

## Cloud Service Offerings Terms of Service

**Effective Date: June 1, 2020**

These Cloud Service Offerings Terms of Service (“Terms of Service”) apply to the Service Offerings, including Evaluation Services, and will be binding on Customer and Service Provider when Service Provider makes any of these available for Customer’s use. Each Service Offering may have a Service Description, which are incorporated into the Terms of Service by reference.

This Terms of Service, Service Offering Documentation, and the Order together constitute the “Agreement.” Customer may purchase the Service Offering from Service Provider under the Terms of Service, or from a Service Provider affiliate that provides Customer a quote referencing these Terms of Service, including additional terms specific to the affiliate’s services, where applicable. The Service Provider or affiliate that issues the quote to Customer is solely responsible to Customer to fulfill the obligations under that quote. Capitalized terms used in these Terms of Service are defined throughout these Terms of Service and in Section 14 (“Definitions”).

### 1. **The Service Offering.**

1.1 Generally. Service Provider may deliver the Service Offering with the assistance of Service Provider’s affiliates and suppliers. Service Provider will remain responsible to Customer for delivery of the Service Offering.

#### 1.2 Use of the Service Offering.

A. Customer may use the Service Offering only (a) during the Subscription Term, (b) for Customer’s own benefit and for Customer’s End Users as provided in the applicable Service Description, and (c) in accordance with the Agreement. To use the Service Offering Customer may be required to register and set up an authorized account with Login Credentials. Customer must keep Customer registration information accurate and complete during the term of the Agreement.

B. Customer is responsible for (i) any use of the Service Offering that occurs under Customer’s Login Credentials, (ii) Customer’s Content, and (iii) Customer’s Users’ compliance with the Agreement. If Customer becomes aware of any User’s or End User’s violation of the Agreement, Customer must promptly suspend that User’s or End User’s access to the Service Offering. If Customer becomes aware that any of Customer’s Content, or any Third-Party Content, violates Section 3.1 (“General Restrictions”) or Section 3.2 (“Content Restrictions”), Customer must promptly remove that Content or suspend use of that Third-Party Content. If Customer believes Customer’s account has been compromised, including any unauthorized access to or use or disclosure of any account information, passwords, user names, or Login Credentials, Customer must notify Service Provider immediately.

C. Customer may receive software from Service Provider, which must be installed in Customer’s on-premises environment to enable Customer to use the Service Offering. Customer may use that software only (a) in connection with Customer’s use of the Service Offering, (b) for the Subscription Term, and (c) in accordance with the Agreement. Service Provider’s standard end user license agreement made generally available by Service Provider on its website also applies.

D. If Service Provider reasonably believes a problem with the Service Offering may

be attributable to Customer's Content or to Customer's use of the Service Offering, Customer must cooperate with Service Provider to identify the source of the problem and to resolve the problem.

### 1.3 Monitoring.

Service Provider monitors and collects configuration, performance, and usage data relating to Customer's use of the Service Offering: (a) to facilitate delivery of the Service Offering (such as (i) tracking entitlements, (ii) providing support, (iii) monitoring the performance, integrity, and stability of the Service Offering's infrastructure, and (iv) preventing or addressing service or technical issues); and (b) to improve Service Provider's products and services, and Customer's experience. Customer must not interfere with that monitoring.

### 1.4 Third-Party Content.

Customer may use Third-Party Content, at Customer's option, where available. If Customer chooses to use Third-Party Content, Customer is responsible for complying with any terms that are presented to Customer when Customer accesses that Third-Party Content, including any separate fees or charges imposed by the provider of that Third-Party Content. Third-Party Content is available "AS IS" without indemnification, support (unless otherwise specified), or warranty or condition of any kind. Service Provider may suspend or terminate provision and hosting of any Third-Party Content at any time, and that suspension or termination will not be deemed a material, detrimental change.

### 1.5 Evaluation Use.

If Customer uses any Evaluation Service, the terms of this Section 1.5 govern that use, and control over any conflicting provision of these Terms of Service. The term "Service Offering" includes an Evaluation Service in all provisions of these Terms of Service that are not in conflict with the provisions of this Section 1.5.

A. Customer may use an Evaluation Service only (a) for internal testing and evaluation or trial purposes, and (b) for a period of 30 days (unless Service Provider specifies otherwise) beginning on the date Service Provider provides Customer Login Credentials for or access to the Evaluation Service. Customer will not have access to the Evaluation Service or to any data or Content in the Evaluation Service after Customer's authorized use period ends.

B. Use of an Evaluation Service may be subject to additional terms from a third-party service provider.

C. Customer may use the Service Offering Documentation provided with an Evaluation Service solely in support of Customer's authorized use of the Evaluation Service.

D. Service Provider may provide the Evaluation Service for a particular Service Offering: (a) "AS IS" and (b) without indemnification, warranty, or condition of any kind. No service level commitment will apply to the Evaluation Service.

E. The Data Processing Addendum does not apply to Customer's use of (i) an Evaluation Service or (ii) any feature within an Evaluation Service, that is not generally available to Service Provider's customers.

F. Customer must not put production data or data regulated by law or regulation into an Evaluation Service. If Customer puts that data into an Evaluation Service, Customer does so at Customer's own risk and Service Provider will not be responsible for the consequences of that use.

G. Certain features or functionality of a Service Offering may not be available in an Evaluation Service. Providing any Evaluation Service, or any feature or functionality in an Evaluation Service, does not constitute Service Provider's commitment to offer the Evaluation Service or that feature or functionality on a generally available basis.

H. Service Provider may modify or terminate an Evaluation Service at any time, and any modification or termination will not be deemed a material, detrimental change.

I. The aggregate liability (excluding indirect damages, for which Service Provider expressly disclaims all liability) of Service Provider, and its affiliates and suppliers, for any claim arising from Customer's use of an Evaluation Service will not exceed \$5,000 USD (or the equivalent in local currency).

## 1.6 Optional Feedback.

Customer may provide comments and suggestions regarding a Service Offering, but Customer is not required to do so. If Customer provides comments or suggestions, Service Provider may use that feedback without restriction, and Customer hereby irrevocably assigns to Service Provider all right, title, and interest in and to that feedback. Subject to the preceding sentence regarding any feedback Customer provides, providing any comments and suggestions does not grant us any rights in Customer's Content or Customer's intellectual property.

## 1.7 Modifications.

A. Service Provider may from time to time: (a) modify the Service Offering, or (b) cease providing any Service Offering. Any changes will become effective on the date published or as Service Provider may notify Customer, but in no case less than 30 days after the date Service Provider publishes notice of those changes or modifications (except for new features or functionality, which may take effect immediately). Customer's continued use of the Service Offering after the effective date of any change will be deemed acceptance of the modified Service Offering.

B. If Service Provider makes a material, detrimental change to the Service Offering, Service Provider will notify Customer prior to the effective date of that change. If Customer elects to terminate the Agreement because of that change, Customer must notify Service Provider not later than 30 days after the date of Service Provider's notice. If Customer terminates the Agreement pursuant to this Section 1.7.B, the termination will be effective as of: (a) the date Service Provider receives Customer's notice of termination; or (b) any later date specified in Customer's notice, provided that the effective termination date must not be more than 90 days after the date on which Service Provider receives Customer's notice, unless Customer and Service Provider agree to some longer period. Customer will be responsible for all fees incurred prior to the effective date of any termination pursuant to this Section 1.7.B. If Customer terminates the Service Offering pursuant to this Section 1.7.B, Service Provider will refund any prepaid fees prorated as of the effective date of the termination. Termination and refund, as provided in this Section 1.7.B, is Customer's sole and exclusive remedy if Service Provider makes a material, detrimental change to the Service Offering.

1.8 Required Disclosures. If Service Provider is required by a subpoena, court order, agency action, or any other legal or regulatory requirement to disclose any of Customer's Content, Service Provider will provide Customer with notice and a copy of the demand as soon as practicable, unless Service Provider is prohibited from doing so pursuant to applicable law. If Customer requests, Service Provider will, at Customer's expense, take reasonable steps to contest any required disclosure. Service Provider will limit the scope of any disclosure to only the information Service Provider is required to disclose.

## 2. **Data Protection and Security.**

2.1 Customer is solely responsible for ensuring that the Service Offering and its security is appropriate for Customer's Content and Customer's intended use.

2.2 Customer is responsible for taking and maintaining appropriate steps to protect the confidentiality, integrity, and security of Customer's Content. Those steps include (a) controlling access Customer provides to Customer's Users, (b) configuring the Service Offering appropriately, (c) ensuring the security of Customer's Content while it is in transit to and from the Service Offering, (d) using encryption technology to protect Customer's Content, and (e) backing up Customer's Content.

2.3 Customer is responsible for providing any necessary notices to Users and obtaining any legally required consents from Users regarding their use of the Service Offering.

## 3. **Acceptable Use.**

### 3.1 General Restrictions.

Customer must not: (a) resell or sublicense the Service Offering; (b) reverse engineer, decompile, disassemble, or attempt to discover or modify in any way the underlying source code of the software included with the Service Offering, or any part thereof; (c) use the Service Offering (i) in a way prohibited by law or that would cause Customer or Service Provider to be out of compliance with applicable law, (ii) to violate any rights of others, (iii) to try to gain unauthorized access to, test the vulnerability of, or disrupt the Service Offering or any other service, device, data, account, or network, (iv) to distribute spam or malware, (v) in a way that could harm the Service Offering or impair anyone else's use of it, (vi) in a way intended to work around the Service Offering's technical limitations, recurring fees calculation, or usage limits, (vii) for High Risk Activities; (viii) to create or enhance a competitive offering or for any purpose which is competitive to Service Provider; (ix) to perform or fail to perform any other act which would result in a misappropriation or infringement of Service Provider's intellectual property rights in the Service Offering; (x) to attempt to use or gain unauthorized access to Service Provider's or to any third-party's networks or equipment; (xi) to attempt to probe, scan or test the vulnerability of the Service Offering, or a system, account or network of Service Provider or any of Service Provider's customers or suppliers; (xii) to transmit unsolicited bulk or commercial messages or intentionally distribute worms, Trojan horses, viruses, corrupted files or any similar items; (xiii) to restrict, inhibit, interfere or attempt to interfere with the ability of any other person, regardless of purpose or intent, to use or enjoy the Service Offering or a user's network, or cause a performance degradation to any facilities used to provide the Service Offering. Where applicable, if Customer purchases any managed services from Service Provider, Customer will not cause Service Provider to use anything for which Service Provider would need to obtain a license from such third-party in order to provide those managed services.

### 3.2 Content Restrictions.

Customer must not upload into the Service Offering any Content that: (a) may create a risk of harm or any other loss or damage to any person or property; (b) may constitute or contribute to a crime or a tort; (c) includes any data that is illegal, unlawful, harmful, pornographic, defamatory, infringing, or invasive of personal privacy or publicity rights; (d) contains any data that Customer does not have a right to upload into the Service Offering; (e) constitutes information governed by HIPAA unless Customer has signed a Business Associate Agreement (as defined by HIPAA) with Service Provider; or (f) is otherwise prohibited as specified in the Agreement.

### 3.3 Uploading Content.

Customer acknowledges that uploading Customer's Content to the Service Offering does not constitute a disclosure of Customer's Content to Service Provider and, accordingly, Section 12 (Confidential Information) does not apply to Customer's Content.

### 3.4 Notification of Infringement Concerns.

If Customer believes that Customer's copyrighted work has been copied and is accessible on the Service Offering in a way that constitutes copyright infringement Customer may send a notice to Service Provider's copyright agent, providing the following information: (a) a description of the copyrighted work that Customer claims has been infringed and a description of the infringing activity; (b) the location of the material that Customer claims is infringing, such as the URL where it is posted; (c) Customer's name, address, telephone number, and email address; (d) a statement by Customer that Customer has a good faith belief that the disputed use of the material is not authorized by the copyright owner, its agent, or the law; (e) Customer's statement under penalty of perjury that the information in Customer's notice of infringement concern is accurate, and that Customer is the copyright owner or is authorized to act on the copyright owner's behalf; and (f) Customer's electronic or physical signature, as the copyright owner or as the person authorized to act on the copyright owner's behalf. Solely for purposes of reporting copyright infringement, please contact Service Provider's copyright agent as follows:

**Dell Inc.**

**Attn:** IP Legal Department - Copyrights

Hopkinton, MA 01748

**Email:** dmca@dell.com

## 4. Intellectual Property Ownership.

### 4.1 Ownership of Service Offering.

As between Customer and Service Provider, Service Provider owns all right, title, and interest in and to the Service Offering and any related Service Provider Software, including all improvements, enhancements, modifications, and derivative works of them, and all Intellectual Property Rights in all of them. This includes any information Service Provider collects and analyzes about Customer's use of the Service Offering pursuant to Section 1.3 ("Monitoring"). Customer's rights to use the Service Offering are limited to those expressly granted in the Agreement. No other rights are implied with respect to the Service Offering, any related Service

Provider Software, or any related Intellectual Property Rights.

#### 4.2 Ownership of Customer's Content.

As between Customer and Service Provider, Customer retains all right, title and interest in and to Customer's Content and all Intellectual Property Rights in Customer's Content. Service Provider's rights to access and use Customer's Content are limited to those expressly granted in the Agreement.

### 5. **Orders, Payment, and Taxes.**

#### 5.1 Orders Generally.

A. Customer must pay all charges Customer incurs for Customer's use of the Service Offering. Charges may consist of both a committed amount as well as additional amounts, including but not limited to charges for add-on features that Customer orders or enables, as well as charges Customer incurs based on actual usage of the Service Offering (metered charges, or "overages"). Customer must establish a method of payment to cover charges. Service Provider may bill Customer directly for any additional charges, even if Customer purchases the entitlement for the Service Offering through a Service Provider authorized reseller. Service Provider may not require a purchase order to invoice Customer for charges.

B. All Orders are subject to the terms of the Agreement and are not binding until Service Provider accepts them. An Order will be deemed accepted upon the earlier of (a) when Service Provider issues an email or other written communication to Customer accepting such order, or (b) otherwise as set forth in the Service Description. Service Provider is not required to provide the Service Offering to Customer until Customer provides to Service Provider all information Service Provider requires for processing Customer's Order and provisioning the Service Offering for Customer. All Orders are non-refundable and non-cancellable except as expressly provided in the Agreement. Any refunds to which Customer is entitled under the Agreement will be remitted to Customer or to the Service Provider channel partner from which Customer purchased Customer's entitlement to use the Service Offering.

C. Service Provider is responsible for shipping physical objects, if any, in connection with applicable Service Offerings to Customers. Unless the applicable Service Description states otherwise, Service Provider retains title to the physical objects, which must be returned to Service Provider at the end of the applicable Subscription Term. During the Subscription Term, Customer is responsible for securing any physical objects and for any damage to or loss of physical objects unless the Service Description states otherwise. Customer must insure the physical objects (with a reputable insurance company) against all: (a) liability whatsoever to any third party arising directly or indirectly out of Customer's selection, possession, or use of the physical objects, and (b) loss or damage to the physical objects from all insurable risks for the full cost of replacing it, and (c) other risks in respect of which a prudent owner or operator of physical objects of the same nature as the physical objects would normally insure such physical objects. In regard to (a) and (b), Service Provider will be named as additional insured and loss payee respectively. Upon Service Provider's request, Customer must show Service Provider evidence that the insurance required under this Agreement is in place in respect of the relevant physical objects. Customer must immediately notify Service Provider of any loss claim and Customer must not settle any claims without Service Provider's agreement.

D. If Customer pays for a Service Offering through a credit card where credit card

payment is available, Customer will be subject to any additional terms presented to Customer by Service Provider's third-party credit card payment processor, which will be the merchant of record for that transaction.

## 5.2 Direct Orders.

This Section 5.2 applies only to Orders directly with Service Provider. If Customer purchases an entitlement to the Service Offering through a Service Provider authorized reseller, different terms regarding invoicing, payment, and taxes may apply.

A. Unless Customer and Service Provider agree otherwise, (i) charges Customer incurs for using the Service Offering will be governed by the applicable price list at the time of invoicing, and (ii) Customer must pay all charges no later than 30 days after the date of invoice.

B. Service Offering fees are exclusive of Taxes. Customer must pay or reimburse Service Provider for all Taxes arising out of the transactions contemplated by the Agreement, except for taxes based on Service Provider's net income, gross revenue or employment obligations. Service Provider shall provide Customer with a valid invoice if VAT is chargeable in respect of any amount payable under this agreement. Customer may qualify for tax exemptions from time to time in which case Service Provider requests that Customer timely provide it with a valid certificate of exemption or other appropriate documentary proof of exemption. If Customer is required to pay or withhold any Tax for payments due under the Agreement, where Service Provider is resident in a different country than Customer, Customer must gross up Customer's payments to Service Provider so that Service Provider receives the amount it would have received if such deduction or withholding tax were not required where legally permitted. If Customer is required to pay any Taxes to a taxing authority, Customer must also provide documentation to Service Provider showing that Customer paid those Taxes. Service Provider will not be responsible to Customer for any penalties, interest or other charges arising from any act or omission by Customer with respect to tax compliance.

## 6. **Temporary Suspension.**

6.1 Generally. Service Provider may, at its option, suspend Customer's use of any Service Offering if: (a) Customer is in breach of the Agreement (including failure to make timely payment) and does not cure that breach within 10 days after Service Provider notifies Customer of that breach; (b) Service Provider believes that Customer's use of the Service Offering poses a security risk to the Service Offering or to other users of the Service Offering; or (c) Service Provider suspects fraud or abuse. Service Provider will give Customer notice before suspending Customer's use of the Service Offering if permitted by law or unless Service Provider reasonably determines that providing notice presents a risk of harm to the Service Offering, to other users of the Service Offering, or to any person or property, in which case Service Provider will notify Customer as soon as feasible or permitted. Service Provider will suspend Customer's access only to the Service Offering that is the subject of the issue giving rise to the suspension. Service Provider will promptly reinstate Customer's access to the Service Offering once Service Provider has determined that the issues related to the suspension have been resolved.

6.2 Effect of Suspension. Customer will remain responsible for all fees incurred before and during any suspension. Customer will not be entitled to any service credits under any Service Level Agreement provided in the applicable Service Description that Customer might have otherwise accrued during any suspension.

## 7. **Termination.**

### 7.1 Generally.

Customer has the right to use the Service Offering during the applicable Subscription Term. Customer may stop using a Service Offering at any time, but Customer will remain liable for all fees and charges otherwise due during the applicable Subscription Term.

### 7.2 Termination for Cause.

Service Provider may, at its option, terminate the Agreement, or any Service Offering, effective immediately upon written notice to Customer if (i) Service Provider has the right to suspend under Section 6.1 (“Temporary Suspension; Generally”); (ii) Customer commits a material breach of the Agreement that cannot be cured; (iii) Customer terminates or suspends its business; or (iv) Customer fails to comply with applicable law.

7.3 Termination for Insolvency. Either Customer or Service Provider may terminate the Agreement effective immediately upon sending the other party notice if that party: (a) becomes insolvent, admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors; or (b) becomes subject to control of a trustee, receiver, or similar authority, or to any bankruptcy or insolvency proceeding.

### 7.4 Effect of Termination.

A. Upon termination of the Agreement for any reason: (a) Customer must stop using the Service Offering, and (b) Customer must return or, if Service Provider requests, destroy, any Confidential Information of Service Provider or its suppliers in Customer’s possession or under Customer’s control (other than information that must be retained pursuant to law). Deletion of any Content remaining in the Service Offering will occur as specified in the applicable Service Description. As between Customer and Service Provider, Customer is responsible for ensuring that Customer has necessary copies of all Customer’s Content prior to the effective date of any termination.

B. Any provision that, by its nature and context is intended to survive termination or expiration of the Agreement, will survive. The Data Processing Addendum (to the extent Service Provider continues to process Personal Data, as defined in the Data Processing Addendum, following any termination of the Agreement) will also survive any termination or expiration of the Agreement.

C. Except to the extent Customer or Service Provider are permitted to terminate the Agreement pursuant to Sections 1.7 (“Modifications”), or 10.2 (“Indemnification by Service Provider”), any termination of the Agreement will not entitle Customer to any refunds, credits, or exchanges, and Customer will be liable for all fees incurred as of the effective termination date. If Service Provider terminates the Agreement prior to expiration of a Subscription Term pursuant to Section 7.2, Customer will be liable for all fees due with respect to the Service Offering for the remainder of the then-current Subscription Term.

## 8. **Support.**

Service Provider will provide support to Customer for the Service Offering in accordance with the applicable Support Terms as specified in the applicable Service Description. Service Provider will



not provide support to Customer's End Users or for Content of Customer or End Users.

## 9. Warranties.

### 9.1 Limited Warranty: Duration and Remedy.

Service Provider warrants that the Service Offering will perform substantially in accordance with the Service Level Agreement, if any, stated in the Service Description, if any, during the Subscription Term, provided that the Service Offering has at all times been used in accordance with the Agreement. If Service Provider fails to meet this limited warranty, Customer's sole and exclusive remedy for that failure is as specified in the Service Level Agreement.

### 9.2 Disclaimer.

**Other than the limited warranty set forth in section 9.1, to the maximum extent permitted by law, service provider, for itself and on behalf of its suppliers, disclaims all warranties, whether express, implied, or statutory, including any warranties of merchantability, satisfactory quality, fitness for a particular purpose, title, and non-infringement, and any warranties arising from course of dealing or course of performance, relating to the service offering and to all materials or services provided to customer under the agreement, including any third-party content. Service Provider and Service Provider's suppliers do not warrant that the service offering will be uninterrupted or free from defects or errors, or that the service offering will meet (or is designed to meet) customer's business requirements.**

## 10. Indemnification.

### 10.1 Indemnification by Customer.

Subject to the remainder of this Section 10.1, Customer will (a) defend Service Provider against any Third-Party Claim; and (b) indemnify Service Provider from all fines, damages, and other costs resulting from a final award, judgment, or order of a court of competent jurisdiction or a government agency arising out a Third-Party Claim. Service Provider will: (i) provide Customer with notice of any Third-Party Claim within a reasonable period after learning of the claim (provided that any delay in providing the notice will relieve Customer of Customer's indemnification obligations only to the extent that the delay prejudices Customer), and (ii) reasonably cooperate in response to Customer's requests for assistance. Customer will have sole control over the defense of any Third-Party Claim. Customer may not, without Service Provider's prior written consent, settle any Third-Party Claim if that settlement obligates Service Provider to admit any liability, to make any monetary payment, or to undertake any material obligation; or if that settlement would affect any Service Offering or Service Provider's business practices or policies.

### 10.2 Indemnification by Service Provider; Infringement Claims.

A. Subject to the remainder of this Section 10.2, Service Provider will: (a) defend Customer against any Infringement Claim; and (b) indemnify Customer from all fines, damages, and costs resulting from a final award, judgment, or order of a court of competent jurisdiction or a government agency with regard to any Infringement Claim. The foregoing obligations are applicable only if Customer: (i) provides Service Provider with notice of any Infringement Claim within a reasonable period after learning of the claim (provided that any delay in providing the notice will relieve Service Provider of its indemnification obligations only to the extent that the

delay prejudices Service Provider); (ii) allow Service Provider sole control over the defense of the Infringement Claim; and (iii) reasonably cooperate in response to Service Provider's requests for assistance with regard to the Infringement Claim. Service Provider will not, without Customer's prior written consent, enter into any settlement of any Infringement Claim that obligates Customer to admit any liability, to make any unreimbursed monetary payment, or to undertake any material obligation.

B. If the Service Offering becomes or in Service Provider's opinion is likely to become the subject of an Infringement Claim, Service Provider may, at its option and expense: (a) procure the rights necessary for Customer to keep using the Service Offering; (b) modify or replace the Service Offering to make it non-infringing without materially reducing its functionality; or (c) terminate the Agreement and refund any prepaid fees, prorated for the remaining portion of the then-current Subscription Term.

C. Service Provider will have no obligation under this Section 10.2 or otherwise with respect to any Infringement Claim based on: (a) combination of the Service Offering with Third Party Content, Customer's Content, and/or other content, products or services not provided by Service Provider; (b) use of the Service Offering for a purpose or in a manner not permitted by the Agreement, or use after Service Provider notifies Customer to cease such use due to a possible or pending Infringement Claim; (c) any modification to the Service Offering made without Service Provider's express written approval; (d) any modifications Service Provider makes to the Service Offering pursuant to instructions, designs, specification, or other information Customer provides to Service Provider; (e) Customer's own services (including Infringement Claims where the damages sought are based on revenues from Customer's own services); (f) any data or information Customer or a third party records on or utilizes in connection with the Service Offering; (g) any claim that relates to open source software, freeware technology, Third-Party Products and Services, or any derivative or other adaptation thereof; or (h) any Service Offering provided on a no-charge basis.

D. This Section 10.2 states Customer's sole and exclusive remedy and Service Provider's entire liability for any Infringement Claims.

## 11. **Limitation of Liability.**

### 11.1 Disclaimer.

**To the maximum extent permitted by law, in no event will service provider be liable for any lost profits or business opportunities, loss of use of the service offering, or loss of content for any reason including power outages, system failures, or other interruptions (subject to service provider's obligations under the applicable service level agreement), loss of revenue, loss of goodwill, business interruption, or for any indirect, special, incidental, or consequential damages under any theory of liability, whether based in contract, tort, negligence, product liability, or otherwise. This limitation will apply regardless of whether a party has been advised of the possibility of those damages and regardless of whether any remedy fails of its essential purpose.**

### 11.2 Cap on Monetary Liability.

**Service provider's liability for any claim under the agreement will not exceed an amount equal to the total fees paid to service provider for customer's use of the particular service offering giving rise to the claim in the 12 months prior to the event giving rise to the claim.**

**The limitation of liability in this section 11.2 will not apply to (i) service provider's indemnification obligations under section 10.2.1 of these terms of service or (ii) any liability which may not be excluded by law.**

### 11.3 Further Limitations.

A. Service Provider's suppliers have no liability of any kind under the Agreement. Customer may not bring a claim directly against any of them under the Agreement. Service Provider's liability with respect to any Third-Party Content used or made available as part of a Service Offering is subject to this Section 11.

B. Customer may not bring a claim under the Agreement more than 18 months after the cause of action arises.

## 12. **Confidential Information.**

### 12.1 Protection.

Either party (the "**recipient**") may use Confidential Information of the other party (the "**discloser**") disclosed to it in connection with the Agreement solely to exercise its rights and perform its obligations under the Agreement or as otherwise permitted by the Agreement. Customer and Service Provider will each use reasonable care to protect that Confidential Information in the same manner as each party protects its own Confidential Information of a similar nature, but in any event with not less than reasonable care. The recipient may disclose the discloser's Confidential Information only to the recipient's employees, or to third parties, who have a need to know the Confidential Information for purposes of the Agreement, and who are under a duty of confidentiality no less restrictive than as specified in this Section 12. The recipient may also disclose the discloser's Confidential Information in accordance with the procedures set forth in Section 1.8 ("Required Disclosures").

### 12.2 Exceptions.

The recipient's obligations under Section 12.1 with respect to any of the discloser's Confidential Information will terminate if the recipient can show by written records that the information: (a) was, at the time of disclosure by the discloser, already rightfully known to the recipient without any obligation of confidentiality; (b) was disclosed to the recipient by a third party who had the right to make the disclosure without any confidentiality restrictions; (c) at the time of disclosure is, or through no fault of the recipient has become, generally available to the public; or (d) was independently developed by the recipient without access to or use of the discloser's Confidential Information.

### 12.3 Injunctive Relief.

Nothing in the Agreement limits either party's ability to seek equitable relief.

## 13. **General.**

### 13.1 Assignment.

Customer may not assign or transfer the Agreement, in whole or in part, by operation of law or otherwise, without Service Provider's prior written consent. Any attempted assignment or transfer

of the Agreement without Service Provider's consent will be void and will be a breach of the Agreement. Subject to these limitations, the Agreement will bind and inure to the benefit of the parties and their respective successors and assigns.

### 13.2 Notices.

Any notice by Service Provider to Customer under the Agreement will be given: (a) by email to the email address associated with Customer's account, if Customer has subscribed to this method of receiving notices, or (b) by posting on either the Service Offering portal or Service Provider's generally available customer access portal. Customer must direct legal notices or other correspondence to (i) Service Provider's physical address, and (ii) the legal notices email address identified above.

### 13.3 Waiver.

Waiver of a breach of any provision of the Agreement will not constitute a waiver of any later breach of that provision, or waiver of a breach of any other provision.

### 13.4 Severability.

If any provision of the Agreement is held to be invalid or unenforceable, the remaining provisions of the Agreement will remain in force to the extent feasible.

### 13.5 Compliance with Laws.

Customer and Service Provider must each comply with all laws applicable to the actions contemplated by the Agreement.

### 13.6 Export Control.

Customer acknowledges that the Service Offering is provided subject to the U.S. Export Administration Regulations (including "deemed export" and "deemed re-export" regulations) and may be subject to the export control laws of any other applicable country. Customer provides that: (a) Customer, and any User, are not, and are not acting on behalf of, (i) individuals or entities located in a country or territory (including without limitation, North Korea, Cuba, Iran, Syria, Sudan and Crimea) that is the subject or target of, economic sanctions of the United States, European Union or other applicable jurisdictions; or (ii) any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons, or the U.S. Commerce Department Denied Persons List or Entity List, or any similar designated persons list published for the jurisdiction in which the applicable data center is located; (b) Customer, and any User, will not permit the Service Offering to be used for any purposes prohibited by law, including any prohibited development, design, manufacture, or production of missiles or nuclear, chemical, or biological weapons; (c) no Content will be classified or listed on the United States Munitions list or similar list published for the jurisdiction in which the applicable data center is located, or contain defense articles, defense services, or ITAR-related data; (d) no Content will require an export license or is restricted under applicable export control laws from export to any country where Service Provider's or Service Provider's service providers maintain facilities or personnel; and (e) Customer, and any User, are not subject, either directly or indirectly, to any order issued by any agency of the United States government revoking or denying, in whole or in part, Customer's United States export privileges. Customer must notify Service Provider promptly if Customer or any User becomes subject to any order of that type.

### 13.7 Force Majeure.

Neither Customer nor Service Provider will be liable for any delay or failure to perform its obligations under the Agreement, except for Customer's payment obligations, due to any cause beyond Customer's or Service Provider's reasonable control including labor disputes or other industrial disturbances, systemic electrical, telecommunications or other utility failures, earthquakes, storms or other acts of nature, embargoes, riots, acts or orders of government, acts of terrorism, or war.

### 13.8 Construction.

The headings of sections of these Terms of Service are for convenience and are not for use in interpreting these Terms of Service. As used in these Terms of Service, the word "including" means "including but not limited to".

### 13.9 Language.

The Agreement is in English, and the English language version governs any conflict with a translation into any other language.

### 13.10 Governing Law.

This Agreement is governed by the laws of the State of Texas and the federal laws of the United States. Conflict of law rules are expressly disclaimed. The U.N. Convention on Contracts for the International Sale of Goods does not apply.

### 13.11 Third Party Rights.

Other than as expressly provided in the Agreement, the Agreement does not create any rights for any person who is not a party to it, and only persons who are parties to the Agreement may enforce any of its terms or rely on any exclusion or limitation contained in the Agreement.

### 13.12 Independent Parties.

Service Provider and Customer are independent contracting parties, and the Agreement will not be construed to create a partnership, joint venture, agency, or employment relationship between us. Neither Customer nor Service Provider, nor any of Service Provider's respective affiliates, officers, directors, or employees, is an agent of the other for any purpose, nor has the authority to bind the other.

### 13.13 Order of Precedence.

The terms of the Agreement will supersede any conflicting or additional terms and conditions of any purchase order or other purchasing-related document issued by Customer relating to any Order for the Service Offering. In case of conflict between a Service Description and the terms of this Agreement, the Service Description shall take precedence.

### 13.14 Entire Agreement.

The Agreement as it may be modified from time to time is the entire agreement between Customer and Service Provider regarding its subject matter. The Agreement supersedes all prior or

contemporaneous communications, understandings and agreements, whether written or oral, between Customer and Service Provider regarding its subject matter.

14. **Definitions.**

14.1 “Account Information” means information about Customer that Customer provides to Service Provider in connection with creation or administration of Customer’s account, including names, usernames, phone numbers, email addresses, and billing information associated with Customer’s account.

14.2 “Confidential Information” means Customer’s Login Credentials, and any non-public technical, business, or other information or materials disclosed or otherwise made available by either Customer or Service Provider to the other party regarding the Agreement or the Service Offering, that are in tangible form and labelled “confidential” or the like, or are provided under circumstances reasonably indicating confidentiality. Customer’s Confidential Information does not, for purposes of the Agreement, include Customer’s Content. If Customer discloses Customer’s Content to Service Provider, Service Provider will use the same standard of care with respect to that data as Service Provider uses to protect its own Confidential Information.

14.3 “Content” means any data, including all text, sound, video, or image files, and software (including machine images), or other information.

14.4 “Customer’s Content” means Content uploaded into the Service Offering for processing, storage or hosting, by Customer or by any User, but does not include (i) Third-Party Content, (ii) Account Information, or (iii) data Service Provider collects as specified in Section 1.3 (“Monitoring”).

14.5 “Data Processing Addendum” means the then-current version of the Service Provider’s Data Processing Addendum.

14.6 “End User” means a user of a Service Offering who is not Customer’s employee, or onsite contractor or agent. End Users include, for example, persons or entities to whom Customer provides a service and with whom Customer is in a commercial contractual relationship.

14.7 “Evaluation Service” means any Service Offering, or a feature or functionality of a Service Offering, that Service Provider offers on an evaluation or trial basis. If Customer is participating in a separate Service Provider technical preview or beta program, then the terms of that program will apply.

14.8 “High Risk Activities” means workloads or applications used to control or operate activities with a likelihood of injury or death, including but not limited to controlling aircraft or other modes of human mass transportation, nuclear or chemical facilities, life support systems, implantable medical equipment, motor vehicles, weaponry systems, or any similar scenario where failure could lead to personal injury, death, or environmental damage.

14.9 “HIPAA” means the Health Insurance Portability and Accountability Act of 1996, as amended and supplemented, and the regulations issued pursuant to that Act.

14.10 “Infringement Claim” means any claim by a third party that the Service Offering (excluding Third Party Products and Services, open source software, and Evaluation Services) infringes any patent, trademark, or copyright of that third party, or misappropriates a trade secret of that third

party (but only to the extent that the misappropriation is not a result of Customer's actions), under the laws of: (a) the United States, (b) Canada, (c) European Economic Area member states, (d) Australia, (e) New Zealand, (f) Japan, or (g) the People's Republic of China, to the extent that Customer's instance of the Service Offering is provisioned in a data center located in the applicable country (e.g., the laws of Japan would control regarding an Infringement Claim based on a Service Offering instance provisioned in a data center located in Japan).

14.11 "Intellectual Property Rights" means all worldwide intellectual property rights, including copyrights, trademarks, service marks, trade secrets, patents, patent applications, moral rights, and all other proprietary rights, whether registered or unregistered.

14.12 "Law" includes any statute, ordinance, regulation, or governmental requirement, order, or decree.

14.13 "Login Credentials" means any passwords, authentication keys, or security credentials that enable Customer's access, management to the Service Offering, or both.

14.14 "Order" means the internet order page, where applicable, or other ordering document, that evidences Customer's purchase of a Service Offering, whether Customer purchases a subscription or uses the Service Offering on an on-demand basis.

14.15 "Service Description" means the then-current version of the Service Description for the particular Service Offering or a mutually executed agreement for services that Service Provider provides to Customer.

14.16 "Service Level Agreement" means the then-current version of the Service Level Agreement, if any, within each Service Description for the particular Service Offering. Certain Service Offerings may not have a Service Level Agreement.

14.17 "Service Offering" means the Service Provider cloud service offering specified in Customer's Order. "Service Offering" includes an Evaluation Service.

14.18 "Service Offering Documentation" means: (i) the Service Provider Data Processing Addendum, when applicable,, and (ii) the specific Service Description for the Service Offering; all as revised by Service Provider from time to time.

14.19 "Service Provider Software" means the software programs listed in Service Provider's commercial price list.

14.20 "Subscription Term" means the initial term of Customer's authorized use of the Service Offering, as set forth in the applicable Order, together with any renewal terms (if applicable, as may be set forth in the Service Description). The initial term begins on the earlier of: (i) the date on which Customer starts using the Service Offering or (ii) the date Customer completes the registration process; or as otherwise specified in the Order or in the applicable Service Description. For purposes of any on-demand Service Offering, "Subscription Term" means the period during which Customer is using the Service Offering, for which Customer will be billed, as specified in the applicable Order, and as may be further defined in the Service Description.

14.21 "Support Terms" means the then-current terms regarding support for the particular Service Offering described in each Service Description.

14.22 “Taxes” means any sales, VAT (value-added tax), GST (goods and services tax), use, excise, and other similar taxes (other than income taxes), export and import fees, customs duties, and similar charges imposed by any government or other authority.

14.23 “Third-Party Claim” means any third-party claim or demand arising from or relating to (i) Customer’s Content, (ii) Customer’s use of any Service Offering, including an Evaluation Service, in violation of the Agreement, (iii) Customer’s misrepresentation of facts regarding an export license or any allegation made against any Service Provider or its affiliates due to Customer’s violation or alleged violation of applicable export laws, or (iv) Customer’s combination of the Service Offering with non-Service Provider products or content, including any Customer Content and/or any Third-Party Content.

14.24 “Third-Party Content” means Content provided by a third party, that interoperates with the Service Offering, including open source software, but that is not embedded in or required for use of the Service Offering. As an example, Third-Party Content may include an application that is listed on a marketplace or in a catalogue.

14.25 “Third-Party Products and Services” means products (whether hardware, software, firmware, or otherwise) or services, where such products or services are not branded with a trademark or service mark owned by Service Provider or its affiliates.

14.26 “User” means any person who is authorized to access or use the Service Offering or Customer’s Content directly under Customer’s Login Credentials, and may include Customer’s employees, contractors, service providers, and other third parties, but does not include Customer’s End Users.