGEMENT. PUMPPOD MAKES NO REPRESENTATIONS OR WARRANTIES THAT THE CONTENT WILL BE UNINTERRUPTED, TIMELY, SECURE, OR ERROR FREE; NOR DOES PUMPPOD MAKE ANY REPRESENTATIONS OR WARRANTIES AS TO THE QUALITY, SUITABILITY, TRUTH, ACCURACY OR COMPLETENESS OF THE CONTENT. PUMPPOD MAKES NO REPRESENTATIONS ABOUT THE RESULTS TO BE OBTAINED FROM USING THE SITE OR THE CONTENT. PUMPPOD MAKES NO WARRANTY REGARDING ANY GOODS OR SERVICES PURCHASED OR OBTAINED THROUGH THE CONTENT OR ANY TRANSACTION ENTERED INTO THROUGH THE CONTENT AND IS NOT RESPONSIBLE FOR ANY USE OF CONFIDENTIAL OR PRIVATE INFORMATION BY THIRD PARTIES. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES, SO SOME OF THE ABOVE EXCLUSIONS MAY NOT APPLY TO YOU.**

**V. INDEMNITY**

You agree to indemnify PumpPod against any and all claims, liabilities, and costs, including reasonable attorneys' fees, reasonably incurred in the defense of any claim or suit arising out of or otherwise related to this Agreement, including without limitation, any breach or threatened breach by you of this Agreement. PumpPod shall promptly notify you in writing of any such claim or suit, and cooperate fully (at your expense) in the defense of such claim or suit. PumpPod may participate in the defense of such claim or defense at its own expense.

## **VI. LIMITATION OF LIABILITY**

IN NO EVENT SHALL PUMPPOD (OR ITS LICENSORS) BE LIABLE TO YOU, OR ANY OTHER THIRD PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES, INCLUDING LOSS OF PROFITS OR GOODWILL, FOR ANY MATTER ARISING OUT OF OR RELATING TO THIS AGREEMENT, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT OR OTHERWISE, EVEN IF PUMPPOD HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL PUMPPOD'S TOTAL AGGREGATE LIABILITY HEREUNDER FOR DIRECT DAMAGES EXCEED THE TOTAL FEES PAID BY YOU FOR USE AND ACCESS TO THE CONTENT.

YOU ALSO UNDERSTAND AND AGREE THAT PUMPPOD SHALL NOT BE LIABLE TO YOU OR ANY THIRD PARTY UNDER ANY THEORY FOR ANY LOSS OR DAMAGE TO YOUR COMPUTER SYSTEM, HANDHELD DEVICE OR ANY OTHER STORAGE/PLAYBACK DEVICE USED BY YOU TO STORE OR DISPLAY THE CONTENT. YOU AGREE THAT YOU SHALL BE SOLELY RESPONSIBLE FOR ANY SUCH LOSS OR DAMAGE. YOU FURTHER UNDERSTAND AND AGREE THAT PUMPPOD SHALL NOT BE LIABLE UNDER ANY THEORY FOR ANY LOSS OR DAMAGE TO ANY DATA ON YOUR PERSONAL COMPUTER, HANDHELD DEVICE OR ANY OTHER STORAGE/PLAYBACK DEVICE USED BY YOU TO STORE OR DISPLAY THE CONTENT WHICH DAMAGE OR LOSS RESULTS FROM THE DOWNLOAD OF THE CONTENT. YOU AGREE THAT YOU SHALL BE SOLELY RESPONSIBLE FOR ANY SUCH LOSS OR DAMAGE.

Remedies under this agreement are exclusive and are limited to those expressly provided for herein.

**PUMPPOD EXPRESSLY DISCLAIMS ANY AND ALL LIABILITY FOR ANY INJURY YOU SUFFER AS A RESULT OF USING THE CONTENT. BY ACCEPTING THE TERMS OF THIS AGREEMENT, YOU EXPRESSLY AGREE TO ASSUME ALL RISKS ASSOCIATED WITH AND WHICH MAY ARISE FROM YOUR USE OF THE CONTENT.**

## **VII. TERM AND TERMINATION**

### **a. Term**

The term of this Agreement shall begin on the date that you first download/install the Content and shall continue in effect until such time as either party terminates the Agreement, with or without cause. PumpPod reserves the right to change or discontinue at any time any aspect or feature of this Site or the Content

### **b. Effect of Termination**

Upon termination of this Agreement for any reason, (1) all licenses granted hereunder shall terminate immediately, (2) you shall erase and destroy all copies of the Content (including, without limitation deleting the Content from any cached files on the hard drive of your computer); and (3) PUMPPOD shall immediately cease providing access to the Content to you.

### **c. Survival**

The parties' rights and obligations under Sections **II(b)**, **II(c)**, **II(e)**, **III**, **IV**, **V**, **VI**, **VII(b)**, and **VIII** shall survive any expiration or earlier termination of this Agreement.

## **VIII. GENERAL TERMS**

### **a. Governing Law**

This Agreement and all matters arising out of or otherwise relating to this Agreement, shall be governed by the laws of the State of New York, excluding its conflict of law provisions. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement. The parties hereby submit to the personal jurisdiction of the state and federal courts in the State of New York. Exclusive venue for any litigation permitted under this Agreement shall be with the state and federal courts located in Borough of Manhattan, City of New York.

### **b. Rights to Injunctive Relief**

Both parties acknowledge that remedies at law may be inadequate to provide an aggrieved party with full compensation in the event of the other party's breach of Section 2, and that an aggrieved party shall therefore be entitled to seek injunctive relief in the event of any such breach, in addition to seeking all other remedies available at law or in equity.

### **c. Arbitration**

If there is a dispute between the parties arising out of or relating to this Agreement, the parties shall meet and negotiate in good faith to attempt to resolve the dispute. If the parties are unable to resolve the dispute through direct negotiations, then, except as otherwise provided herein, either party may submit the issue to binding arbitration in accordance with the then-existing Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be conducted in borough of Manhattan, City of New York, and conducted by a single arbitrator, knowledgeable in software, the Internet and e-Commerce. The party bringing the action shall be responsible for paying all costs for arbitration, including the arbitrator's fees, unless attorney's fees may be awarded to the prevailing party as a matter of substantive law. The arbitrator shall have no authority to award any punitive or exemplary damages, certify a class action, add any parties, or to vary or ignore the terms of this Agreement and shall be bound by governing and applicable law. This Section shall not apply to any breach (or any allegation which if true would constitute a breach) of Section 2.

### **d. Assignment**

The rights and liabilities of the parties hereto will bind and inure to the benefit of their respective assignees, successors, executors, and administrators, as the case may be. Neither this Agreement nor any rights granted hereunder may be sold, leased, assigned or otherwise transferred, in whole or in part by you.

### **e. Severability**

If for any reason a court of competent jurisdiction or arbitrator finds any provision of this Agreement or any portion thereof, to be unenforceable, that provision will be enforced to the maximum extent permissible and the remainder of this Agreement will continue in full force and effect.

### **f. No Waiver**

Failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision, and no waiver of one breach will constitute a waiver of subsequent breaches of the same or of a different nature.

### **g. Complete Agreement**

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes and replaces all prior or contemporaneous understandings or agreements, written or oral, regarding such subject matter. No amendment to or modification of

this Agreement will be binding unless in writing and signed by a duly authorized representative of both parties.

#### **h. Relationship Between the Parties**

Content Provider is an independent contractor; nothing in this Agreement shall be construed to create a partnership, joint venture or agency relationship between the parties.

#### **i. Headings**

Section and subsection headings of this Agreement are inserted for convenience only and shall not be deemed to constitute a part hereof nor to affect the meaning thereof.

#### **j. Force Majeure**

PumpPod shall not be responsible for any failure to perform due to unforeseen circumstances or to causes beyond its reasonable control, including but not limited to: acts of God; war, riot, embargoes, acts of civil or military authority, or terrorism; fire, flood, earthquakes, hurricanes, tropical storms or other natural disasters; fiber cuts; strikes, or shortages in transportation, facilities, fuel, energy, labor or materials; failure of the telecommunications or information services infrastructure; hacking, SPAM, or any failure of a computer, server or software, including Y2K errors or omissions, for so long as such event continues to delay PumpPod's performance.

#### **k. Export**

You understand and acknowledge that the software elements of the Content may be subject to regulation by agencies of the U.S. Government, including the U.S. Department of Commerce, which prohibits export or diversion of software to certain countries and third parties. You will not assist or participate in any such diversion or other violation of applicable U.S. laws and regulations. You warrant that you will not license or otherwise permit anyone not approved to receive controlled commodities under applicable U.S. laws and regulations and that you will abide by such laws and regulations. You shall hold Content Provider harmless and indemnify PumpPod from any breach or threatened breach of this Section VIII(k).

#### **l. Government Rights**

The software elements of the Content have been developed at private expense and is "commercial computer software" or "restricted computer software" within the meaning of the FARs, the DFARs, and any other similar regulations relating to government acquisition of computer software. Nothing contained herein will be deemed to: (1) grant any government agency any license or other rights greater than are mandated by statute or regulation for commercial computer software developed entirely at private expense, or (2) restrict any government rights in any extensions or custom solutions provided hereunder and developed at government expense.

#### **J. Transmission of Data**

You acknowledge that in connection with the Site, information will be transmitted over local exchange, inter-exchange and Internet backbone carrier lines and through routers, switches and other devices owned, maintained and serviced by third party local exchange and long distance carriers, utilities, Internet service providers and others, all of which are beyond the control and jurisdiction of PumpPod and their suppliers. Accordingly, PumpPod assumes no liability for or relating to the delay, failure, interruption or corruption of any data or other information transmitted in connection with use of the Site.

#### **K. Rights**

All information provided by PumpPod on these Web pages and in the Content is owned by or licensed to PumpPod except where noted. PumpPod and its licensors retain all proprietary rights to the information contained on these pages to the fullest extent of their rights. The information contained on these pages may not be downloaded or reproduced except for use by Buyers of the Site for use only as prescribed by PumpPod with appropriate consultation with the user's health care provider.

**L. Updates and Health**

Users of the Site and PumpPod Trainers are advised that health advice is often subject to updating and refining due to medical research and developments. PumpPod attempts to update these the content pages frequently. However, no assurance can be given that the advice contained in the Content will include the most recent findings or developments with respect to the particular material. You are encouraged to consult with your health care provider with any questions or concerns you may have regarding any health condition that you may have. PumpPod is not responsible for your use of the material contained herein other than as intended by PumpPod.

**M. Health Warranty**

Buyer represents that Buyer is in good health and has no disability, impairment, injury disease or ailment preventing him/her from engaging in active or passive exercise or which would cause increased risk or injury or adverse health consequences as a result of naive or abusive exercise.