

# STANDARD TERMS FOR STRETCHSENSE PROTOTYPING AND DEVELOPMENT SERVICES

## INTRODUCTION

Our prototyping model enables our customers to develop prototype devices, and iterate those prototypes, rapidly and cost effectively.

Having standard terms for our prototyping services is a key ingredient in enabling us to provide our prototyping services in the manner that we do. These Terms are relatively *lightweight* when compared to a supply or consulting services agreement, but we believe that they are fair and reasonable for use in conjunction with a new product development project, and will enable you to engage with us cost effectively and quickly get your product concept to the point where you can make a decision about the commercial viability. If you wish to move to larger-scale manufacturing utilising our technology, or you would like to engage us to provide additional consulting services to assist with your product development, we are happy to discuss entering into a supply or consulting services agreement with you.

## TERMS AND CONDITIONS

### 1 APPLICATION OF TERMS

- 1.1 These Terms apply to all Prototype Devices and Prototyping Services supplied by us to you, unless there is a separate written agreement signed by both parties which excludes these Terms.
- 1.2 Our acceptance of your Order in accordance with clause 4.6 forms a binding agreement on the terms set out in these Terms, the relevant Proposal or Quote and Order and (if applicable) the Credit Terms (**Agreement**).
- 1.3 The Agreement applies to the exclusion of any standard or other terms you may have for the purchase of goods or services, including any terms you may have included in the Order.

### 2 CHANGES

- 2.1 We may change these Terms at any time by notifying you of the change by email or by posting a notice or update on the Website.
- 2.2 Unless stated otherwise, any change takes effect from the date set out in the notice or update. Changes will apply only to Orders that you place with us on or after the date the change takes effect.

2.3 You are responsible for ensuring you are familiar with the latest Terms. Subject to clause 2.2, if you issue an Order on or after the date on which the Terms are changed, you agree to be bound by the changed Terms.

2.4 **These Terms were last updated on 13 July 2018.**

### 3 **INTERPRETATION**

In these Terms:

*Agreement* has the meaning given in clause 1.2. If there is any conflict between the documents that form part of the Agreement, they will have precedence in the descending order of priority set out below:

- these Terms;
- the Credit Terms;
- the Proposal or Quote; and
- the Order.

*Agreement Start Date* means the date we accept your Order in accordance with clause 4.6.

*Application* means the function that you intend be performed utilising StretchSense Technology and Sensor Data.

*CAD* means computer aided design.

*Client IP* means Intellectual Property Rights owned by you under clause 6.8.

*Circuit* means a collection of electrical elements used to implement an analogue or digital function, including an integrated circuit.

*Circuit Design File* means a file or document containing technical information relating to the design and function of a Circuit, including schematics, datasheets, specifications and bills of material.

*Confidential Information* means any information that is not public knowledge and that is obtained from the other party in the course of, or in connection with, the Agreement. Our Confidential Information includes Intellectual Property owned by us (or our licensors). Our Confidential Information does not include any feedback on your Requirements that we provide to you, which you can use and otherwise deal with without restriction. Your Confidential Information includes the Client IP. Your Confidential Information does not include any know-how, techniques, ideas and methodologies acquired by us in your Requirements for the purpose of generating a Quote or Proposal. We may use and otherwise deal with such know-how, techniques, ideas or methodologies without restriction.

*Credit Terms* means the terms and conditions attached to, or incorporated by reference into, a credit application submitted by you to us and accepted by us.

*Design Files* means any 2- or 3-dimensional drawing, diagram or CAD file:

- that we develop based on the Requirements; and
- that illustrates the externally visible layout of the Sensing Elements and of the silicone tracks that connect the Sensing Elements to a sensing Circuit or other electronics.

*Fees* means the fees set out in the Proposal or Quote.

*Force Majeure* means an event that is beyond the reasonable control of a party, excluding:

- an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care; or
- a lack of funds for any reason.

*including* and similar words do not imply any limit.

*IP Claim* has the meaning given in clause 6.11.

*Intellectual Property Rights* includes copyright and all rights anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity. *Intellectual Property* has a consistent meaning, and includes any enhancement, modification or derivative work of the Intellectual Property.

*NDA* has the meaning given in clause 7.3.

*Order* means an order for a Prototype Device and/or any Prototyping Services placed in connection with a Proposal or Quote or that otherwise references these Terms.

a *party* includes that party's permitted assigns.

a *person* includes an individual, a body corporate, an association of persons (whether corporate or not), a trust, a government department, or any other entity.

*Permitted Fields of Use* means the fields of consumer electronics, motion capture, augmented/virtual reality, and sports and fitness.

*Proposal or Quote* means a proposal, quote and/or invoice issued by us for the manufacturing of Prototype Device and/or any Prototyping Services that references these Terms.

*Prototype Device* means a tangible deliverable supplied or to be supplied to you by us under the Agreement. A Prototype Device may consist of Sensing Elements and supporting sensing Circuits and may (optionally) be attached to fabric or incorporated in a garment.

*Prototyping Services* means any design, development or engineering services that we provide to you under the Agreement including work for hire and non-recurring engineering.

*Reference Software* means any software for communication with StretchSense Sensing Elements and/or Circuits provided or otherwise made available by StretchSense as reference or example software, excluding any third party software.

*Requirements* means the product requirements that you provide to us.

*Sales Tax* means goods and services tax, value added tax, sales tax or equivalent tax payable under any applicable law.

*Sensing Elements* means silicone or fabric stretch or compression sensing elements that connect to a sensor Circuit, including cable and connection design.

*Sensor Data* means data that is outputted by StretchSense Technology.

*StretchSense Garment Designs* means garment designs developed by or licensed to us:

- that existed prior to the Agreement Start Date; or
- that were developed independently of the Agreement.

*StretchSense Sensing Elements and Circuits* means Sensing Elements and Circuits developed by us and/or supplied by us to you;

*StretchSense Technology* means:

- the StretchSense Sensing Elements and Circuits;
- technology and Intellectual Property relating to the StretchSense Sensing Elements and Circuits (including technology and Intellectual Property relating to physical placement, arrays, cabling, connectors, tracks and termination points);
- the sensing algorithm and all embedded firmware used to control the acquisition, processing, and/or transmission of stretch and/or compression data generated by the StretchSense Sensing Elements and Circuits;
- all embedded firmware and software used to sense, output, and/or control the operation of the StretchSense Sensing Elements and Circuits; and
- systems and methods in relation to the manufacture and/or quality control of the foregoing, including mechanical, electronic or adhesive materials, systems and methods for attaching StretchSense Sensing Elements and Circuits to a structure.

*Terms* means these terms titled *Standard terms for StretchSense Prototyping and Development Services*, including the Schedule but excluding the Introduction.

*We, us or our* means StretchSense Limited, a New Zealand company, company number 4099622.

*Website* means the internet site at stretchsense.com, or such other site notified to you by us.

*You or your* means the customer named in the Proposal or Quote.

Words in the singular include the plural and vice versa.

A reference to a statute includes references to regulations, orders or notices made under or in connection with the statute or regulations and all amendments, replacements or other changes to any of them.

## 4 PROVISION OF PROTOTYPE DEVICES AND PROTOTYPING SERVICES

4.1 We will use reasonable efforts to provide the Prototype Devices and Prototyping Services:

- a in accordance with the Agreement and applicable law;
- b exercising reasonable care, skill and diligence; and
- c using suitably skilled, experienced and qualified personnel.

4.2 Our provision of the StretchSense Technology and Prototyping Services to you is non-exclusive. Subject to your rights in the Client IP and our obligations under clause 7, nothing in the Agreement prevents us from providing StretchSense Technology and Prototyping Services to any other person.

4.3 Unless otherwise set out in the Proposal or Quote, the Proposal or Quote is valid for 30 days from the date of issue.

4.4 We may amend any part of the Proposal or Quote (including fees) for any reason before an Order is placed.

4.5 You are not obliged to accept any Proposal or Quote.

4.6 We are not obliged to provide the Prototype Devices and/or Prototyping Services set out in an Order until we have accepted the Order. Our acceptance occurs on the earlier of when we:

- a commence the production of the Prototype Devices and/or the supply of the Prototyping Services to you; or
- b notify you by email that we accept your Order.

4.7 We can reject an Order on reasonable grounds, including where:

- a it does not reflect the Proposal or Quote;

- b it includes terms or conditions that conflict with or are additional to these Terms;
  - c we receive it after the validity period of the Proposal or Quote has expired; or
  - d you have not complied with our payment terms.
- 4.8 We will ship the Prototype Devices to the site stated in the Proposal or Quote or otherwise agreed in writing. Any stated time for shipment or delivery is an estimate only. You must accept and pay for the Prototype Devices and Prototyping Services regardless of any delay. We will not be liable for any loss or damage resulting from any delay, however caused.
- 4.9 Title to the Prototype Devices passes to you on the later of shipment and payment in full for the Prototype Devices. Risk in the Prototype Devices passes to you when we ship the Prototype Devices.
- 4.10 Subject to clause 4.9, the Prototype Devices will be shipped to you FCA our premises (as defined in the 2010 edition of Incoterms, published by the International Chamber of Commerce).

## 5 FEES

- 5.1 You must pay us the Fees:
- a before we will commence production of the Prototype Devices or provision of the Prototyping Services, unless you have prior credit approval from us (in which case you must pay the Fees in accordance with the Credit Terms); and
  - b electronically in cleared funds or credit card using PayPal without any set-off or deduction. Credit card payments incur a 3.9% surcharge.
- 5.2 We will provide you with invoices prior to the due date for payment.
- 5.3 The Fees exclude Sales Taxes, which you must pay on taxable supplies.
- 5.4 Except as otherwise expressly set out in the Proposal or Quote, the Fees exclude all costs of delivery, insurance, export and import clearance, and other applicable taxes and duties.

## 6 INTELLECTUAL PROPERTY

- 6.1 Intellectual Property that existed prior to the date we accept the Order, or which is developed independently of the Agreement, (**Pre-existing IP**) remains the property of the current owner, regardless of its incorporation in any Prototype Device or use in connection with the Prototyping Services. To avoid doubt, if any Intellectual Property or other item or material provided by us in the course of providing any Prototyping Services is not described in the Proposal or Quote as *non-recurring engineering, NRE, work for hire* or *WFH*, that Intellectual Property, item or material is our (or our licensors') Pre-Existing IP.



- 6.2 Without limiting clause 6.1, we (and our licensors) own all Intellectual Property Rights in:
- a the StretchSense Technology;
  - b StretchSense Garment Designs;
  - c the Proposal or Quote;
  - d the Design Files;
  - e any other item or material created, developed or provided by us or on our behalf in the course of producing a Prototype Device and/or providing any Prototyping Services that are described in the Proposal or Quote as *non-recurring engineering* or *NRE*; and
  - f any Reference Software or Circuit Design Files we provide or otherwise make available to you (including through our public Github repository or any other public repository).
- 6.3 You must not dispute our ownership under clauses 6.1 and 6.2.
- 6.4 We grant you a non-exclusive, fully paid up licence to:
- a use the Prototype Devices for:
    - i your internal evaluation purposes; and
    - ii application validation purposes within the Permitted Fields of Use;
  - b incorporate the Prototype Devices into finished products for use for market validation purposes within the Permitted Fields of Use; and
  - c distribute and/or sell the Prototype Devices and/or finished products that incorporate the Prototype Devices for use for market validation purposes within the Permitted Fields of Use.
- 6.5 You must not use, resell or make available the Prototype Devices other than as set out in clause 6.4.
- 6.6 Where we provide any Design File or StretchSense Garment Design to you, we grant you a non-exclusive, fully paid up licence to use, store, copy, modify, make available and communicate any of our Intellectual Property Rights incorporated in that Design File or StretchSense Garment Design.
- 6.7 Where we provide or otherwise make available any Reference Software or Circuit Design File to you, we license the Reference Software or Circuit Design File (as applicable) to you on the terms set out in the Schedule.

- 6.8 Subject to clauses 6.1 and 6.2, as between the parties, you own all Intellectual Property Rights in:
- a the Requirements;
  - b on receipt of payment in full of the Fees, any other item or material created, developed or provided by us or on our behalf in the course of producing a Prototype Device and/or providing any Prototyping Services that are described in the Proposal or Quote as being *work for hire* or *WFH*; and
  - c any new material, enhancement, modification or derivative work created by you as a result of your use of any Reference Software or Circuit Design File we provide or otherwise make available to you, provided that nothing in this clause is intended to prevent us from independently developing any similar new material, enhancement, modification or derivative work.
- 6.9 You grant us a worldwide, non-exclusive, fully paid up licence to use, store, copy, modify, make available and communicate the Client IP to exercise our rights and perform our obligations under the Agreement, including for the production of the Prototype Devices and the provision of the Prototyping Services in accordance with the Agreement.
- 6.10 You must arrange all consents and approvals that are necessary for us to use the Client IP as described in clause 6.9.
- 6.11 You indemnify us against any liability, claim, proceeding, cost, expense (including the actual legal fees charged by our solicitors) and loss of any kind arising from any actual or alleged claim by a third party that our possession or use of the Client IP in accordance with the Agreement (including, to avoid doubt, the production of the Prototype Devices and the provision of the Prototyping Services in accordance with the Agreement) infringes the Intellectual Property Rights of that third party (**IP Claim**).
- 6.12 To the extent not owned by us, you grant us a royalty-free, transferable, irrevocable and perpetual licence to use for our own business purposes any know-how, techniques, ideas, methodologies, and similar Intellectual Property used or developed by us in the provision of the Proposal or Quote, the production of the Prototype Devices or the provision of the Prototyping Services. Nothing in this clause is intended to grant a license to or waive any rights to any patents, copyright rights, trade marks or circuit layout rights.
- 6.13 If you provide us with ideas, comments or suggestions relating to the StretchSense Technology (together **feedback**):
- a we may use your feedback for any purpose; and
  - b anything created by us as a result of your feedback (including new material, enhancements, modifications or derivative works) is owned solely by us, provided that



nothing in this clause is intended to grant a license to or waive any rights to any patents, copyright rights, trade marks, or circuit layout rights.

- 6.14 You must not use, reproduce, translate, decompile, reverse-engineer, resell, modify, vary, sublicense or otherwise deal in the Prototype Devices or any of our Intellectual Property except as expressly provided for in the Agreement.

## 7 CONFIDENTIALITY

7.1 Each party must, unless it has the prior written consent of the other party:

- a keep confidential at all times the Confidential Information of the other party;
- b effect and maintain adequate security measures to safeguard the other party's Confidential Information from unauthorised access or use; and
- c disclose the other party's Confidential Information to its personnel or professional advisors on a *need to know* basis only and, in that case, ensure that any personnel or professional advisor to whom it discloses the other party's Confidential Information is aware of, and complies with, the provisions of clauses 7.1a and 7.1b.

7.2 The obligation of confidentiality in clause 7.1a does not apply to any disclosure or use of Confidential Information:

- a for the purpose of performing the Agreement or exercising a party's rights under the Agreement;
- b required by law (including under the rules of any stock exchange);
- c which is publicly available through no fault of the recipient of the Confidential Information or its personnel;
- d which was rightfully received by a party to the Agreement from a third party without restriction and without breach of any obligation of confidentiality; or
- e by us if required as part of a *bona fide* sale of our business (assets or shares, whether in whole or in part) to a third party, provided that we enter into a confidentiality agreement with the third party on terms no less restrictive than this clause 7.

7.3 If the parties have signed a separate non-disclosure agreement (**NDA**) then:

- a clause 7.1 will not apply;
- b the use and disclosure of Confidential Information is governed by the NDA; and
- c to avoid doubt, information that is Confidential Information under the Agreement is confidential information for the purposes of the NDA.



## 8 WARRANTIES

- 8.1 Each party warrants that it has full power and authority to enter into, and perform its obligations, under the Agreement.
- 8.2 You warrant that our possession and use of the Client IP in accordance with the Agreement will not infringe the Intellectual Property Rights of any third party.
- 8.3 We warrant that:
- a your possession and use of the StretchSense IP in accordance with the Agreement will not infringe the Intellectual Property Rights of any third party; and
  - b at the time of dispatch and for 3 months from dispatch, the Prototype Devices will meet the specifications in the Proposal or Quote and are free from material defects in workmanship and materials.
- 8.4 You acknowledge that the Prototype Devices are of a technical nature and are provided for the evaluation and validation purposes set out in clause 6.4 only and may not be error-free or defect-free.
- 8.5 Subject to clause 8.6, if a Prototype Device does not meet the warranty in clause 8.3b, we will, at our option and cost, remedy, repair, enhance or replace the Prototype Device so that the Prototype Devices meets and satisfies that warranty. The remedy, repair, enhancement or replacement of a Prototype Device as described in this clause will be your sole remedy against us for a breach of warranty under clause 8.3b.
- 8.6 The warranties in clause 8.3 do not apply, and we are not obliged to remedy, repair, enhance or replace any defective Prototype Device under clause 8.5 to the extent that the failure to meet the warranty arises from or in connection with:
- a modification or alteration of the Prototype Device by any person other than us; or
  - b a breach of the Agreement by you, including use of the Prototype Device by you in a manner or for a purpose not reasonably contemplated by the Agreement or not authorised in writing by us.
- 8.7 TO THE MAXIMUM EXTENT PERMITTED BY LAW OUR WARRANTIES ARE LIMITED TO THOSE SET OUT IN THESE TERMS, AND ALL OTHER CONDITIONS, GUARANTEES OR WARRANTIES WHETHER EXPRESSED OR IMPLIED BY STATUTE OR OTHERWISE ARE EXPRESSLY EXCLUDED.
- 8.8 You agree and represent that you are acquiring the Prototype Devices and Prototyping Services, and entering into the Agreement, for the purpose of a business and any applicable consumer protection legislation does not apply to the supply of the Prototype Devices or Prototyping Services or the Agreement.



8.9 Where legislation or rule of law implies into the Agreement a condition or warranty that cannot be excluded or modified by contract, the condition or warranty is deemed to be included in the Agreement. However, our liability for any breach of that condition or warranty is limited, at our option, to:

- a supplying the relevant Prototype Device or Prototyping Service again;
- b remedying, repairing, enhancing or replacing (as applicable) the Prototype Device or Prototyping Service so that it meets and satisfies that condition or warranty; or
- c refunding the relevant Fees.

## 9 LIABILITY

9.1 Our maximum aggregate liability under or in connection with the Agreement or relating to the Prototype Devices and Prototyping Services, whether in contract, tort (including negligence), breach of statutory duty or otherwise, must not exceed:

- a the total Fees paid by you for the Prototype Device or Prototyping Service giving rise to liability; or
- b to the extent that clause 9.1a does not apply, the total Fees paid by you under the Agreement in the 12 month period before the first event giving rise to liability.

9.2 NEITHER PARTY IS LIABLE TO THE OTHER UNDER OR IN CONNECTION WITH THE AGREEMENT, THE PROTOTYPE DEVICES OR THE PROTOTYPING SERVICES FOR ANY:

- a LOSS OF PROFIT, REVENUE, SAVINGS, BUSINESS, USE, DATA, AND/OR GOODWILL; OR
- b CONSEQUENTIAL, INDIRECT, INCIDENTAL OR SPECIAL DAMAGE OR LOSS OF ANY KIND.

9.3 Clauses 9.1 and 9.2 do not apply to limit our liability:

- a under or in connection with the Agreement for:
  - i any matter for which liability cannot be excluded under applicable law; or
  - ii fraud or wilful misconduct;
- b for infringement of your Intellectual Property Rights; or
- c for breach of clause 7.1 or the NDA (as applicable).

9.4 Clause 9.2 does not apply to limit your liability:

- a to pay the Fees;
- b under the indemnity in clause 6.11; or

- c under or in connection with the Agreement for:
  - i any matter for which liability cannot be excluded under applicable law; or
  - ii fraud or wilful misconduct;
- d for infringement of our Intellectual Property Rights; or
- e for breach of clause 7.1 or the NDA (as applicable).

9.5 Neither party will be responsible, liable, or held to be in breach of the Agreement for any failure to perform its obligations under the Agreement or otherwise, to the extent that the failure is caused by the other party failing to comply with its obligations under the Agreement, or by the negligence or misconduct of the other party or its personnel.

9.6 Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with the Agreement or the Prototype Devices or Prototyping Services.

## 10 TERMINATION

10.1 Either party may, by notice to the other party, immediately terminate the Agreement if the other party:

- a breaches any material provision of the Agreement and the breach is not:
  - i remedied within 10 days of the receipt of a notice from the first party requiring it to remedy the breach; or
  - ii capable of being remedied; or
- b becomes insolvent, liquidated or bankrupt, has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of insolvency action or external administration, or ceases to continue business for any reason.

10.2 We may, by notice to you, immediately terminate the Agreement if we become aware of an IP Claim.

10.3 Termination of the Agreement does not affect either party's rights and obligations that accrued before that termination.

10.4 On termination of the Agreement, you must pay all Fees for the Prototype Devices and Prototyping Services provided prior to that termination.

10.5 Except to the extent that a party has ongoing rights to use Confidential Information or is required to keep a copy for audit or legal record-keeping purposes, at the other party's request following termination of the Agreement, a party must promptly return to the other party or

destroy all Confidential Information of the other party that is in the first party's possession or control.

## 11 GENERAL

- 11.1 You must comply with all applicable export control laws and not export or re-export Prototype Devices or technical data you receive other than in compliance with the applicable export control laws. You are responsible for obtaining any required licences to export, re-export or import Prototype Devices or technical data.
- 11.2 Neither party is liable to the other for any failure to perform its obligations under the Agreement to the extent caused by Force Majeure.
- 11.3 No person other than you and us has any right to a benefit under, or to enforce, the Agreement.
- 11.4 For us to waive a right under the Agreement, that waiver must be in writing and signed by us.
- 11.5 We are your independent contractor, and no other relationship (e.g. joint venture, agency, trust or partnership) exists under the Agreement.
- 11.6 The Agreement, and any dispute relating to the Agreement or the Prototype Devices or Prototyping Services are governed by and must be interpreted in accordance with the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with the Agreement or the Prototype Devices or Prototyping Services.
- 11.7 Clauses which, by their nature, are intended to survive termination of the Agreement, including clauses 6, 7, 8, 9, 10.3 to 10.5, 11.6 and 11.7, continue in force.
- 11.8 If any part or provision of the Agreement is or becomes illegal, unenforceable, or invalid, that part or provision is deemed to be modified to the extent required to remedy the illegality, unenforceability or invalidity. If a modification is not possible, the part or provision must be treated for all purposes as severed from the Agreement. The remainder of the Agreement will be binding on you.
- 11.9 Subject to clause 2.1, any variation to the Agreement must be in writing and signed by both parties.
- 11.10 These Terms set out everything agreed by the parties relating to the Prototype Devices and Prototyping Services, and supersede and cancel anything discussed, exchanged or agreed prior to the date we accept your Order. The parties have not relied on any representation, warranty or agreement relating to the Prototype Devices or Prototyping Services that is not expressly set out in the Agreement, and no such representation, warranty or agreement has any effect from the date we accept your Order.
- 11.11 You may not assign, novate, subcontract or transfer any right or obligation under the Agreement without our prior written consent, that consent not to be unreasonably withheld.

You remain liable for your obligations under the Agreement despite any approved assignment, subcontracting or transfer.

## SCHEDULE

### MIT LICENSE FOR REFERENCE SOFTWARE AND CIRCUIT DESIGN FILES

Copyright (c) 2012 - 2018 StretchSense Limited

In this notice, "Circuit Design File" means a file or document containing technical information relating to the design and function of an electronic circuit (including an integrated circuit), including schematics, datasheets, specifications and bills of material.

Permission is hereby granted, free of charge, to any person obtaining a copy of this Software or Circuit Design File ("Item"), to deal in the Item without restriction, including without limitation the rights to use, copy, modify, merge, publish, distribute, sublicense, and/or sell copies of the Item, and to permit persons to whom the Item is furnished to do so, subject to the following conditions:

The above copyright notice and this permission notice shall be included in all copies or substantial portions of the Item.

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