|  |  |
| --- | --- |
| C:\Users\DTollen\My ShareSync\Law Practice\Tech Contracts Academy\Admin\Identity\Logo\TCA_TM Logo_FINAL\PNG\Tech-Contracts-Academy-Logo_TM_Color_FINAL.png<https://TechContracts.com/> | **THE TECH CONTRACTS HANDBOOK****Cloud Computing Agreements, Software Licenses, and Other IT Contracts for Lawyers and Businesspeople**Second Edition**by David W. Tollen**(ABA Publishing - Intellectual Property Law Section of the American Bar Association; 2015) |

***Form Contract***

**SaaS Terms of Service w/ Sub-Customers**

***Provider-Friendly; System Access for Customer’s Own Customers/Clients; Online Execution***

*You may use the form contract below subject to the “Terms of Use” posted at* [*https://techcontracts.com/terms-of-use-and-privacy-policy/*](https://techcontracts.com/terms-of-use-and-privacy-policy/)*. In addition to the Terms of Use, PLEASE READ THE FOLLOWING DISCLAIMER BEFORE USING THE FORM CONTRACT:*

***NEITHER TECH CONTRACTS ACADEMY, LLC™ NOR THE AUTHOR OR PUBLISHER, OR ANYONE AFFILIATED WITH THEM, REPRESENTS THAT THE FORM CONTRACT BELOW WILL MEET YOUR SPECIFIC GOALS, PROTECT YOUR SPECIFIC INTERESTS, OR WITHSTAND CHALLENGES TO ITS LEGAL OR FACTUAL SUFFICIENCY. The form contract below is general in nature and may not be sufficient for a specific contractual, technological, or legal problem or dispute. THE FORM IS NOT PROVIDED WITH ANY GUARANTY, WARRANTY, OR REPRESENTATION AS TO QUALITY OR SUITABILITY FOR ANY PARTICULAR PURPOSE. Publication of the form does not constitute the practice of law and is not legal counsel or advice. Neither Tech Contracts Academy, LLC™ or the author or the publisher of this website or* The Tech Contracts Handbook*, or anyone affiliated with them, is rendering a legal or other professional service. The form should not be relied upon as a substitute for consultation with an attorney.***

*Note that this document uses Microsoft Word multi-level bullets/numbering for section numbers and cross-referencing features for section references.*

*Please delete all text above the following dotted line, as well as the line itself and the page-break following it, before using this form.*

------------------------------------

Posted/Revised: \_\_\_\_\_\_\_\_\_\_

**TERMS OF SERVICE**

**PLEASE READ THESE TERMS OF SERVICE CAREFULLY. BY CLICKING “ACCEPTED AND AGREED TO,” CUSTOMER AGREES TO THESE TERMS AND CONDITIONS.**

These Terms of Service constitute an agreement (this “Agreement”) by and between \_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ whose principal place of business is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Provider”) ***[fix throughout]*** and the corporation, LLC, partnership, sole proprietorship, or other business entity executing this Agreement (“Customer”). This Agreement is effective as of the date Customer clicks “Accepted and Agreed To” (the “Effective Date”). Customer’s use of and Provider’s provision of Provider’s System (as defined below in Section 1.8) are governed by this Agreement, as are Customer’s authorizations to grant its own customers use of the System.

EACH PARTY ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS, AND THAT THE PERSON SIGNING ON ITS BEHALF HAS BEEN AUTHORIZED TO DO SO. THE PERSON EXECUTING THIS AGREEMENT ON CUSTOMER’S BEHALF REPRESENTS THAT HE OR SHE HAS THE AUTHORITY TO BIND CUSTOMER TO THESE TERMS AND CONDITIONS.

1. **DEFINITIONS.** The following capitalized terms will have the following meanings whenever used in this Agreement.
	1. “AUP” means Provider’s acceptable use policy currently posted at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
	2. “Client ToS” means such terms of service as Provider may require for users of the System who are not Provider’s customers or their employees.
	3. “Customer’s Clients” means any of Customer’s clients or customers or other third parties Customer gives access to the System, including without limitation such companies’ agents and employees.
	4. “Customer Data” means all information processed or stored through the System by Customer or on Customer’s behalf. Customer data does not include payment records, credit cards or other information Customer uses to pay Provider, or other information and records related to Customer’s account, including without limitation identifying information related to Customer staff involved in payment or other management of such account.
	5. “Documentation” means Provider's standard manual related to use of the System, as well as \_\_\_\_\_\_\_\_\_\_\_\_\_\_.
	6. “Order” means an order for access to the System, executed as follows: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
	7. “Privacy/Security Law” means privacy and security laws governing Provider’s handling of Customer Data (if any).
	8. “System” means Provider’s \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
	9. “SLA” means Provider’s standard service level agreement, currently posted at \_\_\_\_\_\_\_\_\_\_\_.
	10. “Term” is defined in Section 11.1 below.
	11. “User” means any company or individual who uses the System on Customer’s behalf or through Customer’s account or passwords, whether authorized or not, including without limitation Customer’s Clients.
2. **THE SYSTEM.**
	1. Use of the System. During the Term, Customer may access and use the System pursuant to the terms of any outstanding Order, including such features and functions as the Order requires.
	2. Service Levels. Provider shall provide the remedies listed in the SLA for any failure of the System listed in the SLA. Such remedies are Customer’s sole remedy for any failure of the System, and Customer recognizes and agrees that if the SLA does not list a remedy for a given failure, it has no remedy; provided this sentence does not restrict any Customer right to terminate this Agreement for breach where applicable. Credits issued pursuant to the SLA apply to outstanding or future invoices only and are forfeit upon termination of this Agreement. Provider is not required to issue refunds or to make payments against such credits under any circumstances, including without limitation after termination of this Agreement. Provider may revise the SLA at any time. If any such revision materially reduces service levels provided pursuant to an outstanding Order, the revisions will not go into effect with respect to such Order until the start of the Term beginning 45 or more days after Provider posts the revision and so informs Customer.
	3. Documentation: Customer may reproduce and use the Documentation solely as necessary to support Users’ use of the System.
	4. Customer’s Clients. Subject to the provisions below of this Section 2.4, Customer may authorize Customer’s Clients to access and use the System in such numbers and according to such restrictions as are set forth in the applicable Order, solely for the following purposes: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. Customer shall: (a) provide complete name and contact information for each proposed Customer’s Client upon or before providing such access, and update such information as soon as it become aware of a change; and (b) require that each Customer’s Client execute the then-standard Client ToS. Customer shall make no representations or warranties regarding the System or any other matter, to Customer’s Clients or Users or any other third party, from or on behalf of Provider, and Customer shall not create or purport to create any obligations or liabilities for Provider. Provider may reject any proposed Customer’s Client for any reason that does not violate applicable law, in its sole discretion. Customer shall be jointly and severally liable to Provider for Customer’s Client’s compliance with the Client ToS. Provider shall have no obligation to provide support or other services, SLA remedies, or other remedies to Customer’s Clients.
3. **SYSTEM FEES.**
	1. Fees. Customer shall pay Provider the fee set forth in each Order for each Term. Provider will not be required to refund fees under any circumstances. Provider’s invoices are due within 30 days of issuance. For late payment, Customer shall pay interest charges from the time the payment was due at the rate that is the lower of \_\_\_% per month or the highest rate permissible under applicable law.
	2. Taxes. Amounts due under this Agreement are payable to Provider without deduction for any tax, tariff, duty, or assessment imposed by any government authority (national, state, provincial, or local), including without limitation any sales, use, excise, ad valorem, property, withholding, or value-added tax, whether or not withheld at the source (collectively, “Sales Tax”). Except as forbidden by applicable law, Provider may require that Customer submit applicable Sales Taxes to Provider. However, the preceding sentence does not apply to the extent that Customer is tax exempt, provided it gives Provider a valid tax exemption certificate within 30 days of the Effective Date. Provider’s failure to include any applicable tax in an invoice will not waive or dismiss its rights or obligations pursuant to this Section 3.2. If applicable law requires withholding or deduction of Sales Taxes or any other tax or duty, Customer shall separately pay Provider the withheld or deducted amount, over and above fees due. For the avoidance of doubt, this Section 3.2 does not govern taxes based on Provider’s net income.
4. **CUSTOMER DATA & PRIVACY.**
	1. Use of Customer Data. Provider shall not: (a) access, process, or otherwise use Customer Data other than as necessary to facilitate the System; or (b) give Customer Data access to any third party, except Provider’s subcontractors that have a need for such access to facilitate the System and are subject to a reasonable written agreement governing the use and security of Customer Data. Further, Provider: (c) shall exercise reasonable efforts to prevent unauthorized disclosure or exposure of Customer Data; and (d) shall comply with all Privacy/Security Laws that are applicable both specifically to Provider and generally to data processors in the jurisdictions in which Provider does business and operates physical facilities.
	2. Statutory Special Terms. The parties recognize and agree that Attachment \_\_ (\_\_\_\_): (a) governs the following Customer Data: \_\_\_\_\_\_\_\_\_\_ [list the data governed by the privacy/security law in question]; and (b) applies only to such Customer Data and not to any of the parties’ other rights or duties pursuant to this Agreement. If Provider receives a “right to know,” deletion, “right to be forgotten,” or similar request related to Customer Data, Provider may respond in accordance with applicable law. Nothing in this Agreement precludes Provider from asserting rights or defenses it may have under applicable law related to such requests.
	3. Additional Fees. Customer recognizes and agrees that Provider may charge additional fees (without limitation) (a) for activities (if any) required by Privacy/Security Laws and (b) for activities Customer requests to help it comply with Privacy/Security Laws.
	4. Privacy Policy. Customer acknowledges Provider’s privacy policy at \_\_\_\_\_\_\_\_\_\_, and Customer recognizes and agrees that such privacy policy is not part of this Agreement and that nothing in this Agreement restricts Provider’s right to alter such privacy policy.
	5. De-Identified Data. Notwithstanding the provisions above of this Article 4, Provider may use, reproduce, sell, publicize, or otherwise exploit De-Identified Data (as defined below) in any way, in its sole discretion, including without limitation aggregated with data from other customers. (“De-Identified Data” refers to Customer Data with the following removed: information that identifies or could reasonably be used to identify an individual person, a household, or Customer.)
	6. Erasure. Provider may permanently erase Customer Data if Customer’s account is delinquent, suspended, or terminated for 30 days or more, without limiting Provider’s other rights or remedies.
	7. Required Disclosure. Notwithstanding the provisions above of this Article 4, Provider may disclose Customer Data as required by applicable law or by proper legal or governmental authority. Provider shall give Customer prompt notice of any such legal or governmental demand and reasonably cooperate with Customer in any effort to seek a protective order or otherwise to contest such required disclosure, at Customer’s expense.
	8. Risk of Exposure. Customer recognizes and agrees that hosting data online involves risks of unauthorized disclosure or exposure and that, in accessing and using the System, Customer assumes such risks. Provider offers no representation, warranty, or guarantee that Customer Data will not be exposed or disclosed through errors or the actions of third parties.
	9. Data Accuracy. Provider shall have no responsibility or liability for the accuracy of data uploaded to the System by Customer, including without limitation Customer Data and any other data uploaded by Users.
	10. Excluded Data. Customer warrants that (a) it has not and will not transmit Excluded Data (as defined below), or permit transmission of Excluded Data, to Provider or its computers or other media and, (b) to the best of its knowledge, Customer Data does not and will not include Excluded Data. Customer shall inform Provider of any Excluded Data within Customer Data promptly after discovery (without limiting Provider’s rights or remedies). Customer recognizes and agrees that: (i) the provisions of this Agreement related to Customer Data do not apply to Excluded Data; (ii) Provider has no liability for any failure to provide protections in the Excluded Data Laws (as defined below) or otherwise to protect Excluded Data; and (iii) Provider’s systems are not intended for management or protection of Excluded Data and may not provide adequate or legally required security for Excluded Data. Provider is not responsible or liable for any data exposure or disclosure or related loss to the extent that it involves Excluded Data. (“Excluded Data” means \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. “Excluded Data Laws” means any law or regulation governing Excluded Data, including without limitation any law or regulation protecting privacy or security rights of Excluded Data subjects, as well as the following statutes and regulations: \_\_\_\_\_\_\_\_\_\_\_\_.)
5. **CUSTOMER’S RESPONSIBILITIES & RESTRICTIONS.**
	1. Acceptable Use. Customer shall comply with the AUP. Customer shall not: (a) use the System for service bureau or time-sharing purposes or in any other way allow third parties to exploit the System, except Customer’s Clients as specifically authorized by this Agreement; (b) provide System passwords or other log-in information to any third party, except Customer’s Clients as specifically authorized by this Agreement; (c) share non-public System features or content with any third party, except Customer’s Clients as specifically authorized by this Agreement; (d) access the System in order to build a competitive product or service, to build a product using similar ideas, features, functions or graphics, or to copy any ideas, features, functions or graphics of the System; or (e) engage in web scraping or data scraping on or related to the System, including without limitation collection of information through any software that simulates human activity or any bot or web crawler. In the event that it suspects any breach of the requirements of this Section 5.1, including without limitation by Users, Provider may suspend Customer’s access to the System without advanced notice, in addition to such other remedies as Provider may have. Neither this Agreement nor the AUP requires that Provider take any action against Customer or any User or other third party for violating the AUP, this Section 5.1, or this Agreement, but Provider is free to take any such action it sees fit.
	2. Unauthorized Access. Customer shall take reasonable steps to prevent unauthorized access to the System, including without limitation by protecting its passwords and other log-in information. Customer shall notify Provider immediately of any known or suspected unauthorized use of the System or breach of its security and shall use best efforts to stop said breach.
	3. Compliance with Laws. In its use of the System, Customer shall comply with all applicable laws, including without limitation Privacy/Security Laws.
	4. Customer’s Clients & Other Users; System Access. Customer is responsible and liable for: (a) Customer’s Clients’ and other Users’ use of the System, including without limitation unauthorized User conduct and any User conduct that would violate the AUP or the requirements of this Agreement applicable to Customer; and (b) any use of the System through Customer’s account, whether authorized or unauthorized.
6. **IP & FEEDBACK.**
	1. IP Rights to the System. Provider retains all right, title, and interest in and to the System, including without limitation all software used to provide the System and all graphics, user interfaces, logos, and trademarks reproduced through the System. This Agreement does not grant Customer any intellectual property license or rights in or to the System or any of its components. Customer recognizes that the System and its components are protected by copyright and other laws.
	2. Feedback. Provider has not agreed to and does not agree to treat as confidential any Feedback (as defined below) Customer provides to Provider, and nothing in this Agreement or in the parties’ dealings arising out of or related to this Agreement will restrict Provider’s right to use, profit from, disclose, publish, keep secret, or otherwise exploit Feedback, without compensating or crediting Customer. Notwithstanding Article 7 (*Confidential Information*), Feedback will not be considered Customer’s Confidential Information or its trade secret. (“Feedback” refers to any suggestion or idea for improving or otherwise modifying any of Provider’s products or services.)
7. **CONFIDENTIAL INFORMATION.** “Confidential Information” refers to the following items Provider discloses to Customer: (a) any document Provider marks “Confidential”; (b) any information Provider orally designates as “Confidential” at the time of disclosure, provided Provider confirms such designation in writing within \_\_ business days; (c) the Documentation and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, whether or not marked or designated confidential; and (d) any other nonpublic, sensitive information Customer should reasonably consider a trade secret or otherwise confidential. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in Customer’s possession at the time of disclosure; (ii) is independently developed by Customer without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of Customer’s improper action or inaction; or (iv) is approved for release in writing by Provider.
	1. Nondisclosure*.* Customer shall not use Confidential Information for any purpose other than \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Purpose”). Customer: (a) shall not disclose Confidential Information to any employee or contractor of Customer unless such person needs access in order to facilitate the Purpose and executes a nondisclosure agreement with Customer with terms no less restrictive than those of this Article 7; and (b) shall not disclose Confidential Information to any other third party without Provider’s prior written consent. Without limiting the generality of the foregoing, Customer shall protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. Customer shall promptly notify Provider of any misuse or misappropriation of Confidential Information that comes to Customer’s attention. Notwithstanding the foregoing, Customer may disclose Confidential Information as required by applicable law or by proper legal or governmental authority. Customer shall give Provider prompt notice of any such legal or governmental demand and reasonably cooperate with Provider in any effort to seek a protective order or otherwise to contest such required disclosure, at Provider’s expense.
	2. Injunction. Customer agrees that: (a) no adequate remedy exists at law if it breaches any of its obligations in Section 7.1 (*Nondisclosure*); (b) it would be difficult to determine the damages resulting from its breach of Section 7.1 (*Nondisclosure*), and such breach would cause irreparable harm to Provider; and (iii) a grant of injunctive relieve provides the best remedy for any such breach, without any requirement that Provider prove actual damage or post a bond or other security. customer waives any opposition to such injunctive relief or any right to such proof, bond, or other security. (This Section 7.2 does not limit either party’s right to injunctive relief for breaches not listed.
	3. Termination & Return. With respect to each item of Confidential Information, the obligations of Section 7.1 above (*Nondisclosure*) will terminate \_\_\_\_\_\_\_\_\_\_\_ after the date of disclosure; provided that such obligations related to Confidential Information constituting Provider’s trade secrets shall continue so long as such information remains subject to trade secret protection pursuant to applicable law. Upon termination of this Agreement, Customer shall return all copies of Confidential Information to Provider or certify, in writing, the destruction thereof.
	4. Retention of Rights. This Agreement does not transfer ownership of Confidential Information or grant a license thereto. Provider will retain all right, title, and interest in and to all Confidential Information.
	5. Exception & Immunity. Pursuant to the Defend Trade Secrets Act of 2016, 18 USC Section 1833(b), Customer is on notice and acknowledges that, notwithstanding the foregoing or any other provision of this Agreement:
		1. *IMMUNITY*. An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that- (A) is made- (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.
		2. *USE OF TRADE SECRET INFORMATION IN ANTI-RETALIATION LAWSUIT*. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual- (A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order.
8. **REPRESENTATIONS & WARRANTIES.**
	1. From Provider. Provider represents and warrants that it is the owner of the System and of each and every component thereof, or the recipient of a valid license thereto, and that it has and will maintain the full power and authority to grant the rights to use the System set forth in this Agreement without the further consent of any third party. Provider’s representations and warranties in the preceding sentence do not apply to use of the System in combination with hardware or software not provided by Provider. In case of breach of the warranty above in this Section 8.1, Provider, at its own expense, shall promptly: (a) secure for Customer the right to continue using the System; (b) replace or modify the system to make it noninfringing; or if such remedies are not commercially practical in Provider’s reasonable opinion, (c) refund \_\_% of the fees paid for the System for every month remaining in the then-current Term following the date after which Customer access to the System ceases. If Provider exercises its rights pursuant to Subsection 8.1(c) above, Customer shall promptly cease all reproduction and use of the Software and erase all copies in its possession or control. This Section 8.1, in conjunction with Customer’s right to terminate this Agreement where applicable, states Customer’s sole remedy and Provider’s entire liability for breach of the warranty above in this Section 8.1.
	2. From Customer.
		1. *Re Customer Itself*. Customer represents and warrants that: (i) it has the full right and authority to enter into, execute, and perform its obligations under this Agreement and that no pending or threatened claim or litigation known to it would have a material adverse impact on its ability to perform as required by this Agreement; (ii) it has accurately identified itself and it has not provided any inaccurate information about itself to or through the System; and (iii) it is a corporation, the sole proprietorship of an individual 18 years or older, or another entity authorized to do business pursuant to applicable law.
		2. *Re Customer’s Clients*. Customer represents and warrants that, to the best of its knowledge: (i) each Customer’s Client will have the full right and authority to enter into, execute, and perform its obligations as required under this Agreement and the Client ToS, with no pending or threatened claim or litigation that would have a material adverse impact on its ability so to perform; (ii) Customer will accurately identify each Customer’s Client and will not provide any inaccurate information about a Customer’s Client or other User to or through the System; and (iii) each Customer’s Client will be a corporation, the sole proprietorship of an individual 18 years or older, or another entity authorized to do business pursuant to applicable law.
	3. Warranty Disclaimers. Except to the extent set forth in the SLA and in Section 8.1 above, CUSTOMER ACCEPTS THE SERVICE “AS IS,” WITH NO REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OR ANY IMPLIED WARRANTY ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING: (a) PROVIDER HAS NO OBLIGATION TO INDEMNIFY OR DEFEND CUSTOMER OR USERS AGAINST CLAIMS RELATED TO INFRINGEMENT OF INTELLECTUAL PROPERTY; (b) PROVIDER DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM WILL PERFORM WITHOUT INTERRUPTION OR ERROR; AND (c) PROVIDER DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM IS SECURE FROM HACKING OR OTHER UNAUTHORIZED INTRUSION OR THAT CUSTOMER DATA WILL REMAIN PRIVATE OR SECURE.
9. **INDEMNIFICATION.** Customer shall defend, indemnify, and hold harmless Provider and the Provider Associates (as defined below) against any “Indemnified Claim,” meaning any third party claim, suit, or proceeding arising out of or related to Customer's alleged or actual use of, misuse of, or failure to use the System, including without limitation: (a) claims by Customer’s Clients or other Users or by Customer's or Customer’s Clients’ employees; (b) claims related Data Incidents (as defined below); (c) claims related to infringement or violation of a copyright, trademark, trade secret, or privacy or confidentiality right by written material, images, logos or other content uploaded to the System through Customer’s account, including without limitation by Customer Data; and (d) claims that use of the System through Customer’s account, including by Customer’s Clients or other Users, harasses, defames, or defrauds a third party or violates the CAN-Spam Act of 2003 or any other law or restriction on electronic advertising. INDEMNIFIED CLAIMS INCLUDE, WITHOUT LIMITATION, CLAIMS ARISING OUT OF OR RELATED TO PROVIDER’S NEGLIGENCE. Customer’s obligations set forth in this Article 9 include, without limitation: (i) settlement at Customer’s expense and payment of judgments finally awarded by a court of competent jurisdiction, as well as payment of court costs and other reasonable expenses; and (ii) reimbursement of reasonable attorneys’ fees incurred before Customers’ assumption of the defense (but not attorneys’ fees incurred thereafter). If Customer fails to assume the defense on time to avoid prejudicing the defense, Provider may defend the Indemnified Claim, without loss of rights pursuant to this Article 9, until Customer assumes the defense. Provider will have the right, not to be exercised unreasonably, to reject any settlement or compromise that requires that it or a Provider Associate admit wrongdoing or liability or subjects either of them to any ongoing affirmative obligation. (“Provider Associates” are Provider’s officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns. A “Data Incident” is any (1) unauthorized disclosure of, access to, or use of Customer Data or (2) violation of Privacy/Security Law through Customer’s account. Data Incidents include, without limitation, such events caused by Customer, by Provider, by Customer’s customers or other users, by hackers, and by any other third party.)
10. **LIMITATION OF LIABILITY.**
	1. Dollar Cap. PROVIDER’S CUMULATIVE LIABILTY FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED $\_\_\_\_\_\_.
	2. Excluded Damages. Except with regard to breaches of Article 7 (*Confidential Information*), IN NO EVENT WILL PROVIDER BE LIABLE FOR LOST PROFITS OR LOSS OF BUSINESS OR FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT.
	3. Clarifications & Disclaimers. THE LIABILITIES LIMITED BY THIS ARTICLE 10 APPLY TO THE BENEFIT OF PROVIDER’S OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND THIRD PARTY CONTRACTORS, AS WELL AS: (a) TO LIABILITY FOR NEGLIGENCE; (b) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE; (c) EVEN IF PROVIDER IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (d) EVEN IF CUSTOMER’S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. Customer acknowledges and agrees that Provider has based its pricing on and entered into this Agreement in reliance upon the limitations of liability and disclaimers of warranties and damages in this Article 10 and that such terms form an essential basis of the bargain between the parties. If applicable law limits the application of any provision listed in the preceding sentence, Provider’s liability will be limited to the maximum extent permissible. For the avoidance of doubt, Provider’s liability limits and other rights set forth in this Article 10 apply likewise to Provider’s affiliates, licensors, suppliers, advertisers, agents, sponsors, directors, officers, employees, consultants, and other representatives.
11. **Term & Termination.**
	1. Term. The term of this Agreement (the “Term”) shall commence on the Effective Date and continue for the period set forth in the Order or, if none, for \_\_\_\_. Thereafter, the Term will renew for successive \_\_\_\_\_ periods, unless either party refuses such renewal by written notice 30 or more days before the renewal date.
	2. *Termination for Cause*. Either party may terminate this Agreement for the other’s material breach by written notice specifying in detail the nature of the breach, effective in 30 days unless the other party first cures such breach, or effective immediately if the breach is not subject to cure. Without limiting Provider’s other rights and remedies, Provider may suspend or terminate a Customer’s Client’s or other User’s access to the System at any time, without advanced notice, if Provider reasonably concludes such Customer’s Client or other User has conducted itself in a way that is not consistent with the requirements of the AUP or the other requirements of this Agreement or in a way that subjects Provider to potential liability.
	3. Effects of Termination. Upon termination of this Agreement, Customer shall cease all use of the System and delete, destroy, or return all copies of the Documentation in its possession or control. The following provisions will survive termination or expiration of this Agreement: (a) any obligation of Customer to pay fees incurred before termination; (b) Articles and Sections 6 (*IP & Feedback*), 7 (*Confidential Information*), 8.2 (*Warranty Disclaimers*), 9 (*Indemnification*), and 10 (*Limitation of Liability*); and (c) any other provision of this Agreement that must survive to fulfill its essential purpose.
12. **MISCELLANEOUS.**
	1. Independent Contractors. The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other, and neither may make commitments on the other’s behalf. The parties agree that no Provider employee or contractor will be an employee of Customer.
	2. Notices. Provider may send notices pursuant to this Agreement to Customer’s email contact points provided by Customer, and such notices will be deemed received 24 hours after they are sent. Customer may send notices pursuant to this Agreement to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and such notices will be deemed received 72 hours after they are sent. . In addition, Customer is on notice and agrees that: (a) for claims of copyright infringement, the complaining party may contact \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_; and (b) Provider will terminate the accounts of subscribers who are repeat copyright infringers.
	3. Force Majeure. No delay, failure, or default, other than a failure to pay fees when due, will constitute a breach of this Agreement to the extent caused by epidemics, acts of war, terrorism, hurricanes, earthquakes, other acts of God or of nature, strikes or other labor disputes, riots or other acts of civil disorder, embargoes, government orders responding to any of the foregoing, or other causes beyond the performing party’s reasonable control.
	4. Assignment & Successors. Customer may not assign this Agreement or any of its rights or obligations hereunder without Provider’s express written consent. Except to the extent forbidden in this Section 12.4, this Agreement will be binding upon and inure to the benefit of the parties’ respective successors and assigns.
	5. Severability. To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.
	6. No Waiver. Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than by an authorized representative in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any other breach of this Agreement.
	7. Choice of Law & Jurisdiction: This Agreement will be governed solely by the internal laws of the State of \_\_\_\_\_\_\_\_\_\_\_\_, including applicable U.S. federal law, without reference to: (a) any conflicts of law principle that would apply the substantive laws of another jurisdiction to the parties’ rights or duties; (b) the 1980 United Nations Convention on Contracts for the International Sale of Goods; or (c) other international laws. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of \_\_\_\_\_\_\_\_\_\_ [city or county], \_\_\_\_\_\_\_\_\_ [state]. This Section 12.7 governs all claims arising out of or related to this Agreement, including without limitation tort claims.
	8. Conflicts. In the event of any conflict between this Agreement and any Provider policy posted online, including without limitation the AUP, the terms of this Agreement will govern.
	9. Construction. The parties agree that the terms of this Agreement result from negotiations between them. This Agreement will not be construed in favor of or against either party by reason of authorship.
	10. Technology Export. Customer shall not: (a) permit any third party to access or use the System in violation of any U.S. law or regulation; or (b) export any software provided by Provider or otherwise remove it from the United States except in compliance with all applicable U.S. laws and regulations. Without limiting the generality of the foregoing, Customer shall not permit any third party to access or use the System in, or export such software to, a country subject to a United States embargo (as of the Effective Date, Cuba, Iran, North Korea, Sudan, and Syria).
	11. Entire Agreement. This Agreement sets forth the entire agreement of the parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to its subject matter. Neither party has relied upon any such prior or contemporaneous communications.
	12. Amendment. Provider may amend this Agreement from time to time by posting an amended version at its Website and sending Customer written notice thereof. Such amendment will be deemed accepted and become effective 30 days after such notice (the “Proposed Amendment Date”) unless Customer first gives Provider written notice of rejection of the amendment. In the event of such rejection, this Agreement will continue under its original provisions, and the amendment will become effective at the start of Customer’s next Term following the Proposed Amendment Date (unless Customer first terminates this Agreement pursuant to Article 11, *Term & Termination*). Customer’s continued use of the System following the effective date of an amendment will confirm Customer’s consent thereto. This Agreement may not be amended in any other way except through a written agreement by authorized representatives of each party. Notwithstanding the foregoing provisions of this Section 12.12, Provider may revise the AUP at any time by posting a new version of either at the Website, and such new version will become effective on the date it is posted; provided if such amendment materially reduces Customer’s rights or protections, notice and consent will be subject to the requirements above in this Section 12.12.