



WATERLY, LLC STANDARD TERMS AND CONDITIONS – Rev. Dec 2020

I. Definitions.

- A. **"Affiliates"** means any entity that controls, is controlled by, or is under common control with a Party. "Control" and its derivatives means the legal, beneficial, or equitable ownership, directly or indirectly, of more than 50% of the capital stock (or other ownership interest, if not a corporation) of such entity ordinarily having voting rights.
- B. **"Authorized User"** means an individual person (but specifically excludes any entity or organization) who is or becomes an employee, contractor, agent, or representative acting on behalf of Subscriber who is issued Login Credentials.
- C. **"Implementation Services"** means the services performed pursuant to the final approved Services Agreement.
- D. **"Login Credentials"** means the unique login and password assigned to each Authorized User by the User Administrator which permits access to the Services.
- E. **"Parties"** means both Provider and Subscriber and **"Party"** means one of the Parties, as applicable.
- F. **"Personal Information"** means, collectively, (i) any information (including, but not limited to, financial information and credit worthiness) relating to an identified individual of Subscriber, its employees, contractors, customers or the employees, contractors or customers of Subscriber's customers or potential customers with whom Subscriber's customers have been in active negotiations, (ii) any "nonpublic personal information" as such term is defined under the Title V of the U.S. Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., and the rules and regulations issued thereunder which exist presently or as promulgated or amended hereafter, (iii) any information which falls under the Payment Card Industry Security Standards Council or other applicable standards or rules relating to electronic transaction processing and personal information ("PCI" Rules) which exist presently or as promulgated or amended hereafter or (iv) as otherwise defined by applicable law.
- G. **"Proposal"** means the document that details the Services and Software that make up the Statement of Work for the Subscriber.
- H. **"Service"** means the hosted and managed online-based Software and platform provided by Provider (or its third-party service providers) as described in the [Description of Services](#) and referred to as the Waterly platform.
- I. **"Software"** means any online-based software, platform, websites, and mobile applications hosted and maintained by Provider as part of the Services which can be accessed by Subscriber.
- J. **"Statement of Work"** means a document executed by the parties that describes certain Services, Properties, pricing and fees purchased by Subscriber under this Agreement. Each Statement of Work shall incorporate this Agreement by reference.
- K. **"Subscriber"** means the company identified on the cover page of this Agreement, including its Affiliates.
- L. **"Subscriber Data"** means any and all information provided, input or uploaded to Provider servers by an Authorized User, including but not limited to 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 Subscriber or any Authorized User for Processing by or through the Services, or (b) collected, downloaded or otherwise received by Provider or the Services for Subscriber or any Authorized User pursuant to this Agreement or any Service Order or at the written request or instruction of Subscriber 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 Subscriber Data are themselves also Subscriber Data. For the avoidance of doubt, Subscriber Data includes all User Data and Personal Information but does not include any Provider Materials.
- M. **"Support Services"** is defined in Section 2D.
- N. **"Updates"** means updates, modifications, bug fixes, patches, new reports, new functionality or features to the base version of the Software.
- O. **"User Administrator"** means the employee(s) of Subscriber designated by Subscriber who will administer the access and use of the Software and the Services by Authorized Users.
- P. **"Water System"** means any water-related (water, wastewater, gray water, stormwater) system.

II. Access and Services.

- A. Grant of Access Right to Subscriber. Subject to Subscriber complying with the terms of this Agreement, Provider grants to Subscriber during the Term a non-exclusive, non-transferable right (except as set forth in Section 2D) for Authorized Users of Subscriber to access and use the following Services in connection with the sites:
- the hosting, management and operation of the Software as described in the Description for remote electronic access and use via the Platform by the Subscriber and its Authorized Users;
 - the Support Services; and,
 - such other services as may be specified in this Agreement.
- B. Scope of Access. Subscriber shall have access to the Services in connection only with the Water System(s) listed in the Services Agreement. If Subscriber wishes to have additional Water Systems authorized to access the Services, and if Provider agrees, either the Services Agreement will be amended to reflect the new Systems, or a new Statement of Work will be entered into.
- C. Access to Service and Platform. Provider shall use commercially reasonable efforts to provide continuous access to the Service in accordance with the [Support Policy](#). Provider does not guarantee that the Service will be accessible at all times. The Service may be unavailable during scheduled maintenance periods or during an emergency. Provider will use reasonable efforts to notify Subscriber in the event that the Service will be unavailable for scheduled maintenance. In addition to scheduled maintenance, there may be events that will make the Service inaccessible for a limited amount of time due to unforeseen circumstances, such as, but not limited to, software, hardware, network, power and/or Internet problems or outages.
- D. Support Services. Provider shall provide the following support services (collectively, **"Support Services"**) as part of the Services:
- Maintain the Software and Platform;
 - Issue Authorized User credentials in the form of user name and password;
 - Revoke credentials of an Authorized User within 7 days of Subscriber providing Provider with a written request to revoke;
 - Use commercially reasonable efforts to make the Software and Platform available 24 hours a day, seven days a week, except for planned maintenance, unscheduled maintenance, and emergencies (as described in the Support Policy); and,
 - Provide Subscriber with standard customer support services according to the Support Policy in effect at the time that the Services are provided. Provider may amend the Support Policy in its sole and absolute discretion from time to time.
- E. Updates and Additional Services. Provider may, in its sole discretion, provide Updates to the Software from time to time and such Updates shall be made available to Subscriber via the platform at no additional charge. Subscriber may request additional services or functionality from Provider from time to time, which, if agreed to by Provider (in its discretion) and implemented, upon mutual written consent shall then be governed by the terms of this Agreement.
- F. Use by Authorized Users. Subscriber shall be responsible for all use of the Services under the access and use rights granted hereunder, including without limitation any breach by Authorized Users of the terms and conditions of this Agreement. Without limitation of the foregoing, all Authorized Users must be under confidentiality obligations to Subscriber commensurate with those in Section 10 below, protecting Proprietary Information provided to Subscriber by parties such as Provider. Upon initial login using the Login Credentials each new Authorized User may be required to accept the terms of Provider's terms of use as it is provided. Subscriber shall use all reasonable endeavors to prevent any unauthorized access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorized access or use, promptly notify Provider.
- G. Restrictions on Use. Subscriber itself shall not and shall not permit its Authorized Users, employees or contractors to: (i) de-compile, reverse engineer, disassemble, rent, lease, loan, sublicense or create derivative works of the Software; (ii) resell or transfer the Software or use of or access to the Software; (iii) copy, modify, reproduce, republish, distribute, transmit or use for commercial or public purposes the Software, except as otherwise



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provided in this Agreement; (iv) download or save a copy of any of the screens appearing on any website related to the Software, except as otherwise provided in this Agreement; or (v) use or otherwise export or re-export the Software in violation of the export control laws and regulations of the United States of America. These restrictions are not intended to prohibit or limit Subscriber's access or ability to reproduce Subscriber Data.

H. No license to the Software is granted to Subscriber other than as specifically provided herein. All rights not specifically granted in this Agreement are reserved by Provider.

III. Fees and Payment.

A. Data Setup Fee. If applicable, an initial data setup fee ("**Data Setup Fee**") for the initial setup of the Service for Subscriber is set forth in the Proposal and is included in the final approved Services Agreement and is due within thirty (30) calendar days of the Effective Date. If not Data Setup Fee appears in the proposal, there is no Data Setup Fee.

B. Subscription Fee. During the Term Subscriber agrees to pay to Provider the "**Subscription Fee**" as set forth in the Initial Statement of Work included in the final approved Services Agreement. The Subscription Fee is a recurring fee and is based on the size of the Water (or wastewater) system. Provider may adjust the Subscription Fee rates by up to but not exceeding 4% each year as well as adjust the rate for Systems that increase or decrease in size.

C. Payment Terms. Payment of the Subscription Fees is due either monthly or annually within thirty (30) days after the end of the calendar accrual month or year as specified in the Proposal. If Subscriber fails to pay the Subscription Fees when due, Provider has the right to terminate this Agreement and terminate or suspend access to the Service without further notice. All payments shall be made in U.S. dollars. All amounts due hereunder are net amounts, and Subscriber agrees that it will be responsible for the collection and payment of all sales, use or services taxes of any kind, with the exception of taxes due on Provider's income.

D. Late Payment. Payments which are not received when due shall be considered overdue and Subscriber agrees to pay Provider interest on any overdue balance at the lesser of one and one half percent (1½%) per month or the maximum amount allowed by applicable law.

IV. Login Credentials.

A. User Administrator. At all times during the Term, Subscriber shall designate one or more employees to serve as User Administrator(s) for Subscriber. Subject to the terms of this Agreement, Provider grants the User Administrator(s) the non-transferable right to assign and administrate Login Credentials to Authorized Users, to administer security profiles of Authorized Users, and to input data regarding the Authorized Users and to de-authorize Authorized Users. To prevent billing errors, Subscriber agrees that each Authorized User will be assigned unique Login Credentials, and that no Login Credentials will be shared or otherwise utilized by two or more individuals at any time.

B. Login Credentials Protection. Subscriber shall be solely responsible for the security of Login Credentials issued to each Authorized User. Subscriber agrees to comply with the procedures that may be specified by Provider from time to time regarding obtaining and updating passwords for the Services.

V. Intellectual Property Rights and Ownership.

A. You acknowledge that the Software contains proprietary information of Provider and is protected by copyright, trademark, patent, trade secret and/or other intellectual property rights; and that all such intellectual property rights are and shall be owned by Provider. Subscriber also agrees that, except as expressly provided in this Agreement, nothing in this Agreement or the conduct of the parties shall be construed as conferring on the Subscriber any license or right, by implication, estoppel, or otherwise, under copyright or other intellectual property rights. Subscriber also agrees to abide by this Agreement regardless of whether any portion of the Software is deemed not copyrightable. All of Subscriber's obligations and acknowledgements under this Agreement, including without limitation those regarding limitations on use and the intellectual property rights of Provider, shall survive any termination or expiration of this Agreement.

B. All ownership rights in and to the Service and the Software applications and systems used to provide the Service and any related documentation (including any corrections, Updates, authorized copies thereof, or any adaptations, customizations, modifications, derivative works, or other enhancements thereto (whether created by Provider, Subscriber or jointly, all of the foregoing in this list referred to collectively as "**Modifications**")) made during this Agreement, but excluding any Subscriber Data and Subscriber's brands) shall remain exclusively with Provider and its licensors, as applicable. Subscriber agrees to and does hereby assign, transfer and convey to Provider all of Subscriber's right, title and interest in and to all Modifications. This assignment obligation shall survive any termination or expiration of this Agreement. Subscriber agrees not to challenge any intellectual property right of Provider in the Software, the Gateway Software or the Service during this Agreement or at any time after any termination or expiration thereof.

VI. Use of Data.

A. Subscriber Data. As between Subscriber and Provider, Subscriber owns the Subscriber Data provided by Subscriber and its Authorized Users through use of the Service. Subscriber Data uploaded by Subscriber to or stored by the Software will be maintained by Provider. Subscriber will have on-line access to Subscriber Data as set forth in this Agreement.

B. Use of Subscriber Data. Subscriber agrees to and does hereby grant to Provider a perpetual, irrevocable, worldwide, royalty-free, transferrable, sublicensable right to use, analyze, mine, combine, share, transmit, sell, market, exploit and transfer the Subscriber Data in any way it chooses, provided however, that all Subscriber Data, prior to transmission to any third party, shall be anonymized such that Personal Information has been deidentified and so that anonymized information cannot be linked back to an identifiable individual or entity.

C. Provider Data. Provider may also collect data and information in connection with the Service that Provider provides generally (but not including Subscriber Data) through its online Service ("**Provider Data**"). All such Provider Data is and shall remain the sole property of Provider. Provider shall also have the right to combine Subscriber Data and Provider Data and use such data as set forth in Section 6B.

D. Personal Information. Provider shall use commercially reasonable efforts to maintain the confidentiality of all Personal Information; however, Provider shall not be liable for the confidentiality of any Personal Information in the event of unauthorized access, theft or use of such Personal Information, either by Subscriber's Users, or third parties. Subscriber agrees to pay for all costs (including, but not limited to, reasonable attorneys and consultants' fees) for all remedial actions which are required by law or reasonably necessary to protect the privacy and security of the owners of such Personal Information in the event of unauthorized access of the Personal Information which occurred through no fault of Provider. If Subscriber transmits, uploads, downloads, stores or manages Personal Information, Subscriber shall at all times comply with the standards as required by law applicable at the time. Other than a breach of security caused by Provider or Provider's agents and contractors, Subscriber shall indemnify, defend and hold Provider harmless from any damages (including, but not limited to, attorneys' fees, costs, time lost, cost of notification, remediation, fines and penalties) Provider incurs due to any claim or action related to security breach of data Subscriber has transmitted, uploaded, downloaded, stored, managed or in any other way accessed, used or involved Provider's (or its agents and contractors) Services, Software or equipment.

E. Provider shall follow its archiving procedures for Subscriber Data as set out in its Back-Up Policy available at <https://www.waterly.com/backuppolicy> or such other website address as may be notified to Subscriber from time to time (the "Back-Up Policy"), as such document may be amended by Provider in its sole discretion from time to time. In the event of any loss or damage to Subscriber Data, Subscriber's sole and exclusive remedy shall be for Subscriber to use reasonable commercial endeavors to restore the lost or damaged Subscriber Data from the latest backup of such Subscriber Data maintained by Subscriber in accordance with the archiving procedure described in the Backup Policy. Provider shall not be responsible for any loss, destruction, alteration or disclosure of Subscriber Data caused by any third party (except those third parties subcontracted by Provider to perform services related to Subscriber Data maintenance and backup).

VII. Warranty and Warranty Disclaimers.

A. Provider warrants to Subscriber that all Professional Services shall be performed or provided in a professional and workmanlike manner.

B. DISCLAIMER. OTHER THAN AS EXPRESSED IN THIS SECTION 7, THE SOFTWARE, THE SERVICE, THE PROFESSIONAL SERVICES, AND ANY OTHER SERVICES RENDERED BY PROVIDER ARE PROVIDED "AS IS" WITHOUT ANY EXPRESS OR IMPLIED WARRANTY OF ANY KIND. NO OTHER WARRANTIES, GUARANTEES, CONDITIONS OR REPRESENTATIONS, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, ARE MADE WITH RESPECT TO ANY OF THE SERVICES OR SOFTWARE PROVIDED IN CONNECTION WITH THIS AGREEMENT, AND ALL OTHER WARRANTIES, INCLUDING WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, NONINFRINGEMENT, AND UNINTERRUPTED, ERROR-FREE USE ARE EXPRESSLY DISCLAIMED.

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- C. Subscriber represents and warrants to Provider that any and all Subscriber Data will not: (i) violate any foreign, federal, state, local or provincial law or regulation; (ii) infringe any copyright, trademark or other proprietary right of any third party; or (iii) in any way violate or infringe upon any party's privacy right, right of publicity or any other right of any person or entity.

VIII. LIMITATIONS OF LIABILITY.

- A. PROVIDER'S CUMULATIVE LIABILITY ARISING OUT OF OR RELATING TO THE SOFTWARE, ALL SERVICES OR ANY OTHER ASPECT OF THIS AGREEMENT, FOR ANY CAUSE WHATSOEVER, REGARDLESS OF THE FORM OF ANY CLAIM, ACTION OR PROCEEDING, WHETHER BASED IN CONTRACT, TORT OR ANY OTHER LEGAL THEORY NOT SHALL EXCEED THE AGGREGATE SUBSCRIPTION OR OTHER FEES PAID BY SUBSCRIBER TO PROVIDER FOR THE SERVICE DURING THE THREE (3) MONTHS PRIOR TO PROVIDER RECEIVING NOTICE OF THE CLAIM. IN NO EVENT SHALL PROVIDER, ITS LICENSORS OR CONTRACTORS BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT OR PUNITIVE DAMAGES OR EXPENSES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING LOST PROFITS, LOST OPPORTUNITY COSTS, LOSS OF DATA, BREACH OF DATA SECURITY, ETC., EVEN IF THE PARTY HAS BEEN ADVISED OF THEIR POSSIBLE EXISTENCE. THE ALLOCATIONS OF LIABILITY REPRESENT THE AGREED AND BARGAINED-FOR UNDERSTANDING OF THE PARTIES AND PROVIDER'S COMPENSATION FOR THE SERVICES REFLECTS SUCH ALLOCATIONS.
- B. Subscriber acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third-party websites and that it does so solely at its own risk. Provider makes no representation or commitment and shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any such third-party website, or any transactions completed, and any contract entered into by Subscriber, with any such third party. Any contract entered into and any transaction completed via any third-party website is between Subscriber and the relevant third party, and not Provider. Provider recommends that Subscriber refers to the third party's website terms and conditions and privacy policy prior to using the relevant third-party website. Provider does not endorse or approve any third-party website nor the content of any of the third-party website made available via the Services.

IX. Indemnification.

- A. Indemnification by Provider.
1. Provider agrees to indemnify and hold harmless Subscriber and its successors, assigns, parents and subsidiaries and the officers, directors and employees of each of them, from and against any and all claims, losses, actions, damages, expenses and all other liabilities, including, but not limited to, costs and reasonable outside attorneys' fees (collectively, "**Claim(s)**") arising out of (a) the breach of any representation, warranty, covenant or other terms or conditions of this Agreement by Provider, and (b) the negligent acts or omissions of Provider in connection with its obligations set forth in this Agreement.
 2. Provider shall pay any final judgments awarded or settlements entered into, provided that Subscriber gives prompt written notice to Provider of any such Claim and gives Provider the authority to proceed as contemplated herein and timely cooperates with Provider. Provider will have the exclusive right to defend any such Claim, and make settlements thereof at its own discretion, and Subscriber may not settle or compromise such Claim, except with prior written consent of Provider. At Provider's cost, Subscriber shall promptly give such assistance and information as Provider may reasonably require to settle or oppose such Claims.
 3. Provider shall, at its expense, defend or settle any claim, action or allegation (collectively "**Claim**") brought against Subscriber, its authorized agents, representatives and contractors, and their respective officers, directors, employees, agents, representatives and contractors that the Software (other than any customization or modification of the Software specifically requested by Subscriber) or Service infringes any patent or copyright in the United States.
 4. In the event that the use of the Service is or may be enjoined, Provider will use commercially reasonable efforts to: (i) replace the infringing Service with a non-infringing version of the Service; provided, however, if a non-infringing version is not reasonably available to Provider, then Provider will, in its sole discretion, either: (ii) obtain a license permitting Subscriber's continued use of the allegedly infringing Service, or (iii) terminate the Agreement with respect to the infringing part of the Service and provide for a corresponding reduction of fees as determined by Provider payable by Subscriber. Provided Subscriber is current with all fees due and payable to Provider, Subscriber may, in its sole discretion, elect to terminate this Agreement effective thirty (30) days following written notice to Provider in the event the infringing portion of Service is of material functionality thereby materially reducing Subscriber's use of Service. Such written termination must be delivered to Provider within thirty (30) days following Provider's written notice to Subscriber of the reduction of fees attributable to the infringement. Provider will then be released from any further obligation whatsoever to Subscriber in connection with the infringing part of the Service. The foregoing obligations shall not apply to the extent the infringement arises as a result of modifications or customizations to the Service based on specifications or requirements provided by Subscriber or the use of the Service together with the Subscriber Data. This Section 9A states the entire liability of Provider with respect to infringement of any patent, copyright, trade secret or other proprietary right. Provider shall be entitled to collect and retain any damage awards (including, but not limited to, attorneys' fees and costs) related to such Claim.
- B. Indemnification by Subscriber. Except for Claims subject to Section 9A, Subscriber shall defend or settle any Claim brought against Provider, its parent, divisions, subsidiaries, and affiliates and their respective officers, directors, employees, agents, licensors, representatives and contractors, at Subscriber's expense, resulting from, arising out of, or related to Subscriber's and its Authorized Users' breach of the warranties and representations of Section 7, or use of the Service or the Subscriber Data, including without limitation any claim for personal injury, death or damage to property, beach or loss of data and shall pay any final judgments awarded or settlements entered into. Provider will provide the Subscriber with prompt notice of such claims, and provide Subscriber the sole right to defend or settle any such claim. Provider may not settle or compromise such claim, except with prior written consent of Subscriber. At Subscriber's cost, Provider shall provide such reasonable assistance and information as Subscriber may reasonably require with such claims.

X. Confidentiality.

- A. "**Confidential Information**" means all confidential and proprietary financial data, marketing data, product markets, market projections, contacts, customers or customer lists, training materials and techniques, product plans, products, prototypes or models, software, source code, object code, system architecture, documentation, hardware, designs, drawings, research, engineering know-how and negative know-how, services, methods of manufacture or production, techniques for improved production, inventions, copyrightable and uncopyrightable works, which are not otherwise included within the definition of Trade Secrets and that is the subject of its owner's reasonable efforts to maintain confidentiality thereof. "**Trade Secrets**" means confidential and proprietary information disclosed by one Party to the other relating to the whole or any portion or phase of any scientific, technical or nontechnical data, design, pattern, process, formula, device, method, technique, compilation, program, drawing, financial data, financial plans, product plans or list of actual or potential customers or suppliers, which (i) derives economic value, actual or potential, from not being generally known to, and not readily ascertainable by proper means by, other persons and (ii) is the subject of efforts by the Party claiming trade secret status that are reasonable under the circumstances to maintain its secrecy. Without limitation of the foregoing, Provider's Trade Secrets include the applications and systems associated with providing the Services. "**Proprietary Information**" means, collectively, Confidential Information and Trade Secrets.
- B. Each Party shall protect the Proprietary Information of the other Party with the same standard of protection and care that it uses for its own Proprietary Information, but in no event less than reasonable care and diligence. Neither Party shall disclose, publish, transmit or make available all or any part of such Proprietary Information except in confidence or a need-to-know basis to its own employees and third-party contractors who have undertaken a written obligation of protection and confidentiality and its legal and professional advisors under similar confidentiality obligations, and shall not duplicate, transform or reproduce such Proprietary Information except as expressly permitted hereunder.
- C. Any information will not be considered Proprietary Information to the extent, but only to the extent, that such information: (a) is already known to the receiving Party free of any confidentiality obligation at the time it is obtained; (b) is or becomes publicly known through no wrongful act of the receiving Party; (c) is rightfully received from a third party without restriction and without breach of this Agreement; or (d) is required to be disclosed by law or court order. In the event that either Party is required by law or court order or regulatory authority to disclose any Proprietary Information, except

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such disclosure may be made only after the other Party has been notified and has had a reasonable opportunity to seek a court order or appropriate agreement protecting disclosure of such Proprietary Information.

- D. With regard to Trade Secrets, the obligations in this Section 10 shall continue for so long as such information continues to be maintained as a Trade Secret and trade secret status has not been lost based on the holder's actions or inactions or as determined by a final adjudication. With regard to Confidential Information, the obligations in this Section 10 shall continue for the term of this Agreement and for three (3) years after termination or expiration, but without restriction as to duration with respect to any Personal Information.
- E. Provider may disclose that Subscriber is a customer of Provider and may use Subscriber's name (and use related logos) in promotional and marketing material.

XI. Term and Termination.

- A. Term. This Agreement shall commence on the Effective Date and continue for the term specified in the proposal (the "Initial Term"). At the end of the Initial Term this Agreement shall automatically renew for successive periods (each period being a "Renewal Term"). Together, the Initial Term and any Renewal Terms are referred to as the "Term".
- B. Termination. Either Party may terminate this Agreement for cause if the other Party commits a material breach of this Agreement (other than a failure of Subscriber to timely pay any fees owed) that remains uncured ten (10) days after written notice of such breach is delivered to the other Party. Notwithstanding anything to the contrary in this Agreement, any willful unauthorized access, use, copying, disclosure, distribution, or sublicensing of intellectual property or any related methods, algorithms, techniques, or processes of Provider by Subscriber or any Authorized User will be deemed a material breach of this Agreement that cannot be cured and will entitle Provider to immediately terminate this Agreement. Subscriber may terminate this Agreement without cause by providing ten (10) days prior written notice to Provider.
- C. Obligations of the Parties Upon Expiration or Termination; Obligations of Data Delivery. Upon the expiration or termination of the Agreement, Subscriber will return to Provider any Provider Proprietary Information; and Subscriber and each Authorized User will no longer be provided access to the Service; and Subscriber will cease any attempt to access the Service.
- D. Transition Services. Upon the effective termination of this Agreement for reasons other than Subscriber's breach of its payment obligations or its confidentiality obligations hereunder, and upon prepayment of three (3) months of Provider's Subscription Fee then in effect Provider shall cooperate with Subscriber in allowing Subscriber to transition to another service provider and shall promptly provide Subscriber with a data file of Subscriber's Data so that Subscriber may transition to another service provider, subject to the confidentiality provisions of Section 10. In the event the transition is accomplished in less than three (3) months' time, Provider will refund a pro rata amount of such prepaid amount within thirty (30) days of the transition being completed.
- E. Nonsolicitation. Subscriber agrees that during the Term of this Agreement and for a period of two (2) years following the termination or expiration of this Agreement for any or no reason whatever, subject to the terms of any escrow agreement in place between the parties, if applicable, Subscriber will not, on its own behalf or in the service or on behalf of others, solicit, recruit or hire, or attempt to recruit or hire, directly or by assisting others, any employee of Provider. The obligations of this Section 11E shall survive any expiration or termination of this Agreement.
- F. Suspension or Termination Based on Threat of Infringement. In the event that either Provider or Subscriber is threatened in writing or is sued for infringement or violation of any third-party intellectual property right relating to the performance of the Services, then the Party receiving the threat or lawsuit shall notify the other Party within five (5) days of receipt. In such an event Provider may, at its option and by providing written notice to Subscriber, either (a) suspend performance of the Services until the threat is removed to the reasonable satisfaction of Provider or the lawsuit dismissed or, (b) if the threat is not resolved or the lawsuit dismissed within three (3) months of Provider receiving notice thereof, Provider may terminate this Agreement by providing notice in writing to Subscriber. In such an event, Provider shall be paid for all completed Services and for all in-process Services provided up to the date of termination on a pro rata basis. Further, in such an event Subscriber shall immediately discontinue use of any Service of Software that is the subject of the threat or lawsuit until such threat is removed or the lawsuit is dismissed. If Subscriber does not immediately discontinue such use or commercialization, Provider shall have no obligation to indemnify, defend or hold Subscriber harmless for such continued use or commercialization, and further, Subscriber shall indemnify, defend and hold Provider pursuant to Subscriber's obligations in Section

XII. Noncompetition.

- A. During this Agreement and for a period of twenty four (24) months after any termination or expiration of this Agreement, Subscriber shall not develop, or cause to be developed (directly or indirectly) any software that would compete with the Software.

XIII. General Provisions.

- A. Governing Law. This Agreement is governed by Illinois law, excluding its conflicts of law rules. Each Party irrevocably submits to venue and exclusive personal jurisdiction in the federal and state courts in Cook County, Illinois, for any dispute arising out of this Agreement, and waives all objections to jurisdiction and venue of such courts.
- B. Dispute Resolution. Provider and Subscriber will attempt in good faith to resolve any dispute. Each Party will designate an officer or senior level management executive with decision making authority (collectively, an "Executive") with the responsibility and the authority to resolve the dispute. These Executives will meet or hold a telephone conference call within thirty (30) days after the request to identify the scope of the dispute and the information needed to discuss and attempt to resolve such dispute. These Executives will then gather relevant information regarding the dispute and will meet or hold a telephone conference call promptly to discuss the issues and to negotiate in good faith to resolve that issue. In the event the parties are unable to resolve the dispute within sixty (60) days after the specific meeting of the designated Executives as specified above (or such longer time as the parties agree), then the dispute shall be resolved by mandatory arbitration, which may be submitted by either Party. Such arbitration will be conducted in or near Chicago, Illinois, in accordance with the commercial rules ("Rules") then in effect of the American Arbitration Association by one (1) arbitrator appointed in accordance with such rules. The award rendered by the arbitrator will be final and binding, and judgment may be entered upon it in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties may apply to any court of competent jurisdiction for a temporary restraining order, preliminary injunction, or other interim or conservatory relief, as necessary, without breach of this arbitration agreement and without any abridgment of the powers of the arbitrator. In the event the arbitrator determines that either Party fails to resolve any dispute in good faith, the arbitrator may award (in any amount deemed appropriate by the arbitrator) the prevailing Party its costs and expenses of arbitration, including filing fees and attorneys, accountants, and experts fees. All aspects of the arbitration shall be treated as confidential, as provided in the Rules. Before making any disclosure permitted by the Rules, a Party shall give written notice to the other Party and afford such Party a reasonable opportunity to protect its interests. Each Party shall bear its own costs in the arbitration; however, the Parties shall share the fees and expenses of the arbitrator equally.
- C. Publicity. Either Party may disclose that Subscriber is a customer of Provider, so long as Provider does not disclose any Subscriber Confidential Information and Provider may list Subscriber (and use Subscriber's name and logos) to indicate Subscriber as being a customer and describe the non-confidential nature of the relationship in Provider's press releases, marketing and promotional material. The parties agree to keep the financial and other terms of this Agreement confidential (subject to any disclosures required by law under Section 10). This Section 13C shall survive any termination or expiration of this Agreement.
- D. Waiver. No waiver of any right under this Agreement shall be deemed effective unless contained in writing signed by a duly authorized representative of the Party against which the waiver is sought to be enforced, and no waiver of any past or present right arising from any breach or failure to perform shall be deemed to be a waiver of any future right arising under this Agreement.
- E. Severability. If any provision in this Agreement is invalid or unenforceable, that provision shall be construed, limited, modified or, if necessary, severed, to the extent necessary, to eliminate its invalidity or unenforceability, and the other provisions of this Agreement shall remain in full force and effect.
- F. Assignment. This Agreement shall not be assigned, conveyed or transferred, whether by contract or operation of law (collectively referred to in this Section 13F as "assign" or "assignment") by Subscriber without the prior written consent of Provider. Provider may assign this Agreement in whole or in part, including the right to receive payments, upon written notice to Subscriber, provided that assignee of Provider's rights agrees to be bound by

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the terms and conditions of the Agreement and any agreements entered into between the parties which form a part of this Agreement. Any assignment in violation of this Section 13F shall be of no force or effect.

- G. **Compliance with Laws.** Each Party agrees to comply with all applicable laws and regulations with respect to its activities hereunder, including but not limited to any export laws and regulations of the United States.
- H. **Force Majeure.** With the exception of the payment of amounts owed, if by reason of labor disputes, strikes, lockouts, riots, war, inability to obtain labor or materials, earthquake, fire or other action of the elements, governmental restrictions, appropriation, telecommunications failures or cable line cuts or other causes beyond the control of a Party hereto (any of the foregoing is referred to as a "**Force Majeure Event**"), either Party is unable to perform in whole or in part its obligations as set forth in this Agreement, then such Party shall be relieved of those obligations to the extent it is so unable to perform and such inability to perform shall not make such Party liable to the other Party. A Party shall promptly notify the other Party in the event of a Force Majeure Event impacting the Party's ability to perform. Neither Party shall be liable for any loss, injury, delays or damages suffered or incurred by the other Party due to the above causes. In the event a Force Majeure Event occurs whereby either Party is unable to perform in whole or in part its obligations as set forth in this Agreement for a period of thirty (30) consecutive days, the other Party shall have the right to terminate this Agreement without termination liability.
- I. **Notices.** All notices required to be given pursuant to this Agreement shall be given in writing and delivered by fax, hand, certified first class mail, email or overnight courier, addressed to the receiving Party at the address identified in the most recent Services Agreement. Each Party will provide written notice to the other Party in the event of a change in the contact information identified in the most recent Services Agreement. Notice shall be deemed given when (i) sent by fax; (ii) delivered by hand to the address specified below, (iii) three (3) days after mailing by certified first class mail, (iv) one (1) day after delivering to a recognized overnight delivery carrier, or (v) on the date sent by electronic mail, provided that confirmation is sent by one of the other foregoing methods.
- J. **Entire Agreement.** This Agreement and the final approved Services Agreement sets forth the entire understanding and agreement between Subscriber and Provider regarding the subject matter of this Agreement and supersedes all prior or contemporaneous proposals or communications, oral or written, between the parties relating to the subject matter of this Agreement. No modification of this Agreement shall be binding unless it is in writing and is signed by authorized representatives of both parties. The terms of this Agreement shall govern and prevail in the event of a conflict with any purchase orders or order forms of Subscriber.
- K. **Construction.** Each Party has had an opportunity for their respective legal counsel to review this Agreement. Accordingly, no rule of construction against the drafter shall be applied.
- L. **Duplicate Counterparts.** This Agreement may be executed in separate counterparts, each of which shall be deemed an original, and all of which together shall constitute one agreement. The signature page of any Party to any counterpart, and photocopies and facsimiles thereof, may be appended to any other counterpart and when so appended, shall constitute an original.

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