

**5.0 Representations and Warranties.** Math-Whiz represents and warrants [*QUESTION: Does MathWhiz want to proactively offer both reps and warranties?*] to Gigunda, its successors, and Assigns, that during the entire Warranty Period specified in Article [*insert Article reference for “Warranty Period”*], that:

**5.1 Due Authority.** Math-Whiz has full right and power to execute, deliver, and perform this Agreement without the consent of any third party, and its performance under this Agreement will not conflict with any other obligation Math-Whiz may have to any other party. [*COMMENT: A lot of “everyday” contracts would omit this.*]

**5.2 Standard of Performance.** Math-Whiz will perform the Services in a timely, professional manner and, at a minimum, be of quality workmanship and design equal to applicable industry standards for similar services. [*COMMENT: I like this, for reasons I’ll explain in class.*] In addition, all Services and each Deliverable shall conform in all material respects with the description set forth in the SOW [*ensure Statement of Work is included*].

**5.3 No Malicious Code.** Math-Whiz uses [*COMMENT: You’re correct that this isn’t a rep or warranty, so it shouldn’t be in the rep-and-warranty section*] frequently updated virus and malware protection software to prevent the introduction of viruses, Trojan horses, spyware, malware, or similar items ("Malicious Code"). As Customer Group’s [*ensure defined term “Customer Group” is Gigunda, all its affiliates & subcontractors*] sole remedy with respect to a breach of this warranty, Math-Whiz will use reasonable efforts to remove such Malicious Code. [*COMMENT: Nice work in being proactive about something that Gigunda is likely to care about.*]

**5.4 Technical Support.** Math-Whiz warrants that its technical support is available during all regular business hours, five business days a week, excluding U.S. public holidays. Technical support will be provided by a technically qualified employee or subcontractor of Math-Whiz. [*COMMENT: I wouldn’t put this as a warranty; it’s better phrased as just a covenant, i.e., “MathWhiz will do X ....”*]

**5.5 Compliance with Law.** Math-Whiz warrants that its services will meet any regulatory approvals or requirements, and in compliance with all laws and regulations.

**5.6 Intellectual Property Rights.** Math-Whiz warrants that [*THE?*] Services do not [*COMMENT: “Will not” might be better*] [*QUESTION: Does MathWhiz really want to warrant that there’s no patent infringement?*] infringe any patent, published patent application, or other intellectual property rights of any third party and not utilize

misappropriated third party trade secret information. Math-Whiz further warrants that none of its Services, Deliverables or element thereof will be subject to any restrictions or to any mortgages, liens, pledges, security interests, encumbrances or encroachments. *[COMMENT: This sentence isn't something you normally see in a services agreement]*

**5.7 Remedy of Defects.** Math-Whiz shall, without charge, correct any non-conformity, defect or malfunction in any Deliverable reported by Gigunda within 30 days of receipt of notice from Gigunda. If Math-Whiz is unable to correct the non-conformity, defect or malfunction as warranted within such 30-day period, then Gigunda may terminate the specific SOW deliverable by issuing a written termination notice. Math-Whiz shall refund to Gigunda all fees paid for such defective and terminated SOW deliverable(s) within 15 days of receiving such termination notice. The remedies set forth in this Section 5.5 shall be non-exclusive. *[QUESTION: Is the last sentence something MathWhiz would voluntarily include in a first draft? What's a better alternative?]*

**5.8 No Employment, Agency or Partnership.** Math-Whiz warrants and represents to Gigunda that Math-Whiz is an independent contractor. *[COMMENT: This rep and warranty is sort of meaningless — independent-contractor status is determined by the nature of the parties' relationship.]* Math-Whiz shall perform services on behalf of Gigunda in the capacity of independent contractor, and not as an employee, worker, partner, agent or joint venture partner of Gigunda. *[COMMENT: Same as previous comment — consider instead just saying that the parties don't intend any kind of relationship except that of independent contractor.]* Math-Whiz shall not have any right or power whatsoever to contract on behalf of Gigunda in any way in relation to third parties and will not hold Math-Whiz out as having such authority unless specifically authorized to do so. *[COMMENT: Now that's the way to do it!]*

**5.9 Dispute Resolution and Applicable Law.** *[COMMENT: This whole section will need a rewrite — I'll talk about it in class.]* Math-Whiz warrant they *[COMMENT: Use "it" for an organization, not "they."]* will follow the applicable laws of California. *[COMMENT: I think what you mean here is that California law will apply; that's in the reading for this week.]* Math-Whiz and Gigunda representatives shall use best efforts *[COMMENT: "Best efforts" is something I try to avoid.]* to exclude conflicts *[COMMENT: What does "exclude conflicts" mean in this context?]* by settling disputes by negotiations. *[COMMENT: If you want to have an escalation clause, that's a possibility.]* If such conflicts arise between the Parties, the Parties shall undertake to refrain from unilateral actions. *[COMMENT: What's a "unilateral action" in this context?]* If and when negotiations do not result in amicable resolution, [THE] Parties

shall resolve such disputes or disagreements in a California judicial venue.  
*[COMMENT: This would be a forum-selection provision.]*

**5.10 Warranty Disclaimer.** Math-Whiz warrants that its services will meet any regulatory approvals or requirements. *[COMMENT: The first sentence doesn't belong in a warranty disclaimer section.]* Except as otherwise provided herein, all conditions, representations and warranties, whether express, implied, statutory or otherwise, including, without limitation, any implied warranty of merchantability, fitness for a particular purpose, or non-infringement of third-party rights, are hereby disclaimed by Math-Whiz to the maximum extent permitted by applicable Law. *[COMMENT: If "Law" isn't a defined term, then don't capitalize it.]*