

Software as a Service Agreement

This Software as a Service (SaaS) Agreement (the “**Agreement**”), is by and between Sims Group USA Holdings Corporation, and for and on behalf of its Affiliates (“**Customer**”), a Delaware corporation with offices located at 16 W. 22nd St, 10th Floor, New York City, NY 10101, and such supplier as listed in the document to which these terms are attached or in which these terms are incorporated by reference (“**Provider**”).

1. Definitions.

“**Accept**” has the meaning set forth in [Section 4.2\(b\)](#).

“**Acceptance**” has the meaning set forth in [Section 4.2\(b\)](#).

“**Action**” has the meaning set forth in [Section 14.1](#).

“**Actual Uptime**” means the total minutes in the Service Period that the Hosted Services are Available.

“**Affiliate**” of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term “control” (including the terms “controlled by” and “under common control with”) means the direct or indirect power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise/ownership of more than 40% of the voting securities of a Person.

“**Agreement**” has the meaning set forth in the preamble.

“**Allegedly Infringing Features**” has the meaning set forth in [Section 14.3\(b\)\(ii\)](#).

“**Authorized Users**” means all Persons authorized by Customer or any of its Affiliates to access and use the Services through Customer’s account under this Agreement.

“**Availability**” has the meaning set forth in [Section 5.1](#).

“**Availability Requirement**” has the meaning set forth in [Section 5.1](#).

“**Available**” has the meaning set forth in [Section 5.1](#).

“**Business Day**” means a day other than a Saturday, Sunday, or other day on which commercial banks in New York City are authorized or required by Law to be closed for business.

“**Change Order**” has the meaning set forth in [Section 2.2](#).

“**Code**” has the meaning set forth in [Section 20](#).

“**Confidential Information**” has the meaning set forth in [Section 10.1](#).

“**Corrective Action Plan**” has the meaning set forth in [Section 6.6](#).

“**Critical Service Error**” has the meaning set forth in [Section 6.4\(a\)](#) (chart).

“**Customer**” has the meaning set forth in the preamble.

“**Customer Data**” means any and all information, data, materials, works, expressions, or other content, including any that are (a) uploaded, submitted, posted, transferred, transmitted, or otherwise provided or made available by or on behalf of Customer or any Authorized User for Processing by or through the Hosted Services, or (b) collected, downloaded, or otherwise received by Provider or the Hosted Services for Customer or any Authorized User pursuant to this Agreement or any Service Order or at the written request or instruction of Customer or such

Authorized User. All output, copies, reproductions, improvements, modifications, adaptations, translations, and other derivative works of, based on, derived from, or otherwise using any Customer Data are themselves also Customer Data. For the avoidance of doubt, Customer Data includes all User Data and Personal Information[but does not include any Provider Materials].

"**Customer Indemnitee**" has the meaning set forth in [Section 14.1](#).

"**Customer Modification**" has the meaning set forth in [Section 14.2\(a\)](#).

"**Customer SaaS Manager**" has the meaning set forth in [Section 2.8](#).

"**Customer Systems**" has the meaning set forth in [Section 7.5\(a\)\(vi\)](#).

"**Disclosing Party**" has the meaning set forth in [Section 10.1](#).

"**Divested Business**" means any business that at any time during the Term is an operating division of Customer or an Affiliate of Customer, but ceases to be so as a result of the sale or other transfer of ownership of a majority of the equity interest or all or substantially all of the assets of (a) such business or (b) Customer by its parent.

"**Documentation**" means all generally available documentation relating to the Services, including all user manuals, operating manuals, and other instructions, specifications, documents, and materials, in any form or media, that describe any component, feature, requirement, or other aspect of the Services, including any functionality, testing, operation, or use thereof.

"**Effective Date**" has the meaning set forth in the preamble.

"**Escrow Agent**" has the meaning set forth in [Section 19.1](#).

"**Escrow Agreement**" has the meaning set forth in [Section 19.1](#).

"**Exceptions**" has the meaning set forth in [Section 5.2](#).

"**Fees**" has the meaning set forth in [Section 8.1](#).

"**Force Majeure Event**" has the meaning set forth in [Section 18.1](#).

"**Harmful Code**" means any software, hardware or other technologies, devices, or means, the purpose or effect of which is to: (a) permit unauthorized access to, or to destroy, disrupt, disable, distort, or otherwise harm or impede in any manner, any (i) computer, software, firmware, hardware, system or network, or (ii) any application or function of any of the foregoing or the integrity, use, or operation of any data Processed thereby; or (b) prevent Customer or any Authorized User from accessing or using the Services or Provider Systems as intended by this Agreement, and includes any virus, bug, Trojan horse, worm, backdoor, or other malicious computer code and any time bomb or drop dead device.

"**High Service Error**" has the meaning set forth in [Section 6.4\(a\)](#) (chart).

"**Hosted Services**" has the meaning set forth in [Section 2.1\(a\)](#).

"**Indemnifying Party**" has the meaning set forth in [Section 14.1](#).

"**Indemnitee**" has the meaning set forth in [Section 14.1](#).

"**Initial Term**" has the meaning set forth in [Section 7.1](#).

"**Intellectual Property Rights**" means any and all registered and unregistered rights granted, applied for, or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection, or other intellectual property rights Laws, and all similar or equivalent rights or forms of protection, in any part of the world.

"Key Personnel" means any Provider Personnel identified as key personnel in this Agreement or any Service Order.

"Law" means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, or other requirement of any federal, state, local, or foreign government or political subdivision thereof, or any arbitrator, court, or tribunal of competent jurisdiction.

"Losses" means any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including [reasonable] attorneys' fees, fees, and the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers.

"Low Service Error" has the meaning set forth in [Section 6.4\(a\)](#) (chart).

"Medium Service Error" has the meaning set forth in [Section 6.4\(a\)](#) (chart).

"Permitted Uses" means any use of the Services by Customer or any Authorized User for the benefit of Customer or any of its Affiliates in or for Customer's or its Affiliate's internal business operations/for any and all lawful purposes/the.

"Person" means an individual, corporation, partnership, joint venture, limited liability company, governmental authority, unincorporated organization, trust, association, or other entity.

"Personal Information" has the meaning set forth in [Section 11.1\(a\)](#).

"Plan" has the meaning set forth in [Section 13.3\(a\)](#).

"Process" means to perform any operation or set of operations on any data, information, material, work, expression, or other content, including to (a) collect, receive, input, upload, download, record, reproduce, store, organize, combine, log, catalog, cross-reference, manage, maintain, copy, adapt, alter, translate, or make other improvements or derivative works, (b) process, retrieve, output, consult, use, disseminate, transmit, submit, post, transfer, disclose, or otherwise provide or make available, or (c) block, erase, or destroy. **"Processing"** and **"Processed"** have correlative meanings.

"Provider" has the meaning set forth in the preamble.

"Provider Indemnitee" has the meaning set forth in [Section 14.4](#).

"Provider Materials" means all devices, documents, data, know-how, methods, processes, software, and other inventions, works, technologies and materials (including any and all Service Software, Documentation, computer hardware, programs, reports and specifications, client software, and deliverables) that are proprietary to Provider and provided or used by Provider in [connection with] performing the Services.

"Provider Personnel" means all employees and agents of Provider[, all Subcontractors and all employees and agents of any Subcontractor,] involved in the performance of Services.

"Provider Security Officer" has the meaning set forth in [Section 2.5\(a\)](#).

"Provider Service Manager" has the meaning set forth in [Section 2.5\(a\)](#).

"Provider Systems" has the meaning set forth in [Section 12.3](#).

"Receiving Party" has the meaning set forth in [Section 10.1](#).

"Regulator" has the meaning set forth in [Section 12.5](#).

"Reimbursable Expenses" has the meaning set forth in [Section 8.4](#).

"**Reject**" has the meaning set forth in [Section 4.2\(b\)](#).

"**Rejection**" has the meaning set forth in [Section 4.2\(b\)](#).

"**Release Event**" has the meaning set forth in [Section 19.2](#).

"**Renewal Term**" has the meaning set forth in [Section 7.2](#).

"**Representatives**" means, with respect to a party, that party's and its Affiliates' respective employees, officers, directors, consultants, agents, independent contractors, service providers, sublicensees, subcontractors, and legal advisors and, with respect to Provider, Provider's Subcontractors and, with respect to Customer, solely its independent contractors or service providers that are Authorized Users.

"**Resolve**" has the meaning set forth in [Section 6.4\(b\)](#).

"**Scheduled Downtime**" has the meaning set forth in [Section 5.3](#).

"**Scheduled Uptime**" means the total minutes in the Service Period.

"**Secondary Backup Facility**" has the meaning set forth in [Section 13.1](#).

"**Service Availability Credits**" has the meaning set forth in [Section 5.5\(a\)](#).

"**Service Error**" means any failure of any Hosted Service to be Available or otherwise perform in accordance with this Agreement and the Specifications.

"**Service Level Credits**" has the meaning set forth in [Section 6.5](#).

"**Service Level Failure**" means a failure to perform the Support Services fully in compliance with the Support Service Level Requirements.

"**Service Order**" has the meaning set forth in [Section 2.1\(a\)](#).

"**Service Period**" has the meaning set forth in [Section 5.1](#).

"**Service Software**" means the Provider software application or applications and any third-party or other software, and all new versions, updates, revisions, improvements, and modifications of the foregoing, that Provider provides remote access to and use of as part of the Services.

"**Services**" has the meaning set forth in [Section 2.1](#).

"**Source Code**" means the human readable source code of the Service Software to which it relates, in the programming language in which the Service Software was written, together with all related flow charts and technical documentation, including a description of the procedure for generating object code, all of a level sufficient to enable a programmer having ordinary skill in such programming language to understand, build, operate, support, maintain, and develop modifications, upgrades, updates, adaptations, enhancements, new versions, and other derivative works and improvements of, and to develop computer programs compatible with, the Service Software.

"**Specifications**" means the specifications for the Services [set forth in the applicable Service Order] and, to the extent consistent with and not limiting of the foregoing, the Documentation.

"**Subcontractor**" has the meaning set forth in [Section 2.4\(a\)](#).

"**Support Request**" has the meaning set forth in [Section 6.4\(a\)](#).

"**Support Service Level Requirements**" has the meaning set forth in [Section 6.4](#).

"**Support Services**" has the meaning set forth in [Section 6](#).

"Sustaining Resources" means (a) personnel that are: (i) technically qualified to perform the Services; (ii) made available during the time period and at the place where performance of the Services is required to occur; and (iii) sufficient, ready, willing, and able to perform all of Provider's [material] obligations; (b) materials, facilities, and equipment that are sufficient to perform Provider's obligations; and (c) other assets, including Intellectual Property Rights, that are sufficient to perform Provider's obligations, in the case of each of clauses (a), (b), and (c), in a professional, timely, and efficient manner in accordance with this Agreement and the Specifications.

"Term" has the meaning set forth in [Section 7.2](#).

"Territory" means the United States or any other territory of which the Provider is advised of from time to time.

"User Data" means any and all information reflecting the access or use of the Hosted Services by or on behalf of Customer or any Authorized User, including any end user profile-, visit-, session-, impression-, click through- or click stream- data, and any statistical or other analysis, information, or data based on or derived from any of the foregoing.

2. Services.

2.1 Services. Throughout the Term and at all times in connection with its actual or required performance under this Agreement, Provider shall, in accordance with all terms and conditions set forth in this Agreement and each applicable Service Order, provide to Customer and its Authorized Users the following services ("**Services**"):

- (a) the hosting, management, and operation of the Service Software and other services for remote electronic access and use by the Customer and its Authorized Users ("**Hosted Services**") as described in one or more written service orders and/or any other written agreements specifically referencing or incorporating this Agreement, and made a part of this Agreement (each, a "**Service Order**");
- (b) service maintenance and the Support Services as set forth in [Section 6](#) and in the Service Order; and
- (c) such other services as may be specified in the applicable Service Order.

2.2 Service Orders. Service Orders will be effective only when signed by Customer and Provider. Any modifications or changes to the Services under any executed Service Order will be effective only if and when memorialized in a mutually agreed written change order ("**Change Order**") signed by both Parties, provided, however, that for any Services provided on a limited basis (for example, on a per user, server, CPU, or named-user basis), Customer may, at any time, increase or decrease the number of its licenses hereunder subject to a corresponding forward-going adjustment of the Fees to reflect these changes in accordance with the pricing set forth in an applicable Service Order.

2.3 Compliance with Laws. Provider shall comply with all applicable Laws as they concern this Agreement or the subject matter hereof, including by securing and maintaining all required and appropriate visas, work permits, business licenses, and other documentation and clearances necessary for performance of the Services.

2.4 Subcontracting. Provider shall not itself, and shall not permit any other Person to, subcontract any Services, in whole or in part, without Customer's prior written consent, which consent may be given or withheld in Customer's sole discretion. Without limiting the foregoing:

- (a) Provider shall ensure each Provider subcontractor (including any subcontractor of a Provider subcontractor, each, a "**Subcontractor**") complies with all relevant terms of this Agreement, including all provisions relating to Customer Data, Personal Information, or other Confidential Information of Customer;
- (b) Customer's consent to any such Subcontractor shall not relieve Provider of its representations, warranties, or

obligations under this Agreement;

(c) Provider shall remain responsible and liable for any and all: (i) performance required hereunder, including the proper supervision, coordination, and performance of the Services; and (ii) acts and omissions of each Subcontractor (including, such Subcontractor's employees and agents, who, to the extent they are involved in providing any Services, are deemed Provider Personnel) to the same extent as if such acts or omissions were by Provider;

(d) any noncompliance by any Subcontractor or its employees or agents with the provisions of this Agreement or any Service Order will constitute a breach by Provider; and

(e) Provider shall name Customer a third party beneficiary under each of Provider's agreements with any Subcontractor that relate to the Services; and

(f) prior to the provision of Services by any Subcontractor, Provider shall obtain from each such proposed Subcontractor:

(i) the identity of such Subcontractor and the location of all its data centers, if any, that will be used in Processing any Customer Data, which information Provider shall promptly disclose to Customer in writing; and

(ii) a written confidentiality, restricted use, work-for-hire, and intellectual property rights assignment agreement in form and substance acceptable to Customer/substantially in the form of Exhibit 1, giving Customer rights and protections at least equal to those set forth in [Section 9](#) (Ownership), [Section 10](#) (Confidentiality), [Section 11](#) (Personal Information), [Section 12](#) (Security) and [Section 13](#) (Redundancy, Data Backup and Disaster Recovery), and containing the Subcontractor's acknowledgment of and agreement to the provisions of [Section 2.5](#) (Provider Personnel), a fully-executed copy of which agreement Provider shall promptly provide to Customer on Customer's request].

2.5 Provider Personnel. Provider shall:

(a) subject to the prior written approval of Customer, appoint: (i) a Provider employee to serve as Provider's primary contact with respect to the Services, who will have the authority to act on behalf of Provider in matters pertaining to the receipt and processing of Support Requests and the Support Services (the "**Provider Service Manager**"); (ii) a Provider employee to respond to Customer's inquiries regarding the security of the Provider Systems, who has sufficient knowledge of the security of the Provider Systems and the authority to act on behalf of Provider in matters pertaining thereto ("**Provider Security Officer**"); and (iii) other Key Personnel, who will be suitably skilled, experienced and qualified to perform the Services;

(b) maintain the same Provider Service Manager[,/and] Provider Security Officer and other Key Personnel throughout the Term and such additional period, if any, as Provider is required to perform the Services, except for changes in such personnel due to: (i) Customer's request pursuant to [Section 2.5\(c\)](#); or (ii) the death, disability, resignation, or termination of such personnel or other circumstances outside Provider's reasonable control; and

(c) upon the reasonable written request of Customer, promptly replace any Provider Personnel.

2.6 Management and Payment of Provider Personnel. Provider is solely responsible for the payment of Provider Personnel, including all fees, expenses, and compensation to, by or on behalf of any Provider Personnel and, if applicable, the withholding of income taxes and payment and withholding of social security and other payroll taxes, unemployment insurance, workers' compensation insurance payments, and disability benefits. Provider shall ensure that no Person who has been convicted of a felony or any misdemeanor involving, in any way, theft, fraud, bribery, or the violation of any securities law provides any Services or has access to any Personal Information or other Confidential Information of Customer. Provider shall be solely responsible for conducting all background checks necessary to comply with the foregoing.

2.7 Time of the Essence. Provider acknowledges and agrees that time is of the essence with respect to its obligations under this Agreement and that prompt and timely performance of all such obligations, including all timetables and other requirements of this Agreement and each Service Order, is strictly required.

2.8 Customer SaaS Manager. Customer shall appoint and, in its reasonable discretion, replace, [a/two] Customer employee[s] to serve as Customer's primary contact[s] with respect to the Services, who will have the authority to act on behalf of Customer in matters pertaining to the Support Services, including the submission and processing of Support Requests (each, a "**Customer SaaS Manager**").

3. License Grant and Restrictions.

3.1 License Grant. Provider hereby grants to Customer and its Affiliates, exercisable by and through their Authorized Users, a nonexclusive, royalty-free, irrevocable, transferable (as permitted under [Section 21.8](#)) and sublicensable (pursuant to [Section 3.1\(f\)](#) and [Section 3.2](#)), right and license throughout the world during the Term and such additional periods, if any, as Provider is required to perform any Services, to:

(a) access and use the Hosted Services, including in operation with other software, hardware, systems, networks, and services, for Customer's and its Affiliates' respective business purposes/the Permitted Uses, including for Processing Customer Data;

(b) generate, print, copy, upload, download, store and otherwise Process all GUI, audio, visual, digital, and other output, displays, and content as may result from any access to or use of the Services;

(c) prepare, reproduce, print, download and use as many copies/a reasonable number of copies/one copy of the Specifications and Documentation as may be necessary or useful for any use/Permitted Uses of the Services permitted under this Agreement;

(d) access and use the Services for all such non-production uses and applications as may be necessary or useful for the effective use of the Hosted Services as permitted/for the Permitted Uses hereunder, including for purposes of analysis, development, configuration, integration, testing, training, maintenance, support, and repair, which access and use will be without charge and not included for any purpose in any calculation of Customer's or its Authorized Users' use of the Services, including for purposes of assessing any Fees or other consideration payable to Provider or determining any excess use of the Hosted Services as described in [Section 3.4](#);

(e) perform, display, execute, reproduce, and modify (including to create improvements and derivative works of), and distribute and otherwise make available to Authorized Users, any Provider Materials solely to the extent necessary to access or use the Services in accordance with the terms and conditions of this Agreement; and

(f) grant sublicenses to Divested Businesses pursuant to [Section 3.2](#) and any and all such sublicenses as may be required to authorize third parties to exercise, for Customer's benefit and on its behalf, the license rights set forth in this [Section 3](#).

3.2 Divested Businesses. In the event Customer divests one or more of its operating divisions or Affiliates, or Customer itself is divested, Customer may [in its sole discretion by written notice to Provider/subject to Provider's prior written consent, not to be unreasonably withheld or delayed], assign in part or grant sublicenses under this Agreement to each Divested Business to allow each Divested Business to continue to access and use the Services and Documentation to the same extent as prior to the divestiture for the duration of the Term and such additional periods, if any, as Provider is required to perform the Services/a period not to exceed 2 years from the effective date of the divestiture of such Divested Business. Following such divestiture, Customer shall have no obligation or liability for any amounts payable for a Divested Business's use of the Services or any other performance or

nonperformance by any Divested Business, provided that such Divested Business agrees in writing to be liable directly to Provider therefor. Use of the Services by Customer and all Divested Businesses shall be aggregated for the purposes of calculating any required minimum use of the Services and all volume-based rates and discounts due Customer and such Divested Businesses hereunder.

3.3 License Restrictions. Customer shall not: (a) rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer, or otherwise make any Hosted Services or Provider Materials available to any third party, except as expressly permitted by this Agreement or in any Service Order; or (b) use or authorize the use of the Services or Documentation in any manner or for any purpose that is unlawful under applicable Law.

3.4 Excess Use. If Customer's uses of the Hosted Services exceeds the volume of use permitted by the license then in effect under [Section 3](#) and the applicable Service Order (including as to the number of uses, users, machines, or locations), Customer shall pay Provider the Fees attributable to the excess use in accordance with [Section 8](#). [Such Fees will be Provider's sole and exclusive remedy for such excess use.

4. Service Preparation, Testing and Acceptance.

4.1 Service Preparation. Promptly upon the parties' execution of a Service Order, Provider shall take all steps necessary to make the Services procured thereunder ready and available for Customer's use in accordance with the Service Order and this Agreement, including any applicable milestone date or dates set forth in such Service Order.

4.2 Testing and Acceptance.

(a) When Provider notifies Customer in writing that the Hosted Services are ready for use in a production environment, Customer shall have 60 days (or such other period as may be expressly set forth in the applicable Service Order) from receipt of the notice to test the Hosted Services to determine whether they comply in all material respects with the requirements of this Agreement and the Specifications.

(b) Upon completion of Customer's testing, Customer shall notify Provider of its acceptance ("**Accept**" or "**Acceptance**") or, if it has identified any noncompliance with the Specifications, rejection ("**Reject**" or "**Rejection**") of the Hosted Services. If Customer Rejects the Hosted Services, Customer shall provide a written list of items that must be corrected. On receipt of Customer's notice, Provider shall promptly commence, at no additional cost or charge to Customer, all reasonable efforts to complete, as quickly as possible and in any event within 20 days from receipt of Customer's notice (or such other period as may be agreed upon by the Parties in writing), such necessary corrections, repairs, and modifications to the Hosted Services to bring them into full compliance with the Specifications.

(c) If any corrective measures are required under [Section 4.2\(b\)](#), upon its completion of all such measures, Provider shall notify Customer in writing and the process set forth in [Section 4.2\(a\)](#) and [Section 4.2\(b\)](#) shall be repeated; provided that if Customer determines that the Hosted Services, as revised, still do not comply in all material respects with the Specifications, Customer may, in its sole discretion:

(i) require the Provider to repeat the correction, repair and modification process set forth in [Section 4.2\(b\)](#) at no additional cost or charge to Customer; or

(ii) terminate on 5 days' advance written notice to Provider any and all of the relevant Service Order, this Agreement and any other Service Order(s), with no liability, obligation or penalty to Customer by reason of such termination of any of these instruments or for any reason under or in connection with such terminated relevant Service Order.

(d) The parties shall repeat the foregoing procedure until Customer Accepts the Hosted Services or elects to terminate this Agreement, the relevant Service Order or any other Service Orders as provided in [Section 4.2\(c\)\(ii\)](#)

above. If, exercising its rights under Section 4.2(c)(ii), Customer elects to terminate: (i) solely the relevant Service Order, Provider shall refund to Customer all sums previously paid to Provider under such Service Order; (ii) this Agreement (including the relevant Service Order), Provider shall refund to Customer all sums previously paid to Provider under the relevant Service Order and any prepaid Fees for Services that have not been provided under this Agreement, including any other Service Order hereunder; or (iii) any other Service Order(s) (but not the entirety of this Agreement), Provider shall refund to Customer any prepaid Fees for Services that have not been provided under such other Service Order(s) and, if Customer also terminates the relevant Service Order, all sums previously paid to Provider under such Service Order. All refunds payable under this [Section 4.2\(d\)](#) shall be paid within [ten/[OTHER NUMBER] Business Days of Customer's written notice of termination under Section 4.2(c)(ii).

5. Service Availability and Service Availability Credits.

5.1 Availability Requirement. Provider shall make the Hosted Services Available, as measured over the course of each calendar month during the Term and any additional periods during which Provider does or is required to perform any Hosted Services (each such calendar month, a "**Service Period**"), at least 99.95% of the time, excluding only the time the Hosted Services are not Available solely as a result of one or more Exceptions (the "**Availability Requirement**"). "**Available**" means the Hosted Services are available and operable for access and use by Customer and its Authorized Users over the Internet in full conformity with the Specifications. "**Availability**" has a correlative meaning. The Hosted Services are not considered Available in the event of any performance degradation or inoperability of the Hosted Services, in whole or in part.

5.2 Exceptions. No period of Hosted Service degradation or inoperability will be included in calculating Availability to the extent that such downtime or degradation is due to any of the following ("**Exceptions**"):

- (a) Customer's or any of its Authorized Users' misuse of the Hosted Services;
- (b) failures of Customer's or its Authorized Users' internet connectivity;
- (c) internet or other network traffic problems other than problems arising in or from networks actually or required to be provided or controlled by Provider or its Subcontractor; or
- (d) Customer's or any of its Authorized Users' failure to meet any minimum hardware or software requirements set forth in the Specifications; or
- (e) Scheduled Downtime as set forth in [Section 5.3](#).

5.3 Scheduled Downtime. Provider shall notify Customer at least 24 hours in advance of all scheduled outages of the Hosted Services in whole or in part ("**Scheduled Downtime**"). All such scheduled outages shall: (a) last no longer than one hour; (b) be scheduled between the hours of 12a.m. and 7a.m.,CST; and (c) occur no more frequently than once per week; provided that Provider may request Customer's approval for extensions of Scheduled Downtime above one hour, which approval may be granted in Customer's sole discretion.

5.4 Service Availability Reports. Within 30 days after the end of each Service Period, Provider shall provide to Customer a report describing the Availability and other performance of the Hosted Services during that calendar month and the contract year-to-date as compared to the Availability Requirement and Specifications. The report shall be in electronic or such other form as Customer may approve in writing and shall include, at a minimum: (a) the actual performance of the Hosted Services relative to the Availability Requirement and Specifications; and (b) if Hosted Service performance has failed in any respect to meet or exceed the Availability Requirement or Specifications during the reporting period, a description in sufficient detail to inform Customer of the cause of such failure and the corrective actions the Provider has taken and will take to ensure that the Availability Requirement and Specifications are fully met.

5.5 Remedies for Service Availability Failures.

(a) If the actual Availability of the Hosted Services is less than the Availability Requirement for any Service Period, such failure shall constitute a Service Error for which Provider shall issue to Customer the corresponding service credits as set forth in Schedule C ("**Service Availability Credits**") in accordance with [Section 8.13](#).

(b) If the actual Availability of the Hosted Services is less than the Availability Requirement in any two of four consecutive Service Periods, then, in addition to all other remedies available to Customer, Customer may terminate this Agreement and/or [any/the applicable] Service Order on written notice to Provider with no liability, obligation or penalty to Customer by reason of such termination.

(c) Any Service Availability Credits due under this [Section 5.5](#) will be applied as set forth in Schedule C.

6. Support and Maintenance Services. Provider shall provide maintenance and support services (collectively, "**Support Services**") for the Hosted Services in accordance with the provisions of this [Section 6](#). The Support Services are included in the Services, and Provider shall not assess any additional Fees, costs or charges for such Support Services.

6.1 Support Service Responsibilities. Provider shall:

(a) correct all Service Errors in accordance with the Support Service Level Requirements, including by providing defect repair, programming corrections, and remedial programming;

(b) provide unlimited telephone support during the hours of 8 a.m. to 6 p.m. CST on Business Days;

(c) Provide online access to technical support bulletins and other user support information and forums, to the full extent Provider makes such resources available to its other customers[for services identical to or substantially similar to the Services]; and

(d) Respond to and Resolve Support Requests as specified in this [Section 6](#).

6.2 Service Monitoring and Management. Provider shall continuously monitor and manage the Hosted Services to optimize Availability that meets or exceeds the Availability Requirement. Such monitoring and management shall include:

(a) proactively monitoring on a 24 hour by seven day basis all Hosted Service functions, servers, firewall, and other components of Hosted Service security;

(b) if such monitoring identifies, or Provider otherwise becomes aware of, any circumstance that is reasonably likely to threaten the Availability of the Hosted Services, taking all necessary and reasonable remedial measures to promptly eliminate such threat and ensure full Availability;

(c) if Provider receives knowledge that the Hosted Services or any Hosted Service function or component is not Available (including by written notice from Customer pursuant to the procedures set forth herein or in the applicable Service Order):

(i) confirming (or disconfirming) the outage by a direct check of the associated facility or facilities;

(ii) if Provider's facility check in accordance with clause (i) above confirms a Hosted Service outage in whole or in part: (A) notifying Customer in writing pursuant to the procedures set forth herein or in the applicable Service Order that an outage has occurred, providing such details as may be available, including a Provider trouble ticket number, if appropriate, and time of outage; and (B) working all problems causing and caused by the outage until they are Resolved as Critical Service Errors in accordance with the Support Request Classification set forth in [Section 6.4](#),

or, if determined to be an internet provider problem, open a trouble ticket with the internet provider; and

(iii) notifying Customer that Provider has fully corrected the outage and any related problems, along with any pertinent findings or action taken to close the trouble ticket.

6.3 Service Maintenance. Provider shall continuously maintain the Hosted Services to optimize Availability that meets or exceeds the Availability Requirement. Such maintenance services shall include providing to Customer and its Authorized Users:

(a) all updates, bug fixes, enhancements, new releases, new versions, and other improvements to the Hosted Services, including the Service Software, that Provider provides at no additional charge to its other similarly situated customers; and

(b) all such services and repairs as are required to maintain the Hosted Services or are ancillary, necessary, or otherwise related to Customer's or its Authorized Users' access to or use of the Hosted Services, so that the Hosted Services operate properly in accordance with this Agreement and the Specifications.

6.4 Support Service Level Requirements. Provider shall correct all Service Errors and respond to and Resolve all Support Requests in accordance with the required times and other terms and conditions set forth in this [Section 6.4 \("Support Service Level Requirements"\)](#), this Agreement and the applicable Service Order.

(a) Support Requests. Customer shall classify its requests for Service Error corrections in accordance with the descriptions set forth in the chart below (each a "**Support Request**"). The Customer Service Manager shall notify Provider of Support Requests by email, telephone or such other means as the parties may hereafter agree to in writing.

Support Request Classification	Description: Any Service Error Comprising or Causing any of the Following Events or Effects
Critical Service Error	<ul style="list-style-type: none">• Issue affecting entire system or single critical production function;• System down or operating in materially degraded state;• Data integrity at risk;• Material financial impact;• Declared a Critical Support Request by the Customer; or• Widespread access interruptions.

High Service Error	<ul style="list-style-type: none"> • Primary component failure that materially impairs its performance; or • Data entry or access is materially impaired on a limited basis.
Medium Service Error	<ul style="list-style-type: none"> • Hosted Service is operating with minor issues that can be addressed with a work around.
Low Service Error	<ul style="list-style-type: none"> • Request for assistance, information, or services that are routine in nature.

(b) Response and Resolution Time Service Levels. Response and Resolution times will be measured from the time Provider receives a Support Request until the respective times Provider has (i) responded to, in the case of response time and (ii) Resolved such Support Request, in the case of Resolution time. “**Resolve**” (including “**Resolved**”, “**Resolution**” and correlative capitalized terms) means that, as to any Service Error, Provider has provided Customer the corresponding Service Error correction and Customer has confirmed such correction and its acceptance thereof. Provider shall respond to and Resolve all Service Errors within the following times based on the severity of the Service Error:

Support Request Classification	Service Level Metric (Required Response Time)	Service Level Metric (Required Resolution Time)	Service Level Credits (For Failure to Respond to any Support Request Within the Corresponding Response Time)	Service Level Credits (For Failure to Resolve any Support Request Within the Corresponding Required Resolution Time)

Critical Service Error	10 minutes	1 hour	95% of the Fees for the month in which the initial Service Level Failure begins and 100% of such monthly Fees for each additional hour or portion thereof that the corresponding Service Error is not responded to within the required response time.	100% of the Fees for the month in which the initial Service Level Failure begins and 100% of such monthly Fees for the first additional hour or portion thereof that the corresponding Service Error remains un-Resolved, which amount shall thereafter double for each additional 1 hour increment.
High Service Error	20 minutes	2 hours	80% of the Fees for the month in which the initial Service Level Failure begins and 85% of such monthly Fees for each additional hour or portion thereof that the corresponding Service Error is not responded to within the required response time.	85% of the Fees for the month in which the initial Service Level Failure begins and 85% of such monthly Fees for each additional hour or portion thereof that the corresponding Service Error remains un-Resolved.
Medium Service Error	1 day	1 day	65% of the Fees for the month in which the initial Service Level Failure begins and 70% of such monthly Fees for each additional hour or portion thereof that the corresponding Service Error is not responded to within the required response time.	70% of the Fees for the month in which the initial Service Level Failure begins and 70% of such monthly Fees for each additional 1 day thereafter or portion thereof that the corresponding Service Error remains un-Resolved.

Low Service Error	1 day	4 days	50% of the Fees for the month in which the initial Service Level Failure begins and 55% of such monthly Fees for each additional hour or portion thereof that the corresponding Service Error is not responded to within the required response time.	55% of the Fees for the month in which the initial Service Level Failure begins and 60% of such monthly Fees for each additional 1 day thereafter or portion thereof that the corresponding Service Error remains un-Resolved.
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(c) Escalation. With respect to any Critical Service Error Support Request, until such Support Request is Resolved, Provider shall escalate that Support Request within 60 minutes of the receipt of such Support Request by the appropriate Provider support personnel, including, as applicable, the Provider Service Manager and Provider's management or engineering personnel, as appropriate, each of whom shall be Key Personnel.

6.5 Support Service Level Credits. Failure to achieve any of the Support Service Level Requirements will constitute a Service Level Failure for which Provider shall issue to Customer the corresponding service credits set forth in [Section 6.4\(b\)](#) ("**Service Level Credits**") in accordance with [Section 8.13](#).

6.6 Corrective Action Plan. If two or more Critical Service Errors occur in any 30 period during (a) the Term or (b) any additional periods during which Provider does or is required to perform any Hosted Services, Provider shall promptly investigate the root causes of these Service Errors and provide to Customer within five Business Days of its receipt of notice of the second such Support Request an analysis of such root causes and a proposed written corrective action plan for Customer's review, comment, and approval, which, subject to and upon Customer's written approval, shall be a part of, and by this reference is incorporated in, this Agreement as the parties' corrective action plan (the "**Corrective Action Plan**"). The Corrective Action Plan shall include, at a minimum: (x) Provider's commitment to Customer to devote the appropriate time, skilled personnel, systems support, equipment, and other resources necessary to Resolve and prevent any further occurrences of the Service Errors giving rise to such Support Requests; (y) a strategy for developing any programming, software updates, fixes, patches, etc. necessary to remedy and prevent any further occurrences of such Service Errors; and (z) time frames for implementing the Corrective Action Plan. There will be no additional charge for Provider's preparation or implementation of the Corrective Action Plan in the time frames and manner set forth therein.

7. Term and Termination.

7.1 Term. Unless otherwise agreed in writing, the initial term ("**Initial Term**") of this Agreement commences as of the Effective Date and, unless this Agreement is terminated earlier pursuant to any of its express provisions, will continue in effect until 1 year from such date.

7.2 Renewal. Following expiration of the Initial Term, Customer may renew this Agreement for additional successive terms (each a "**Renewal Term**" and, collectively, together with the Initial Term, the "**Term**") by providing the Provider with written notice up to 3 additional successive terms (each a "**Renewal Term**" and, collectively, together with the Initial Term, the "**Term**") unless and until Customer provides written notice of non-renewal at least 5 days prior to the end of the Initial Term or then-current Renewal Term. Each Renewal Term will commence immediately on expiration of the Initial Term or preceding Renewal Term and, unless this Agreement is terminated

earlier pursuant to any of its express provisions, continue in effect for 5 years from such date.

7.3 Termination for Cause. In addition to any right of termination set forth elsewhere in this Agreement:

(a) either party may terminate by written notice of termination to the other party effective as of the date specified in such notice: (i) this Agreement, if the other party [materially] breaches this Agreement; or (ii) any Service Order, if the other party [materially] breaches that Service Order, in each case (clause (i) and (ii)) provided that such breach (A) cannot be cured or (B) being capable of cure, remains uncured [NUMBER] days after the breaching party receives written notice thereof; and

(b) Customer may terminate any and all of this Agreement and any Service Order(s), effective immediately, by written notice to Provider if Provider: (i) is dissolved or liquidated or takes any corporate action for such purpose; (ii) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due; (iii) files or has filed against it a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency Law[, if such proceeding is not fully stayed within [seven/[OTHER NUMBER]] Business Days or is not dismissed or vacated within [45/[OTHER NUMBER]] days after filing]; (iv) makes or seeks to make a general assignment for the benefit of its creditors; or (v) applies for or has appointed a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

7.4 Termination for Convenience. At any time without cause and without causing any breach or incurring any additional obligation, liability or penalty, Customer may terminate this Agreement and, except as may otherwise expressly be set forth in therein, any Service Order(s), in each case by providing at least 10 days' prior written notice to Provider.

7.5 Effect of Termination; Data Retention. The expiration or termination of this Agreement will not terminate any Service Order that is then in effect and not otherwise expressly terminated, and the terms and conditions of this Agreement will continue in effect with respect to any such Service Order until its expiration or termination as set forth herein. In addition, unless otherwise expressly provided in this Agreement or the applicable Service Order:

(a) upon and after the termination or expiration of this Agreement or one or more Service Orders for any or no reason:

(i) subject to the continuing rights, licenses, and obligations of either party under this Agreement, including this [Section 7.5](#), or any Service Order, all licenses granted hereunder will immediately terminate and the respective parties shall cease all activities concerning, including in the case of Customer, all use of, the expired or terminated Hosted Services and related Provider Materials, and, in the case of Provider, the Customer Data;

(ii) Customer shall pay to Provider, subject to[Customer's right of set-off under [Section 8.14](#) and] any Service Availability Credits and Service Level Credits accrued, respectively, under [Section 5.5](#) and [Section 6.4](#), all undisputed charges and amounts due and payable to Provider, if any, for Services actually performed under the terminated or expired Service Order or Service Orders;

(iii) Provider shall repay, on a pro rata basis, all fees, expenses and other amounts paid in advance for any Services that Provider has not performed as of the effective date of such expiration or termination, as applicable, with respect to Services required to be performed under the terminated or expired Service Order or Service Orders;

(iv) Provider shall, at Customer's option and upon its written request: (A) promptly return or, subject to Provider's obligations under [Section 7.5\(a\)\(v\)](#) and [Section 7.5\(a\)\(vi\)](#), destroy and erase from all systems it directly or indirectly uses or controls i all originals and copies of all documents, materials and other embodiments and expressions in

any form or medium that contain, reflect, incorporate or are based on Customer's Confidential Information, in whole or in part, or ii solely such specific databases or other collections or articles of Customer's Confidential Information as Customer may request, and (B) provide a written statement to Customer certifying that it has complied with the requirements of this [Section 7.5\(a\)\(iv\)](#);

(v) if on or before the effective date of such expiration or termination Provider does not receive any written request or instruction from Customer to destroy, erase, or return any Customer Data or other Confidential Information of Customer, Provider shall notify Customer in writing within three Business Days after such effective date of expiration or termination, and in no event fewer than 30 days before erasing, destroying, or otherwise disposing of any such Confidential Information of Customer, of such intended erasure, destruction, or other disposition and the pending date thereof, and request Customer's written instruction with respect to the return or other disposition of such Confidential Information in accordance with this [Section 7.5](#); and

(vi) at Customer's option and upon its written request, Provider shall: (A) continue to retain the Customer Data, or solely such specific databases or other collections or articles of Customer Data as Customer may request, as though this Agreement and all Service Orders were still in force, for a period to be agreed to by the parties in writing, but that in no event will be shorter than 45 days or longer than 180 days after the effective date of such expiration or termination, as applicable[, provided that Customer pays in full all undisputed Fees due Provider as of the effective date of such expiration or termination and pays monthly data storage fees to Provider for its retention of such Customer Data pursuant to Provider's standard rates for such data storage in effect at the time, or if such standard rates are not in effect, such reasonable prevailing industry rates as may be agreed to by the parties in writing]; and (B) at Customer's reasonable expense, immediately upon the conclusion of such Customer Data retention period, return such Customer Data to the information technology infrastructure, including the computers, software, databases, electronic systems (including database management systems), and networks, of Customer or any of its designees (collectively, "**Customer Systems**"), taking all steps required or reasonably requested to make an orderly transition of the Hosted Services to the Customer Systems [and to assist Customer and any of Customer's designees in migrating such Customer Data to the Customer Systems in both Provider's data format and a platform-agnostic format];

(b) without limiting the generality of [Section 7.5\(a\)](#), upon the termination or expiration of this Agreement and all Service Orders hereunder, Provider shall, at Customer's option and upon its written request: (i) promptly return or destroy and erase from all systems it directly or indirectly uses or controls, all originals and copies of all documents, materials, and other embodiments and expressions in any form or medium that contain, reflect, incorporate or are based on the Customer's Confidential Information; and (ii) provide a written statement to the Disclosing Party certifying that it has complied with the requirements of this [Section 7.5\(b\)](#);

(c) notwithstanding any provisions of this Agreement or any Service Order to the contrary:

(i) the Provider shall not be required to return, destroy, or erase any Customer Confidential Information to the extent that any applicable Law prevents it from doing so, in which case the Provider shall retain, in its then current state, all such Confidential Information then within its or any Provider Personnel's right of control or possession in accordance with the confidentiality, security, and other requirements of this Agreement and perform its obligations under this [Section 7.5](#) as soon as such Law no longer prevents it from doing so; and

(ii) upon Customer's termination of this Agreement or any Service Order for breach pursuant to [Section 7.3\(a\)](#), Customer shall have the right and option to continue to access and use the Services under each applicable Service Order, in whole and in part, for a period not to exceed 180 days from the effective date of such termination pursuant to the terms and conditions of this Agreement and the each applicable Service Order hereunder and for the applicable Fees set forth in each such Service Order.

7.6 Survival. The provisions set forth in the following Sections, and any other right or obligation of the parties in this Agreement that, by its nature, should survive termination or expiration of this Agreement, will survive any expiration or termination of this Agreement: [Section 1](#), [Section 7.5](#), this [Section 7.6](#), [Section 9](#), [Section 10](#), [Section 11](#), [Section 12](#), [Section 14.1](#), [Section 14.2](#), [Section 15](#), [Section 16](#), [Section 17](#), and [Section 21](#).

8. Fees and Expenses.

8.1 Fees. Subject to the terms and conditions of this Agreement and the applicable Service Order, Customer shall pay the fees set forth in the applicable Service Order, which shall be determined and invoiced by Provider in accordance with this [Section 8](#) and, except as otherwise expressly provided in the applicable Service Order, the rates, pricing, and discounts set forth in an applicable Service Order ("**Fees**").

8.2 Fees During Renewal Terms. Provider's Fees are fixed during the Initial Term. Provider may increase Fees for any Renewal Term by providing written notice to Customer at least 180 calendar days prior to the commencement of such Renewal Term. No increase in Fees in effect for any 12 month period in any Renewal Term shall exceed the lesser of:

(a) 4% of the Fees effective during the immediately preceding 12 month period of the Initial Term or Renewal Term;
or

(b) the amount equal to 80% of the percentage by which the then most-recently published CONSUMER PRICE INDEX (CPI) exceeds the CPI published in the same month of the preceding calendar year, it being understood and agreed that if the CPI is no longer published Provider and Customer will negotiate in good faith to select a new index that best reflects and accounts for cost changes relevant to Provider's business.

No increase in Fees is effective unless made in compliance with the provisions of this [Section 8.2](#).

8.3 Responsibility for Costs. Except for any Reimbursable Expenses specified in a Service Order or otherwise pre-authorized by Customer in writing, and subject to [Section 8.4](#), Provider shall be responsible for all costs and expenses incurred in or incidental to the performance of Services, including all costs of any materials supplied by Provider, all fees, fines, licenses, bonds, or taxes required of or imposed against Provider, and all other of Provider's costs of doing business.

8.4 Reimbursable Expenses. Customer shall reimburse Provider, in accordance with Customer's standard expense reimbursement policy in effect from time to time, a current copy of which is attached as Exhibit 2, for direct, documented, out-of-pocket travel and lodging expenses ("**Reimbursable Expenses**") incurred by Provider in performing the Services, subject to the following:

(a) Customer shall only be obligated to reimburse Provider for travel approved in advance by Customer.

(b) All travel arrangements shall conform to Customer's standard travel policy applicable to its employees in effect from time to time, a current copy of which is set forth in Exhibit 2.

(c) Customer shall have the right to require that all travel arrangements be made through Customer's in-house or contracted outside travel agent.

(d) Any individual expense item in excess of \$10.00 (ten dollars) shall require Customer's prior written approval.

In no event will any other expenses or charges incurred or payable by Provider (including for any licenses, rights, materials, goods or services) be a Reimbursable Expense, except to the extent, if any, expressly otherwise provided in an applicable Service Order.

8.5 Taxes. All Fees and amounts set forth this Agreement or any Service Order are inclusive of taxes. Provider shall be solely responsible for all sales, service, value-added, use, excise, consumption, and any other taxes, duties, and charges of any kind, if any, imposed by any federal, state or local governmental entity on any amounts payable by Customer under this Agreement or any Service Order, other than any taxes imposed on, or with respect to, Provider's income, revenues, gross receipts, personnel, real or personal property or other assets. The parties shall reasonably cooperate to more accurately determine each party's tax liability and to minimize such liability to the extent legally permissible.

8.6 Invoices. Provider shall invoice Customer for all Fees and Reimbursable Expenses monthly in arrears in both hard copy and electronic format, via such delivery means and to such address as are set forth in the applicable Service Order or otherwise specified by Customer in writing from time to time. If more than one Service Order is in effect, Provider shall provide an aggregate invoice for all amounts invoiced, together with separate invoices for each Service Order. Each separate invoice shall: (a) clearly identify the Service Order to which it relates, in such manner as is required by Customer; (b) list each Fee item and/, Service Credit and Reimbursable Expense separately; (c) include sufficient detail for each line item to enable Customer to verify the calculation thereof; (d) for Fees determined on a time and materials basis, report details of time taken to perform Services, and such other information as Customer requires, on a per-individual basis; (e) be accompanied by all original supporting documentation required hereunder for Reimbursable Expenses; and (f) include such other information as may be required by Customer as set forth in the applicable Service Order.

8.7 Payment Terms.

(a) Customer shall pay all properly invoiced amounts payable and due hereunder within 30 days after Customer's receipt of Provider's invoice, except that Customer may withhold from any payment any charge or amount disputed in good faith by Customer pending resolution of such dispute. Pending the resolution of such payment dispute, Provider shall continue performing its obligations in accordance with this Agreement. No charge or amount shall be payable for any Fees for Services until at least 30 days after the date of Customer's Acceptance of such Services.

(b) Provider shall give Customer a discount of 2% of Fees (but not Reimbursable Expenses) paid within ten days following the due date determined pursuant to [Section 8.7\(a\)](#).

(c) Customer shall make all payments hereunder in US dollars and, at Customer's option, by check. Customer shall make payments to the address or account specified in an applicable Service Order or such other address or account as is specified by Provider in writing from time to time, provided that Provider shall give Customer at least 30 days' prior notice of any account, address or other change in payment instructions. Customer will not be liable for any late or misdirected payment caused by Provider's failure to provide timely notice of any such change.

8.8 Most Favored Pricing. All Fees and other charges under this Agreement shall be the lowest fees, prices, and rates contemporaneously charged by Provider to any of its customers for similar volumes of services of the same or comparable type and scope. If at any time Provider charges any comparable customer a lower fee, rate, or price for similar volumes of such comparable services than the corresponding Fees or other amounts charged hereunder, Provider shall immediately apply such lower rate or amount, as applicable, for all comparable Services provided to Customer. Such lower rates or amounts, as applicable, shall apply retroactively to the date on which Provider began charging them to such comparable customer.

8.9 Customer Audits of Provider. During the Term [and for [NUMBER] year[s] after], Provider shall: (a) maintain complete and accurate books and records regarding its business operations relevant to the calculation of Fees[, Reimbursable Expenses and any other information relevant to Provider's compliance with this [Section 8](#); and (b) upon Customer's request, make such books and records, and appropriate personnel, available during normal business hours for inspection and audit by Customer or an independent accountant that is reasonably acceptable to Provider, provided that Customer shall: (i) provide Provider with reasonable prior notice of any audit; (ii) undertake an audit no more than once per calendar quarter, except for good cause shown; and (iii) conduct or cause to be conducted such audit in a manner designed to minimize disruption of Provider's normal business operations.

Customer may take copies and abstracts of materials audited, provided that such material is deemed Confidential Information of Provider. Customer will pay the cost of such audits unless an audit reveals an overbilling or over-reporting of 2% or more, in which case Provider shall reimburse Customer for the reasonable cost of the audit. Provider shall immediately upon written notice from Customer pay Customer the amount of any overpayment revealed by the audit, together with any reimbursement payable pursuant to the preceding sentence.

8.10 All Fees Stated. Except as expressly provided in this [Section 8](#), Customer has no obligation or liability to pay or reimburse any fees, charges, or other amounts [for the Services to be provided under this Agreement.

8.11 Payment Does Not Imply Acceptance. The making of any payment or payments by Customer, or the receipt thereof by Provider, will in no way affect the responsibility of Provider to perform the Services in accordance with this Agreement, and will not imply Customer's Acceptance of any Services or the waiver of any warranties or requirements of this Agreement, including any right to Service Credits.

8.12 Withhold Remedy. In addition and cumulative to all other remedies in law, at equity and under this Agreement, if Provider is in material default of its performance or other obligations under this Agreement or any Service Order and fails to cure the default within 15 days after receipt of Customer's written notice of default, Customer may, without waiving any other rights under this Agreement, elect to withhold from the payments due to Provider under this Agreement during the period beginning with the 16th day after Provider's receipt of such notice of default, and ending on the date that the default has been cured to the reasonable satisfaction of Customer, an amount that, in Customer's reasonable judgment, is in proportion to the magnitude of the default or the Service that Provider is not providing. Upon Provider's cure of the default, Customer will cause the withheld payments to be paid to Provider, without interest. Upon a final and binding legal determination that Customer has withheld any payment in bad faith or without an objectively reasonable basis, such payment shall promptly be paid to Provider, plus interest at a rate that is the lesser of (a) 1.5% per month on the basis of a 365-day year and (b) the highest rate permissible under applicable Law, which interest shall accrue starting on the date such payment was due until but excluding the date that such payment with interest is fully paid.

8.13 Availability and Support Service Level Credits. The parties acknowledge and agree that each of the Service Availability Credits and Service Level Credits assessed pursuant to [Section 5](#) and [Section 6](#), respectively: (a) is a reasonable estimate of the [diminished value of the Services/compensation to Customer for the anticipated or actual harm] that may arise from the corresponding Service Error or Service Level Failure, which would be impossible or very difficult to accurately estimate [as of the Effective Date]; (b) is not intended as, and should not be deemed to be, a penalty or forfeiture; and (c) may, at Customer's option, be credited or set off against any Fees or other charges payable to Provider under this Agreement or be payable to Customer upon demand. No Service Availability Credits, Service Level Credits, or combination thereof, for any Service Period shall exceed the total amount of Fees that would be payable for that Service Period if the Services were fully provided in accordance with this Agreement and the Specifications.

8.14 Right of Set-off. Without prejudice to any other right or remedy it may have, Customer reserves the right to set off at any time any amount then due and owing to it by Provider against any amount payable by Customer to Provider under this Agreement or otherwise.

8.15 Support Not to be Withheld or Delayed. Provider shall not withhold or delay any Hosted Services or Support Services or fail to perform any other Services or obligations hereunder by reason of: (a) Customer's good faith withholding of any payment or amount in accordance with this [Section 8](#); or (b) any dispute whatsoever between the parties, including any payment or other dispute arising under or concerning this Agreement or any other agreement between the parties.

9. Ownership.

9.1 Ownership of Customer Data. Customer may, but is not required to, provide Customer Data to Provider in connection with this Agreement. As between Customer and Provider, Customer is and will remain the sole and exclusive owner of all right, title, and interest in and to all Customer Data, including all Intellectual Property Rights

relating thereto, subject only to the limited license granted in [Section 9.2](#).

9.2 Limited License to Use Customer Data. Subject to the terms and conditions of this Agreement, Customer and each of its Affiliates licensed hereunder hereby grants Provider a limited, royalty-free, fully-paid up, non-exclusive, non-transferable, and non-sublicensable license to Process the Customer Data in the United States strictly as instructed by Customer or an Authorized User and solely as necessary to provide the Services for Customer's and such Affiliates' benefit as provided in this Agreement for so long as Customer or any Authorized User uploads or stores such Customer Data for Processing by or on behalf of the Provider on the Provider Systems.

9.3 Ownership of Provider Materials. As between Customer and Provider, Provider is and will remain the sole and exclusive owner of all right, title, and interest in and to the Provider Materials, including all Intellectual Property Rights relating thereto, subject only to the license granted to Customer in [Section 3.1](#).

9.4 No Implied Rights. Except for the limited license expressly provided: (a) in [Section 9.2](#), nothing contained in this Agreement shall be construed as granting Provider or any third party any right, title, or interest in or to any Customer Data; or (b) in [Section 3.1](#), nothing contained in this Agreement shall be construed as granting Customer or any third party any right, title, or interest in or to any Provider Materials, in each case (clause (a) and (b)) whether by implication, estoppel, or otherwise.

10. Confidentiality.

10.1 Confidential Information. In connection with this Agreement, each party (as the "**Disclosing Party**") may disclose or make available Confidential Information to the other party (as the "**Receiving Party**"). Subject to [Section 10.2](#), "**Confidential Information**" means information in any form or medium (whether oral, written, electronic, or other) that the Disclosing Party considers confidential or proprietary, including information consisting of or relating to the Disclosing Party's technology, trade secrets, know-how, business operations, plans, strategies, customers, [OTHER CATEGORIES,] and pricing, and information with respect to which the Disclosing Party has contractual or other confidentiality obligations[, in each case whether or not marked, designated, or otherwise identified as "confidential"]. Without limiting the foregoing, (a) all Customer Data (including all Personal Information) is and will remain the Confidential Information of Customer and (b) the Service Software, Specifications, and Documentation are and will remain the Confidential Information of Provider and (c) the financial terms and existence of this Agreement are the Confidential Information of Customer.

10.2 Exclusions. Subject to [Section 10.3](#), Confidential Information does not include information that: (a) was rightfully known to the Receiving Party without restriction on use or disclosure prior to such information's being disclosed or made available to the Receiving Party in connection with this Agreement; (b) was or becomes generally known by the public other than by the Receiving Party's or any of its Representatives' noncompliance with this Agreement; (c) was or is received by the Receiving Party on a non-confidential basis from a third party that[, to the Receiving Party's knowledge,] was not or is not, at the time of such receipt, under any obligation to maintain its confidentiality; or (d) [the Receiving Party can demonstrate by written or other documentary records] was or is independently developed by the Receiving Party without reference to or use of any Confidential Information.

10.3 Customer Data Exception. Notwithstanding the provisions of [Section 10.2](#) or any other provisions of this Agreement, none of the exclusions set forth in [Section 10.2](#) apply to any Customer Data, whether provided by or on behalf of Customer to Provider or the Services for Processing or generated or derived from such Processing and regardless of whether such Customer Data may be publicly available or otherwise qualify for exclusion under any of the other provisions of [Section 10.2](#). The preceding sentence does not prohibit or limit Provider from any use or disclosure of any information that may be the same as any Customer Data but which Provider can demonstrate by documentary evidence was: (a) obtained by Provider without access to, reference to, or use of any Customer Data; and (b) at all times maintained separately from and not in any way combined, commingled, compared, benchmarked, or in any way associated with any Customer Data.

10.4 Confidentiality and Use. Each Receiving Party recognizes and agrees that the Confidential Information of the Disclosing Party is critical to the Disclosing Party's business and that neither party would enter into this Agreement without assurance that such information and its value will be protected as provided in this [Section 10](#) and elsewhere in this Agreement. As a condition to being provided with any disclosure of or access to Confidential Information, the Receiving Party shall for 1 year:

- (a) not access or use, or permit the access or use of, Confidential Information other than as necessary to exercise its rights or perform its obligations under and in accordance with this Agreement;
- (b) [not use or permit the use of any of the Disclosing Party's Confidential Information, directly or indirectly, in any manner to the detriment of the Disclosing Party or to obtain any competitive advantage over the Disclosing Party];
- (c) except as may be permitted by and subject to its compliance with [Section 10.5](#), not disclose or permit access to Confidential Information other than to its Representatives who: (i) need to know such Confidential Information for purposes of the Receiving Party's exercise of its rights or performance of its obligations under and in accordance with this Agreement; (ii) have been informed of the confidential nature of the Confidential Information and the Receiving Party's obligations under this [Section 10.4](#); and (iii) are bound by [written] confidentiality and restricted use obligations at least as protective of the Confidential Information as the terms set forth in this [Section 10.4](#);
- (d) safeguard the Confidential Information from unauthorized use, access or disclosure using at least the degree of care it uses to protect its most sensitive information and in no event less than a reasonable degree of care;
- (e) ensure its Representatives' compliance with, and be responsible and liable for any of its Representatives' noncompliance with, the terms of this [Section 10](#); and
- (f) notify the Disclosing Party in writing promptly any unauthorized disclosure or use of the Disclosing Party's Confidential Information and cooperate with the Disclosing Party to protect the confidentiality and ownership of all Intellectual Property Rights, privacy rights and other rights therein.

10.5 Compelled Disclosures. If the Receiving Party or any of its Representatives is compelled by applicable Law to disclose any Confidential Information, then, to the extent permitted by applicable Law, the Receiving Party shall: (a) promptly, and prior to such disclosure, notify the Disclosing Party in writing of such requirement so that the Disclosing Party can seek a protective order or other remedy, or waive its rights under [Section 10.4](#); and (b) provide reasonable assistance to the Disclosing Party, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure. If the Disclosing Party waives compliance or, after providing the notice and assistance required under this [Section 10.5](#), the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose only that portion of the Confidential Information that, on the advice of the Receiving Party's outside legal counsel, the Receiving Party is legally required to disclose [and, upon the Disclosing Party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or other presiding authority that such Confidential Information will be afforded confidential treatment]. No such compelled disclosure by the Receiving Party will otherwise affect the Receiving Party's obligations hereunder with respect to the Confidential Information so disclosed.

10.6 Return or Destruction of Customer's Confidential Information. Within one Business Days after Customer's written request at any time and subject to any contrary obligations under applicable Law, Provider shall at Customer's direction [promptly] return or destroy and erase from all systems it directly or indirectly uses or controls (a) all originals and copies of all documents, materials and other embodiments and expressions in any form or medium that contain, reflect, incorporate, or are based on Customer's Confidential Information, in whole or in part, or (b) solely such specific Customer Data, databases, or other collections or articles of Customer's Confidential Information as Customer may request, and provide a written statement to Customer certifying that it has complied with the requirements of this [Section 10.6](#)].

11. Personal Information.

11.1 Definition and Permitted Use.

(a) For purposes of this Agreement, “**Personal Information**” means any information that any of the Provider Personnel collects, receives or obtains, from or on behalf of Customer or any of its Authorized Users that does or can identify a specific individual or by or from which a specific individual may be identified, contacted or located, such as the individual’s name, address, social security number, etc., and any other information relating to an identified or identifiable individual. Personal Information includes such information of or pertaining to Customer’s personnel, directors, officers, agents, suppliers, contractors, investors or customers and all “nonpublic personal information,” as defined under the Gramm-Leach-Bliley Act ([15 U.S.C. § 6801 et seq.](#)), “protected health information” as defined under the Health and Insurance Portability and Accountability Act of 1996 ([42 U.S.C. § 1320d](#)), and “Personal Data” as that term is defined in EU Data Protection Directive (Directive 95/46/EEC) on the protection of individuals with regard to processing of personal data and the free movement of such data, and all rules and regulations issued under any of the foregoing.

(b) Provider shall not cause or permit any Personal Information to be Processed in any manner or for any purpose other than the performance of the Services in compliance with the obligations and restrictions set forth in this Agreement and all applicable Laws.

11.2 Ownership and Treatment of Personal Information. As between Customer and Provider, Customer is and shall remain the sole and exclusive owner of all right, title, and interest in and to Personal Information. Without limiting any other representation, warranty, or obligation of Provider under this Agreement, Provider represents, warrants, and covenants[, and shall obtain the binding written representations, warranties, and covenants of all Provider Personnel involved in any aspect of the Services] that:

(a) during the Term and thereafter in perpetuity, Provider will not Process or otherwise undertake or refrain from any act with respect to any Personal Information in any manner, including any actual or attempted Processing thereof, except for the sole purpose of performing the Services and in compliance with: (i) the express terms and conditions of this Agreement or as Customer may hereafter expressly direct in advance in writing; (ii) Customer’s then current privacy and security policies; and (iii) all applicable Laws (including all then current and applicable Laws relating to spamming, privacy, and consumer and data protection);

(b) except as Customer or an Authorized User may submit to Provider Personnel for purposes of Customer’s or such Authorized User’s use of the Services, or as Customer may hereafter expressly direct in advance in writing, Provider will not under or in connection with this Agreement or any transaction or arrangement hereunder collect any Personal Information from or in connection with Customer’s or any Authorized User’s access to or use of the Services, or through any access Provider may have to the Customer Systems, including through any cookies, applets, beacons, or other data mining methods or technologies; and

(c) Provider shall promptly notify Customer in writing when Provider becomes aware of any unauthorized access, use, or other act respecting Personal Information or if Provider becomes the subject of any government, regulatory, or other investigation or proceeding relating to its privacy, data security, or handling practices.

12. Security.

12.1 Protection of Customer’s Confidential Information. Throughout the Term and at all times in connection with its actual or required performance of the Services hereunder, Provider shall:

(a) maintain and enforce an information security program including safety and physical and technical security policies and procedures with respect to its Processing of Customer’s Confidential Information that meet or exceed the requirements of the Customer’s data security policies (Data Security Requirements) and, to the extent such practices and standards are consistent with and not less protective than the foregoing requirements, are at least equal to applicable best industry practices and standards;

(b) provide technical and organizational safeguards against accidental, unlawful or unauthorized access to or use, destruction, loss, alteration, disclosure, transfer, commingling or Processing of such information that ensure a level of security appropriate to the risks presented by the Processing of Customer’s Confidential Information and the

nature of such Confidential Information, consistent with [best] industry practice and standards;

(c) take all reasonable measures to:

(i) secure and defend all locations, equipment, systems and other materials and facilities employed in connection with the Services against “hackers” and others who may seek, without authorization, to disrupt, damage, modify, access or otherwise use Provider Systems or the information found therein; and

(ii) prevent: (A) Customer and its Authorized Users from having unauthorized access to the data of Provider’s other customers or such other customers’ users of the Services; (B) Customer’s Confidential Information from being commingled with or contaminated by the data of other Provider customers or third-parties (and *vice versa*); and (C) unauthorized access to any of Customer’s Confidential Information;

(d) [periodically test/continuously monitor] its systems for potential areas where security could be breached;

(e) immediately report to Customer any breach of security or unauthorized access to Customer’s Confidential Information that Provider detects or becomes aware of;

(f) [use [its best/diligent] efforts to]remedy such breach of security or unauthorized access in a timely manner and deliver to Customer a root cause assessment and future incident mitigation plan with regard to any breach of security or unauthorized access affecting any Confidential Information of Customer that sets out written details regarding Provider’s investigation of such incident and, upon Customer’s written request, provide a second more in-depth investigation and results of its findings;

(g) refrain from notifying, for or on behalf of Customer or any Authorized User, any regulatory authority, consumer or other Person of any such security breach or unauthorized access unless Customer specifically requests in writing that Provider do so, except as and when otherwise required by applicable Law; and

(h) if such security breach or unauthorized access results from any act or omission of Provider or any Provider Personnel, promptly reimburse Customer for all reasonable costs and expenses Customer may incur in notifying any Person of such security breach or unauthorized access required by applicable Law.

Without limiting the generality of the foregoing, Provider and Customer will work together to formulate a plan to rectify all security breaches and unauthorized access concerning Customer’s Confidential Information.

12.2 Unauthorized Access. Provider shall not access, and shall not permit any access to, the Customer Systems, in whole or in part, whether through Provider’s Systems or otherwise, without Customer’s express prior written authorization. Such authorization may be revoked by Customer in writing at any time in its sole discretion. Any access to the Customer Systems shall be solely in accordance with the terms and conditions, and in no case exceed the scope of, the Customer’s authorization pursuant to this [Section 12.2](#). All Customer-authorized connectivity or attempted connectivity to the Customer Systems shall be only through Customer’s security gateways and firewalls and in compliance with Customer’s security policies as the same may be supplemented or amended by Customer and provided to Provider from time to time.

12.3 Provider Systems. Provider shall be solely responsible for the information technology infrastructure, including all computers, software, databases, electronic systems (including database management systems), and networks used by or for Provider to access the Customer Systems or otherwise in connection with the Services (“**Provider Systems**”) and shall prevent unauthorized access to the Customer Systems through the Provider Systems.

12.4 Security Audits. During the Term and for 10 years thereafter, Provider shall:

(a) maintain complete and accurate records relating to its data protection practices and the security of any of Customer’s Confidential Information, including any backup, disaster recovery or other policies, practices or procedures relating to Customer’s Confidential Information and any other information relevant to its compliance with

this [Section 12](#); and

(b) upon Customer's request, make all such records, appropriate personnel, and relevant materials available during normal business hours for inspection and audit by Customer or an independent data security expert, provided that Customer shall: (i) give Provider reasonable prior notice of any such audit; (ii) undertake such audit no more than once per calendar month, except for good cause shown; and (iii) conduct or cause to be conducted such audit in a manner designed to minimize disruption of Provider's normal business operations and that complies with the terms and conditions of all data confidentiality, ownership, privacy, security, and restricted use provisions of this Agreement. Customer may, but is not obligated to, perform such security audits, which shall, at Customer's option and request, include penetration and security tests, of any and all Provider Systems and their housing facilities and operating environments.

12.5 Regulatory and Compliance Audits. Any authorized representative of any regulatory agency, taxing authority or private entity that functions in a quasi-regulatory manner that has jurisdiction over Customer in connection with its regulatory functions (each, a "**Regulator**") shall, upon request, have the same audit rights as those set forth in [Section 12.4\(b\)](#), provided that no condition or restriction stated in [Section 12.4\(b\)](#) shall apply to any Regulator to the extent it is contrary to applicable Law. Provider shall cooperate with all individuals conducting such audits and timely comply with all legal and regulatory directives and reasonable recommendations that result from such inspections, tests, and audits. Without limiting any of Provider's other obligations under this [Section 12](#) or [Section 13](#), if Provider engages a third party auditor to perform a Statement on Standards for Attestation Engagements No. 16 (SSAE 16) audit of Provider's operations, information security program, or disaster recovery/business continuity plan, Provider shall provide a copy of the audit report to Customer [promptly/within [NUMBER]] [days/Business Days] after Provider's receipt of such report. Any such audit reports shall be Provider's Confidential Information.

12.6 Nonexclusive Remedy for Security Breach. Any failure of the Services to meet the requirements of this Agreement with respect to the security of any Customer Data or other Confidential Information of Customer, including any related backup, disaster recovery, or other policies, practices or procedures, is a material breach of this Agreement for which Customer, at its option, may terminate this Agreement immediately on written notice to Provider without any notice or cure period, and Provider shall promptly reimburse to Customer any Fees prepaid by Customer prorated to the date of such termination.

13. Redundancy, Data Backup, and Disaster Recovery. Provider shall, in accordance with the provisions of this [Section 13](#), maintain or cause to be maintained disaster avoidance procedures designed to safeguard the Customer Data and Customer's other Confidential Information, Provider's Processing capability, and the availability of the Hosted Services, in each case throughout the Term and at all times in connection with its actual or required performance of the Services hereunder. The force majeure provisions of [Section 18](#) shall not limit Provider's obligations under this [Section 13](#).

13.1 Redundant Hosting and Connectivity. Provider shall simultaneously operate a mirror system at a hardened data center facility in the United States that is geographically remote from the primary system on which the Service Software and Hosted Services are hosted (the "**Secondary Backup Facility**"). Except for its location and housing facility, the mirror system shall: (a) be identical in all respects to the primary system; (b) have hardware and software, network connectivity, power supplies, backup generators, and other similar equipment and services that operate independently of the primary system; (c) have fully current backups of all Customer Data stored on the primary system; and (d) have the ability to provide the Hosted Services in accordance with this Agreement and the Specifications during the performance of routine and remedial maintenance or any outage or failure of the primary system. Provider shall operate, monitor and maintain such mirror system so that it may be activated within [PERIOD] of any failure of the Hosted Services to be Available.

13.2 Data Backup. Provider shall conduct or have conducted contemporaneous backups of Customer Data and perform or cause to be performed [other] periodic backups of Customer Data and store such backup Customer Data in a commercially reasonable location and manner on at least a weekly basis at the Secondary Backup Facility. On written notice from Customer and, in any case, on a monthly basis, Provider shall provide Customer with a copy

of the backed up Customer Data in such machine readable format as is specified in an applicable Service Order or as Customer otherwise reasonably requests. Provider shall provide all monthly backups at its sole cost and expense. Customer shall reimburse Provider for all media costs and shipping charges reasonably incurred in fulfilling Customer's additional requests for copies of backed up Customer Data. No backup of Customer Data shall be counted in allotting or calculating any data storage actually used or permitted to be used by Customer or any associated payment or fee.

13.3 Disaster Recovery/Business Continuity. Throughout the Term and at all times in connection with its actual or required performance of the Services hereunder, Provider shall:

(a) maintain a Business Continuity and Disaster Recovery Plan for the Hosted Services (the "**Plan**"), and implement such Plan in the event of any unplanned interruption of the Hosted Services. Provider's current Plan, revision history, and any reports or summaries relating to past testing of or pursuant to the Plan are attached as Exhibit 3. Provider shall actively test, review and update the Plan on at least a quarterly basis using industry best practices as guidance. Provider shall provide Customer with copies of all such updates to the Plan promptly days of its adoption by Provider. All updates to the Plan shall be subject to the requirements of this [Section 13.3](#); and

(b) provide Customer with copies of all reports and summaries resulting from any testing of or pursuant to the Plan promptly after Provider's receipt or preparation thereof. If Provider fails to reinstate all material Hosted Services within the periods of time set forth in the Plan, Customer may, in addition to any other remedies available hereunder, in its sole discretion, immediately terminate this Agreement as a non-curable default under [Section 7.3\(b\)](#).

14. Indemnification.

14.1 General Indemnification. Provider (the "**Indemnifying Party**") shall defend, indemnify and hold harmless Customer and each of Customer's Affiliates, and its officers, directors, employees, agents, contractors, permitted successors, and permitted assigns (each of the foregoing Persons, an "**Customer Indemnitee**") from and against any and all Losses incurred by the Customer Indemnitee arising out of or relating to any claim, suit, action, or proceeding (each, an "**Action**") by a third party (other than an Affiliate of the Customer Indemnitee) to the extent that such Losses do or are alleged to arise out of or result from:

(a) the Provider's breach of any representation, warranty, covenant, or obligation of Provider under this Agreement (including, in the case of Provider, any action or failure to act by any Provider Personnel that, if taken or not taken by Provider, would constitute such a breach by Provider); or

(b) any action or failure to take a required action or more culpable act or omission (including recklessness or willful misconduct) in connection with the performance or nonperformance of any Services or other activity actually or required to be performed by or on behalf of Provider (including, in the case of Provider, any Provider Personnel) under this Agreement.

in the case of each of subclauses (a) and (b), except to the extent, if any, that a final judgment or other final determination in such Action from which no appeal is permitted or taken determines that such Losses were caused by the Customer Indemnitee's negligence or more culpable conduct, or material breach or material non-compliance with the terms and conditions of this Agreement and] provided that, to the extent that any Action or Losses described in this [Section 14.1](#) arises out of, results from, or alleges a claim that any of the Services does or threatens to infringe, misappropriate, or otherwise violate any Intellectual Property Rights or other rights of any third party, Provider's obligations with respect to such Action and Losses, if any, shall be subject to the terms and conditions of [Section 14.2\(a\)](#) through [Section 14.2\(e\)](#) and [Section 14.3](#).

14.2 Infringement Indemnification by Provider. Provider shall indemnify, defend, and hold each and all of the Customer Indemnitees harmless from and against all Losses arising out of or resulting from any Action by a third party (other than an Affiliate of the Customer Indemnitee) to the extent that such Losses do or are alleged to arise

out of or result from a claim that any of the Services, or Customer's or any Authorized User's use thereof, actually does or threatens to infringe, misappropriate, or otherwise violate any Intellectual Property Right or other right of a third party, provided however, that Provider shall have no liability or obligation for any Action or Losses to the extent that such Action or Losses arise out of or results from any:

(a) alteration or modification of the Hosted Services or Service Software by or on behalf of Customer or any Authorized User without Provider's authorization (each, a "**Customer Modification**"), provided that no infringement, misappropriation, or other violation of third party rights would have occurred without such Customer Modification and provided further that any alteration or modification made by or for Provider at Customer's request shall not be excluded from Provider's indemnification obligations hereunder unless (i) such alteration or modification has been made pursuant to Customer's written specifications prepared independently of and without any contribution by Provider and (ii) the Hosted Services, as altered or modified in accordance with the Customer's specifications, would not have violated such third party rights but for the manner in which the alteration or modification was implemented by or for Provider;

(b) use of the Hosted Services by Customer or an Authorized User pursuant to this Agreement in combination with any[apparatus, hardware, software, or service not provided, authorized, or approved by or on behalf of Provider, if (i) no violation of third party rights would have occurred without such combination and (ii) such apparatus, hardware, software, or service is not commercially available and not standard in Provider's or Customer's industry and there are no Specifications, Documentation or other materials] that have been provided to Customer indicating Provider's specification, authorization or approval of the use of the Hosted Services in combination therewith;

(c) access to or use of the Hosted Services that is expressly prohibited by this Agreement or otherwise outside the scope of access or manner or purpose of use described or contemplated anywhere in this Agreement, the Specifications or the applicable Service Order;

(d) material breach of this Agreement by Customer or material noncompliance herewith by any Authorized User; or

(e) violation of any applicable law by Customer or any of its Authorized Users.

14.3 Mitigation.

(a) If Provider receives or otherwise learns of any threat, warning, or notice alleging that all, or any component or feature, of the Services violates a third party's rights, Provider shall promptly notify Customer of such fact in writing, and exercise its best efforts/take all commercially reasonable actions necessary to ensure Customer's continued right to access and use such Services and otherwise protect Customer from any Losses in connection therewith, including investigating such allegation and obtaining a credible opinion of counsel that it is without merit.

(b) Subject to the exclusions set forth in subclauses (a) through (e) of [Section 14.2](#), if any of the Services or any component or feature thereof is ruled to infringe or otherwise violate the rights of any third party by any court of competent jurisdiction, or if any use of any Services or any component thereof is threatened to be enjoined, or in Customer's opinion, is likely to be enjoined or otherwise the subject of an infringement or misappropriation claim, Provider shall, at Provider's sole cost and expense:

(i) procure for Customer the right to continue to access and use the Services to the full extent contemplated by this Agreement and the Specifications; or

(ii) modify or replace all components, features, and operations of the Services that actually, or are likely or alleged to, infringe or otherwise violate the rights of any third party ("**Allegedly Infringing Features**") to end and avoid such infringement or violation while providing equally or more suitable features and functionality, which modified and

replacement services shall constitute Services and be subject to the terms and conditions of this Agreement.

(c) If neither of the remedies set forth in [Section 14.3\(b\)](#) is reasonably available with respect to the Allegedly Infringing Features then Provider may direct Customer to cease any use of any materials that have been enjoined or finally adjudicated as infringing, provided that Provider shall:

(i) refund to Customer any prepaid Fees for Services that have not been provided; and

(ii) in any case, at its sole cost and expense, secure the right for Customer to continue using the Allegedly Infringing Features for a transition period of up to 1 month to allow Customer to replace the affected the Services or Allegedly Infringing Features without disruption.

(d) The remedies set forth in this [Section 14.3](#) are in addition to, and not in lieu of[, all other remedies that may be available to Customer under this Agreement or otherwise, including] Customer's right to be indemnified pursuant to [Section 14.1](#) and [Section 14.2](#).

15. Limitations of Liability.

15.1 EXCLUSION OF INDIRECT DAMAGES. EXCEPT AS OTHERWISE PROVIDED IN [SECTION 15.3](#), IN NO EVENT WILL EITHER PARTY BE LIABLE UNDER THIS AGREEMENT FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL OR PUNITIVE DAMAGES.

15.2 CAP ON MONETARY LIABILITY. IN NO EVENT SHALL CUSTOMER'S LIABILITY UNDER THIS AGREEMENT EXCEED THE AGGREGATE FEES AND REIMBURSABLE EXPENSES UNDER THIS AGREEMENT (INCLUDING AMOUNTS ALREADY PAID AND AMOUNTS THAT HAVE ACCRUED BUT NOT YET BEEN PAID) IN THE 1 YEAR PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

15.3 Exceptions. The exclusions and limitations in [Section 15.1](#) shall not apply to:

(a) Losses arising out of or relating to a party's failure to comply with its obligations under [Section 9](#) (Ownership), [Section 10](#) (Confidentiality), [Section 11](#) (Personal Information), [Section 12](#) (Security), or [Section 13](#) (Redundancy, Data Backup, and Disaster Recovery);

(b) a party's indemnification obligations under [Section 14](#) (Indemnification);

(c) Losses arising out of or relating to Provider's unauthorized [intentional] suspension, termination, or disabling of the Services in breach of this Agreement;

(d) Losses arising out of or relating to a party's gross negligence or more culpable conduct, including any willful misconduct or intentional wrongful acts;

(e) Losses for death, bodily injury, or damage to real or tangible personal property arising out of or relating to a party's negligent or more culpable acts or omissions;

(f) Losses to the extent covered by a party's insurance;

(g) [Losses arising from or relating to a party's violation of Law;

(h) a party's obligation to pay attorneys' fees and court costs in accordance with [Section 21.15](#).

16. Representations and Warranties.

16.1 Mutual Representations and Warranties. Each party represents and warrants to the other party that:

- (a) it is a duly organized, validly existing and in good standing as a corporation or other entity under the Laws of the jurisdiction of its incorporation or other organization;
- (b) it has, and throughout the Term and any additional periods during which it does or is required to perform the Services will retain, the full right, power, and authority to enter into this Agreement and perform its obligations hereunder;
- (c) the execution of this Agreement by its representative whose signature is set forth at the end of this Agreement has been duly authorized by all necessary corporate or organizational action of such party; and
- (d) when executed and delivered by both parties, this Agreement will constitute the legal, valid, and binding obligation of such party, enforceable against such party in accordance with its terms.

16.2 Additional Provider Warranties. Provider represents, warrants and covenants to Customer that:

- (a) Provider has, and throughout the Term and any additional periods during which Provider does or is required to perform the Services will have, the unconditional and irrevocable right, power, and authority[, including all permits and licenses required,] to provide the Services and grant and perform all rights and licenses granted or required to be granted by it under this Agreement;
- (b) neither Provider's grant of the rights or licenses hereunder nor its performance of any Services or other obligations under this Agreement does or [to Provider's knowledge as of the Effective Date] at any time will: (i) conflict with or violate any applicable Law, including any Law relating to data privacy, data security, or Personal Information; (ii) require the consent, approval, or authorization of any governmental or regulatory authority or other third party; or (iii) require the provision of any payment or other consideration by Customer or any Authorized User to any third party, and Provider shall promptly notify Customer in writing if it becomes aware of any change in any applicable Law that would preclude Provider's performance of its [material] obligations hereunder;
- (c) [to Provider's knowledge as of the Effective Date,][as accessed and used by Customer or any Authorized User in accordance with this Agreement and the Specifications], the Hosted Services, Documentation, and all other Services and materials provided by Provider under this Agreement will not infringe, misappropriate, or otherwise violate any Intellectual Property Right or other right of any third party;
- (d) there is no settled, pending or, [to Provider's knowledge as of the Effective Date,] threatened Action, and it has not received any written, oral or other notice of any Action (including in the form of any offer to obtain a license): (i) alleging that any access to or use of the Services or Service Software in the Territory does or would infringe, misappropriate, or otherwise violate any Intellectual Property Right of any third party; (ii) challenging Provider's ownership of, or right to use or license, any software or other materials used or required to be used in connection with the performance, accessing or use of the Services, or alleging any adverse right, title, or interest with respect thereto; or (iii) that, if decided unfavorably to Provider, would reasonably be expected to have an actual or potential adverse effect on its ability to perform the Services or its other obligations under this Agreement, and it has no knowledge [after reasonable investigation] of any factual, legal, or other reasonable basis for any such litigation, claim, or proceeding;
- (e) the Service Software and Services will [in all material respects] conform to and perform in accordance with the Specifications and all requirements of this Agreement, including the Availability and Availability Requirement provisions set forth in [Section 5](#);
- (f) all Specifications are, and will be continually updated and maintained so that they continue to be, current, complete, and accurate so that they do and will continue to fully describe the Hosted Services in all [material] respects such that at no time [during the Term or any additional periods during which Provider does or is required to perform the Services] will the Hosted Services have any [material] undocumented feature;

(g) the Provider Systems and Services are and will remain free of Harmful Code; and

(h) Provider will perform all Services in a timely, professional, and workmanlike manner with a level of care, skill, practice, and judgment consistent with [best/generally recognized/commercially reasonable] industry standards and practices for similar services, using personnel with the requisite skill, experience, and qualifications, and will devote adequate resources to meet Provider's obligations (including the Availability Requirement and Support Service Level Requirements) under this Agreement.

16.3 **DISCLAIMER.** EXCEPT FOR THE EXPRESS WARRANTIES IN THIS AGREEMENT, EACH PARTY HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHER, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY SUBJECT MATTER HEREOF.

17. Insurance.

17.1 Required Coverage. At all times during the Term [and for a period of [NUMBER] years thereafter], Provider shall procure and maintain, at its sole cost and expense, [all insurance coverage required by applicable Law, and in any event] insurance coverage in the following types and amounts:

(a) Commercial General Liability with limits no less than [US \$ [NUMBER]] per occurrence and [US \$ [NUMBER]] in the aggregate[, including bodily injury and property damage and products and completed operations and advertising liability], which policy will include contractual liability coverage insuring the activities of Provider under this Agreement;

(b) Cyber Liability Insurance, including first party and third party coverage, with limits no less than US \$ 2,000,000.00 per occurrence and US \$ 10,000,000.00 in the aggregate for all claims each policy year;

(c) Worker's Compensation and employers' liability insurance with limits no less than the greater of (i) [\$ [NUMBER]] and (ii) the minimum amount required by applicable Law for each accident and occupational illness claim;

(d) Commercial Automobile Liability with limits no less than [US \$ [NUMBER]], each occurrence combined single limit of liability for bodily injury, death, and property damage, including owned and non-owned and hired automobile coverages, as applicable; and

(e) Errors and Omissions/Professional Liability with limits no less than [US \$ [NUMBER]] per occurrence and [US \$ [NUMBER]] in the aggregate for all claims each policy year.

17.2 Policy Terms. All insurance policies required pursuant to this [Section 17](#) shall:

(a) be issued by insurance companies [reasonably acceptable to Customer] [with a Best's Rating of no less than [A-VII]];

(b) provide that such insurance carriers give Customer at least thirty (30) days' prior written notice of any cancellation or non-renewal of, or material change in, the coverage, scope or amount of such policy and, prior to any such cancellation, non-renewal, or material change in coverage, Provider shall have new insurance policies in place that meet the requirements of this [Section 17](#);

(c) waive any right of subrogation of the insurers against the Customer [or any of its Affiliates];

(d) provide that such insurance be primary insurance and any similar insurance in the name of and/or for the benefit of Customer shall be excess and non-contributory; and

(e) name Customer [and Customer's Affiliates], including, in each case, all successors and permitted assigns, as additional insureds.

17.3 Coverage. To the extent any insurance coverage required under this [Section 17](#) is purchased on a “claims-made” basis, such insurance shall cover all prior acts of Provider during the Term and any additional periods during which Provider does or is required to perform the Services, and such insurance shall be continuously maintained until at least [four/[OTHER NUMBER]] years beyond the expiration or termination of the Term, or Provider shall purchase “tail” coverage, effective upon termination of any such policy or upon termination or expiration of the Term, to provide coverage for at least four years from the occurrence of either such event.

17.4 Certificates of Insurance. Upon Customer’s written request, Provider shall provide Customer with copies of the certificates of insurance and policy endorsements for all insurance coverage required by this [Section 17](#). Provider shall not do anything to invalidate such insurance. Provider shall give 30 days’ prior written notice to Customer of any cancellation, non-renewal, or material change in coverage, scope, or amount of any insurance policy required by or affecting the Customer’s rights or remedies under this Agreement.

17.5 Non-Waiver. This [Section 17](#) is not intended to and shall not be construed in any manner as to waive, restrict, or limit the liability of either party for any obligations under this Agreement (including any provisions hereof requiring a party to indemnify, defend and hold harmless the other party).]

18. Force Majeure.

18.1 No Breach or Default. [Subject to [Section 18.2](#),] [n/N]either party shall be liable or responsible to the other party, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, when and to the extent such failure or delay is caused by any: acts of God, flood, fire, earthquake or explosion; war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest; embargoes or blockades in effect on or after the date of this Agreement; national or regional emergency; [strikes, labor stoppages or slowdowns, or other industrial disturbances;] [or] passage of Law or any action taken by a governmental or public authority, including imposing any export or import restriction, quota, or other restriction or prohibition; [or] [complete or partial government shutdown;] [or national or regional shortage of adequate power, telecommunications, or transportation] (each of the foregoing, a “**Force Majeure Event**”), in each case, provided that (a) such event is outside the reasonable control of the affected party; (b) the affected party provides prompt notice to the other party, stating the period of time the occurrence is expected to continue; and (c) the affected party uses diligent efforts to end the failure or delay and minimize the effects of such Force Majeure Event.

18.2 [Customer Performance;]Termination. [In the event of a Force Majeure Event affecting Provider’s performance under this Agreement, Customer may suspend its performance hereunder until such time as Provider resumes full performance in accordance with this Agreement and the Specifications.] Customer may terminate this Agreement by written notice to Provider if the Hosted Services are not Available without interruption for a period of [five/[OTHER NUMBER] consecutive [Business Days/days] or more as a result of a Force Majeure Event. [Unless Customer terminates this Agreement pursuant to the preceding sentence, any date specifically designated for Provider’s performance under this Agreement shall automatically be extended for a period up to the duration of the period the Force Majeure Event has a material adverse effect on such performance, provided that Provider uses diligent efforts to resume full performance hereunder and to minimize the effects of such Force Majeure Event.]

18.3 Exclusions; Non-Suspended Obligations. Notwithstanding the foregoing or any other provisions of this Agreement:

(a) in no event shall any of the following be considered a Force Majeure Event:

(i) shutdowns, disruptions, or malfunctions of the Provider Systems or any of Provider’s telecommunication or internet services other than as a result of general and widespread internet or telecommunications failures that are not limited to the Provider Systems; or

(ii) the delay or failure of any Provider Personnel to perform any obligation of Provider hereunder unless such delay or failure to perform is itself by reason of a Force Majeure Event; and

(b) no Force Majeure Event shall modify or excuse Provider's obligations under [Section 5](#) (Service Availability and Service Availability Credits), [Section 6.5](#) (Support Service Level Credits), [Section 9](#) (Ownership), [Section 10](#) (Confidentiality), [Section 11](#) (Personal Information), [Section 12](#) (Security), [Section 13](#) (Redundancy, Data Backup, and Disaster Recovery) or [Section 14](#) (Indemnification), or any Availability Requirement, Support Service Level Requirement, Service Availability Credit, or Service Level Credit obligations under this Agreement or an applicable Service Order.

19. Software Escrow.

19.1 Escrow Agreement. As soon as practicable after the Effective Date, the parties shall enter into a source code escrow Agreement with a mutually agreed third-party escrow agent ("**Escrow Agent**"). Such source code escrow agreement shall be on the terms and conditions, and in the form, attached as Schedule G ("**Escrow Agreement**"). All terms and conditions of the Escrow Agreement are a part of, and by this reference are incorporated in, this Agreement, and any breach thereof by Provider shall be a breach of this Agreement.

19.2 Release Events. Each of the following shall constitute a "**Release Event**" for purposes of this Agreement and the Escrow Agreement should they occur at any time during the Term or at any time at which the Services are performed or required to be performed hereunder:

(a) Provider:

(i) is the named debtor in any bankruptcy or insolvency proceeding;

(ii) has made a general assignment for the benefit of its creditors;

(iii) has terminated its ongoing business operations or transfers all or substantially all of the assets or obligations associated with or set forth in this Agreement to a third party except in connection with a continuation of the Provider's business;

(iv) has terminated its provision of the Hosted Services or Support Services or ceased to perform the Hosted Services or Support Services for a continuing period of [five or more Business Days/30 or more days] (by reason of a Force Majeure Event or otherwise), except pursuant to the expiration or termination of this Agreement in accordance with its terms;

(b) Provider's incapability, failure, or demonstrated or threatened unwillingness, to perform fully any of the Services on a timely basis, whether or not the same would give Customer a right to terminate this Agreement (other than pursuant to [Section 7.4](#)), it being understood and agreed that Provider shall be deemed to be incapable to perform the Services if either a duly authorized representative of Provider so informs Customer in writing or, as a result of any (i) employee layoffs, (ii) termination of any contract, supply of goods or services or grant of rights, licenses or privileges (other than by Customer) or (iii) sale or loss of assets, Provider for [five/[OTHER NUMBER]] or more consecutive days fails to maintain sufficient Sustaining Resources to fully perform all Services in accordance with the applicable provisions of this Agreement and the Specifications, including, in the case of the Support Services, in accordance with [Section 6](#);

(c) the Escrow Agreement terminates [prior to the expiration or termination of this Agreement and is not replaced within [ten/[OTHER NUMBER]] [Business Days/days] with another escrow agreement reasonably acceptable to Customer], provided that Provider has received notice of such termination and Customer's acceptance of a replacement escrow agreement is not unreasonably withheld or delayed (it being understood and agreed that it shall be unreasonable for Customer to fail or refuse to accept an escrow agreement containing terms that are at least as protective of Customer's interests as those set out in this [Section 19.2](#) and Schedule G)]; and

(d) any other cause or event that, by the terms of this Agreement (other than the terms of [Section 7.4](#)) or the applicable Service Order, gives Customer the right to terminate this Agreement or such Service Order, regardless

of whether Customer exercises such right of termination.

19.3 Escrow License Grant. Provider hereby grants Customer [and its Affiliates], exercisable by and through [its/their respective] Authorized Users, a nonexclusive, royalty-free, irrevocable (except as set forth in [Section 7](#)), transferable (solely as set forth in [Section 21.8\(a\)](#)), and sublicensable, right and license throughout the [world/Territory] to possess, control, and use the Service Software, including the Service Software Source Code and object code, and to reverse engineer, disassemble, decompile, decode, adapt, develop, modify, and maintain the Service Software (including the Service Software Source Code and object code) and make any related modifications to Specifications and Documentation, and use all resulting corrections, repairs, translations, enhancements, and other derivative works and improvements for and in connection with Customer's [and its Affiliates'] performance of the Services for the [uses permitted hereunder/Permitted Uses], in each case solely upon and after the occurrence of a Release Event.

19.4 Employment of Provider Personnel. Upon and after the occurrence of a Release Event, Customer and any Customer sublicensee under [Section 19.3](#) may extend offers of employment to any Provider Personnel who have engaged in or have technical knowledge of the development or performance of the Services. Provider shall waive, and cause its Subcontractors to waive, any provisions of any employment or other agreements with such individuals that may restrict such individuals from accepting such offers of employment. Provider shall not make, and shall ensure that its Subcontractors do not make counter-offers to such Provider Personnel, or otherwise interfere with Customer's or any of such Customer sublicensees' exercise of its rights under this [Section 19.4](#).

20. Effect of Provider Bankruptcy. All rights and licenses granted by Provider under this Agreement or the Escrow Agreement (which is supplementary to this Agreement) are and shall be deemed to be rights and licenses to "intellectual property," and the subject matter of this agreement and the Escrow Agreement, including the Hosted Services and all escrow deposit materials comprising or relating to any of the Hosted Services, is and shall be deemed to be "embodiment[s]" of "intellectual property" for purposes of and as such terms are used in and interpreted under [section 365\(n\) of the United States Bankruptcy Code](#) (the "**Code**") ([11 U.S.C. § 365\(n\)](#)). Customer shall have the right to exercise all rights and elections under the Code and all other applicable bankruptcy, insolvency and similar laws with respect to this Agreement (including all executory Service Orders), the Escrow Agreement and the subject matter hereof and thereof. Without limiting the generality of the foregoing, if Provider or its estate becomes subject to any bankruptcy or similar proceeding: (a) subject to Customer's rights of election, all rights and licenses granted to Customer under this Agreement and the Escrow Agreement will continue subject to the respective terms and conditions hereof and thereof, and will not be affected, even by Provider's rejection of this Agreement or the Escrow Agreement; (b) Customer shall be entitled to a complete duplicate of (or complete access to, as appropriate) all such intellectual property and embodiments of intellectual property, and the same, if not already in Customer's possession, shall be promptly delivered to Customer, unless Provider elects to and does in fact continue to perform all of its obligations under this Agreement; and (c) the automatic stay under [Section 362 of the Code](#) ([11 U.S.C. § 362](#)) shall not apply to any instructions from Customer to the Escrow Agent relating to the escrow deposit materials.

21. Miscellaneous.

21.1 Further Assurances. Upon a party's reasonable request, the other party shall, at the requesting party's sole cost and expense, execute and deliver all such documents and instruments, and take all such further actions, necessary to give full effect to this Agreement.

21.2 Relationship of the Parties. The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

21.3 Public Announcements. Neither party shall issue or release any announcement, statement, press release, or other publicity or marketing materials relating to this Agreement or otherwise use the other party's trademarks, service marks, trade names, logos, domain names, or other indicia of source, affiliation, or sponsorship, in each

case, without the prior written consent of the other party[, which shall not be unreasonably withheld or delayed].

21.4 Notices. Except as otherwise expressly set forth in this Agreement, a/A]ll notices, requests, consents, claims, demands, waivers and other communications under this Agreement have binding legal effect only if in writing and addressed to a party as follows (or to such other address or such other person that such party may designate from time to time in accordance with this [Section 21.4](#)):

If to Provider: To its registered address.

If to Customer: 16 W. 22nd Street, 10th Floor, New York City, NY 10101

Attention: Chief Corporate Counsel

With a copy to:

200 W. Madison St., Suite 3600, Chicago, IL 60606

Attention: Legal Department

Notices sent in accordance with this [Section 21.4](#) shall be deemed effectively given: (a) when received, if delivered by hand, with signed confirmation of receipt; (b) when received, if sent by a nationally recognized overnight courier, signature required; (c) when sent, if by facsimile or email, (in each case, with confirmation of transmission), if sent during the addressee's normal business hours, and on the next business day, if sent after the addressee's normal business hours; and (d) on the [ORDINAL NUMBER] day after the date mailed by certified or registered mail, return receipt requested, postage prepaid.

21.5 Interpretation. For purposes of this Agreement, (a) the words "include," "includes," and "including" are deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; (c) the words "herein," "hereof," "hereby," "hereto," and "hereunder" refer to this Agreement as a whole; (d) words denoting the singular have a comparable meaning when used in the plural, and *vice versa*; and (e) words denoting any gender include all genders. Unless the context otherwise requires, references in this Agreement: (x) to sections, exhibits, schedules, attachments, and appendices mean the sections of, and exhibits, schedules, attachments, and appendices attached to, this Agreement; (y) to an agreement, instrument, or other document means such agreement, instrument or other document as amended, supplemented, and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. The parties intend this Agreement to be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The exhibits, schedules, attachments, and appendices referred to herein are an integral part of this Agreement to the same extent as if they were set forth verbatim herein.

21.6 Headings. The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

21.7 Entire Agreement. This Agreement, including all Service Orders and other Schedules and Exhibits any other documents incorporated herein by reference, constitutes the sole and entire agreement of the parties with respect to the subject matter of this Agreement and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter. In the event of any inconsistency between this Agreement, the related exhibits, schedules, attachments, and appendices (other than an exception expressly set forth as such therein)] and any other documents incorporated herein by reference,

the following order of precedence governs: (a) first, this Agreement, excluding its exhibits, schedules, attachments, and appendices; (b) second, the exhibits, schedules, attachments and appendices to this Agreement as of the Effective Date; and (c) third, any other documents incorporated herein by references.

21.8 Assignment.

(a) Provider shall not assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance, under this Agreement without the other party's prior written consent of Customer

(b) Except for Provider's engagement of Subcontractors pursuant to [Section 2.4](#), Customer shall have the right to terminate this Agreement in its entirety or any Services or Service Orders hereunder pursuant to [Section 7.4](#) if Provider delegates or otherwise transfers any of its obligations or performance hereunder, whether voluntarily, involuntarily, by operation of law, or otherwise, and no such delegation or other transfer will relieve Provider of any of such obligations or performance. For purposes of the preceding sentence, and without limiting its generality, any merger, consolidation, or reorganization involving Provider (regardless of whether Provider is a surviving or disappearing entity) will be deemed to be a transfer of Provider's obligations or performance under this Agreement. The effects of any termination of this Agreement pursuant to this [Section 21.8\(b\)](#), including the resulting rights and obligations of the parties, shall be governed by [Section 7.5](#).

(c) Any purported assignment, delegation, or transfer in violation of this [Section 21.8](#) is void. This Agreement is binding upon and inures to the benefit of the parties hereto and their respective permitted successors and assigns.

21.9 No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective [permitted] successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever, under or by reason of this Agreement.

21.10 Amendment and Modification; Waiver. No amendment to or modification of [or rescission, termination, or discharge of] this Agreement is effective unless it is in writing[, identified as an amendment to [or rescission, termination, or discharge of] this Agreement] and signed by [an authorized representative of] each party. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise of that or any other right, remedy, power, or privilege.

21.11 Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

21.12 Governing Law; Submission to Jurisdiction. This Agreement is governed by and construed in accordance with the internal laws of the State of Illinois without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the State of Illinois. Any legal suit, action, or proceeding arising out of or related to this Agreement or the licenses granted hereunder shall be instituted exclusively in the federal courts of the United States or the courts of the State of Illinois in each case located in the city of Chicago and County of Cook, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding. Service of process, summons, notice, or other document by mail to such party's address set forth herein shall be effective service of process for any suit, action, or other proceeding brought in any such court.

21.13 Waiver of Jury Trial. Each party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal action arising out of or relating to this Agreement or the transactions contemplated hereby.

21.14 Equitable Relief. Each party acknowledges and agrees that a breach or threatened breach by such party of any of its obligations under this Agreement/[Section 5](#) (Service Availability and Service Availability Credits), [Section 6](#) (Support and Maintenance Services), [Section 9](#) (Ownership), [Section 10](#) (Confidentiality), [Section 11](#) (Personal Information), [Section 12](#) (Security), [Section 13](#) (Redundancy, Data Backup, and Disaster Recovery) or [Section 19](#) (Software Escrow) would cause the other party irreparable harm for which monetary damages would not be an adequate remedy and agrees that, in the event of such breach or threatened breach, the other party will be entitled to equitable relief, including a restraining order, an injunction, specific performance, and any other relief that may be available from any court, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity, or otherwise.

21.15 Attorneys' Fees. In the event that any action, suit, or other legal or administrative proceeding is instituted or commenced by either party hereto against the other party arising out of or related to this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and court costs from the non-prevailing party.

21.16 Schedules and Exhibits. All Exhibits that are referenced herein and attached hereto, or are signed by both parties on or after the Effective Date, are hereby incorporated by reference.

21.17 Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. [A signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.]

SCHEDULE C

AVAILABILITY AND SERVICE AVAILABILITY CREDITS

Required Availability Service Level	Calculation Formula	Service Availability Credits
Hosted Services shall be Available 99.95% of the time during each Service Period excluding periods Hosted Services are not Available due to an Exception.	$\frac{\text{Actual Uptime}}{\text{Scheduled Uptime} - \text{Total Minutes in Service Period Hosted Services are not Available Due to an Exception}} \times 100 = \text{Percentage Uptime.}$	No Service Availability Credits will be given for any Service Period in which Percentage Uptime equals or exceeds the Availability Requirement. Customer shall be entitled to a Service Availability Credit of 10% of the Fees payable for Hosted Services provided during the Service Period for each 1% by which Percentage Uptime is less than the Availability Requirement, such credit not to exceed 100%.

END OF DOCUMENT