KLOUDFUSE
MASTER SERVICES AGREEMENT

This Master Services Agreement (this "**Agreement**") consists of this order form (this "**Order Form**") and the attached Terms and Conditions ("**Terms**") and their respective exhibits. This Agreement is effective as of the effective date set forth in this Order Form below and is entered into by and between Kloudfuse Inc., a Delaware corporation with offices at [ADDRESS] ("**Company**") and the customer set forth in the Order Form below ("**Customer**").

For additional products, licenses, and services, the parties may complete and execute additional order forms in substantially the form of this Order Form; when executed by both parties, such order forms will be subject to the Terms and will form a new and separate agreement between the parties.

Party Information	License Terms		
Customer: [Customer Name] [Address 1] [Address 2]	**Software:** Company's next-gen observability datalake known as the "KloudFuse Data Plane." **Platform:** Company's control plane known as the "Control Plane."		
Customer Authorized Representative: [Contact Name] [Phone #] [Email Address]	**Fees**	**Year1**	**Year2***	**Year2***
	Usage Fee: US$ [ ]	US$ [ ]	US$ [ ]
	Support Fee: US$ [ ]	US$ [ ]	US$ [ ]
	Other Fees: US$ [ ]	US$ [ ]	US$ [ ]
	Payment Terms: Net thirty (30) days *Pricing changes apply only if there is an increase in the volume.*		
	Effective Date: [DATE] Initial Term: One (1) year		

This Agreement is signed by duly authorized representatives of the parties as of the last date written below and is effective as of the Effective Date.

KLOUDFUSE INC.

Signature: _____

Print Name: _____

Print Title: _____

Date: _____

CUSTOMER

Signature: _____

Print Name: _____

Print Title: _____

Date: _____

KLOUDFUSE INC.
TERMS AND CONDITIONS

WHEREAS, Company owns Company IP that its customers may use for its internal business purposes; and

WHEREAS, Customer desires to license the Company IP, and Company desires to grant a license to use the Company IP in accordance with the Terms.

NOW THEREFORE, in consideration of the mutual covenants and agreements in this Agreement, the parties hereby agree as follows:

1. **Certain Definitions**.

    1.1. "**Applicable Laws**" means all existing and future federal, state, provincial, regional, territorial and local laws, international treaties, statutes, statutory instruments, ordinances, regulations, rules, executive orders, supervisory requirements, directives, circulars, opinions, interpretive letters and other office releases, guidelines, and policies with the force of law, of or by any government, or any governmental authority, department, or agency thereof (including all federal and state banking laws, regulations, guidance, and policies), or any court of competent jurisdiction that are applicable to the parties in their performance of their obligations or exercise of their rights under this Agreement.

    1.2. "**Company IP**" means, collectively, the Software and Platform.

    1.3. "**Customer Inputs**" means data, algorithms, methodologies, Software code, and other information Customer provides, posts, uploads, publishes, transmits or distributes on or through the Company IP.

    1.4. "**Effective Date**" means the date on which the parties have mutually executed an Order Form.

    1.5. "**Fees**" means the amounts payable by Customer to Company pursuant to this Agreement (including the applicable Order Form).

    1.6. "**Marks**" means trade names, trademarks, service marks, trade dress, logos and other rights in indicia.

    1.7. "**Platform**" means the software-as-a-service Platform described on the Order Form.

    1.8. "**Software**" means the Software described on the Order Form.

    1.9. "**Subscription Term**" means the Initial Term identified in the Order Form and any subsequent renewal periods pursuant to Section 6.1.

2. **Provision of Software and Documentation**.

    2.1. <u>License Grant</u>. During the Subscription Term and subject to the Terms (including any usage limitations set forth in the Order Form), Company hereby grants to Customer a limited, non-exclusive, non-transferable license, without the right to sublicense, to: (a) install and use the Software solely for Customer's internal use up to the number of employees or contractors of Customer identified on the Order Form who Customer permits to use the Software ("**Authorized Users**") and (b) use the product documentation provided by Company in connection with the Software (the "**Documentation**") solely for Customer's internal use in connection with Customer's use of the Software.

    2.2. <u>Customer License</u>. Customer hereby grants to Company during the Subscription Term a fully paid-up, royalty-free, worldwide, nonexclusive right and license, to use the Customer Inputs as necessary to perform its obligations under this Agreement (including providing the features and functionality of the Company IP to Customer) and for such other purposes identified in the Company privacy policy, available at [URL] (the "**Privacy Policy**"), as it may be updated by Company from time to time.

    2.3. <u>Access to Platform</u>. Customer may access and use Platform on a non-exclusive and non-transferrable basis, solely for its internal business purposes, and only in accordance with the terms and conditions of this Agreement, the applicable Order Form, and any Documentation. To the extent Company provides Customer with any downloadable software, agents, SDKs, APIs, or other code in connection with the Platform (the "**Platform Software**"), Company grants to Customer a non-exclusive, non-transferable, non-sublicensable, limited right and license to use the Platform Software during the applicable Subscription Term solely as reasonably necessary for Customer's use of the Platform in accordance with this Agreement. For clarity, except for Platform Software, Company's Software products are provided on a remote, software-as-a-service basis only.

    2.4. <u>Permitted Users</u>. Customer may permit its employees, agents, independent contractors and consultants to use the Company IP on its behalf ("**Permitted Users**"), provided Customer remains responsible for the acts and omissions of each such Permitted User. Use of the Company IP by Customer in the aggregate must be within the restrictions set

forth in the applicable Order Form (if any). If Customer is given passwords to access Platform on Company's systems, Customer shall require that all Permitted Users keep user ID and password information strictly confidential and not share such information with any unauthorized person. Customer shall be responsible for any and all actions taken using Customer's accounts and passwords.

2.5. Restrictions. Customer will not use the Company IP for any purposes beyond the scope of the license granted in this Agreement. Without limiting the foregoing and except as otherwise expressly set forth in this Agreement, Customer will not at any time, directly or indirectly: (a) use or copy the Company IP or Documentation, in whole or in part, except as permitted hereunder; (b) use the Company IP or Documentation as a service bureau or otherwise for the benefit of a third party; (c) rent, lease, loan or otherwise in any manner provide or distribute the Company IP or any copy thereof to any third party; (d) misappropriate any data or information from the Company IP or Documentation; (e) gain any unauthorized access to the Company IP or Documentation for any other purpose; (f) modify, decompile, reverse engineer, disassemble, remove, alter, circumvent, or otherwise tamper with the Company IP, Documentation, or any security technology, software, or rights management information contained within the Company IP or in any software used to enable the Company IP; (g) modify or remove any copyright, trademark or other proprietary rights notice on any Company IP or other materials contained within the Company IP or Documentation; (h) use the Company IP or Documentation for purposes of developing, using, or providing a product or service that competes with, or provides similar functionality to, the Company IP; (i) exploit the Company IP in any unauthorized way whatsoever; or (j) attempt, or encourage or assist any third party to do, any of the foregoing.

2.6. Open Source and Third Party Software. The Company IP may contain or be provided with certain third-party software modules and components that are subject to separate or additional terms and conditions, including Open Source Components as defined below ("**Third-Party Components**"). In addition, the Company IP may contain or be provided with certain software modules and components offered under the terms and conditions of "open source" software licenses ("**Open Source Components**"). Company will provide Customer all notices and materials required for Company's compliance with the terms and conditions applicable to the Third-Party Components in the Documentation, within the Company IP, or through another method chosen by Company in its reasonable discretion. With respect to any Open Source Components, all use of such Open Source Components by Customer is governed by, and subject to, the terms and conditions of the open source software license applicable to the Open Source Component and not this Agreement. With respect to any Third-Party Components that are not Open Source Components, to the extent any separate or additional terms and conditions apply, Company will provide such terms and conditions to Customer and Customer's use of such Third-Party Components is subject to such terms and conditions.

2.7. Reservation of Rights. Company reserves all rights not expressly granted to Customer in this Agreement. Except for the limited rights and licenses expressly granted under this Agreement, nothing in this Agreement grants, by implication, waiver, estoppel, or otherwise, to Customer or any third party any intellectual property rights or other right, title, or interest in or to the Company IP or Documentation.

2.8. Delivery of Software. Company will make available to Customer the Software electronically in a form and via a method determined by Company that is reasonably acceptable to Customer (e.g., preinstalled on a virtual machine or container, in object code form, or another method). Customer acknowledges that the term "Software" as used in this Agreement does not include Third-Party Components and Open Source Components that may be delivered by Company in combination with the Software.

2.9. Customer Responsibilities. Customer is responsible and liable for all uses of the Company IP and Documentation resulting from access provided by Customer, directly or indirectly, whether such access or use is permitted by or in violation of this Agreement, including any Customer Inputs. Without limiting the generality of the foregoing, Customer is responsible for all acts and omissions of Authorized Users, and any act or omission by an Authorized User that would constitute a breach of this Agreement if taken by Customer will be deemed a breach of this Agreement by Customer. Customer will take reasonable efforts to make all Authorized Users aware of this Agreement's provisions as applicable to such Authorized User's use of the Company IP and Documentation and will cause Authorized Users to comply with such provisions.

3. Ownership and Data Rights.

3.1. Ownership. As between Company and Customer, Customer owns all right, title and interest in and to any and all of its Customer Inputs, including all intellectual property and other proprietary rights therein and thereto. As between Company and Customer, Company owns all right, title and interest in and to the Company IP, Documentation, and Usage Data, including all intellectual property and other proprietary rights therein and thereto. Customer may choose to, or Company may invite Customer to, submit comments or ideas about Company's products and services, including the Company IP and Documentation ("**Feedback**"). By submitting any Feedback, Customer agrees that its

disclosure is gratuitous, unsolicited and without restriction and will not place Company under any fiduciary or other obligation, and Customer hereby assigns to Company all right, title and interest in and to such Feedback, including all intellectual property rights therein, and acknowledges that Company shall own such Feedback. Customer further acknowledges that, by acceptance of Customer's submission, Company does not waive any rights to use similar or related ideas previously known to Company, or developed by its employees, or obtained from sources other than Customer.

3.2. <u>Usage Data</u>. Company may collect, maintain, process and use, or Customer may provide to Company, diagnostic, technical, usage and related information, including information about Customer's computers, systems and software ("**Usage Data**"). Customer agrees that all Usage Data is owned solely and exclusively by Company, and Company accordingly may use such Usage Data for any lawful purpose, including to: (a) provide and maintain the Company IP for Customer; (b) develop and improve the Company IP; (c) monitor Customer's usage of the Company IP; (d) for research and analytics and for Company's other business purposes; and (e) share analytics and other derived Usage Data with third parties solely in deidentified or aggregated form. The Company IP may contain technological measures designed to prevent unauthorized or illegal use of the Company IP. Customer acknowledges and agrees that Company may use these and other lawful measures to verify Customer's compliance with the terms of this Agreement and enforce Company's rights, including all intellectual property rights, in and to the Company IP.

4. <u>Maintenance</u>. During the Subscription Term, Company will provide Customer with updates, upgrades, releases, or other adaptations or modifications of the Software, including any updated Documentation, error corrections, enhancements, improvements, or other changes to the user interface, functionality, compatibility, capabilities, performance, efficiency, or quality of the Software ("**Maintenance Releases**") that Company may, in its sole discretion, make generally available to its customers at no additional charge. All Maintenance Releases provided by Company to Customer are deemed Software. Customer will install all Maintenance Releases as soon as practicable after receipt and in any event, Customer will not use any release of the Software that is more than three (3) calendar months older than the then-most-current release of the Software.

5. **Fees; Payment**.

5.1. <u>Fees</u>. Customer shall pay the Fees set forth in the applicable Order Form in accordance with the payment terms set forth therein. Fees are non-refundable unless otherwise set forth in this Agreement (including the applicable Order Form) or as required by Applicable Laws. All amounts payable to Company under this Agreement shall be paid by Customer to Company in full without any setoff, recoupment, counterclaim, deduction, debit or withholding for any reason (other than any deduction or withholding of tax as may be required by Applicable Laws).

5.2. <u>Late Payments</u>. Overdue payments will be subject to interest at the rate of one and one-half percent (1.5%) per month, or the maximum allowable under Applicable Laws, whichever is less, and Customer will indemnify and hold Company harmless from and against any costs incurred in connection with its collection of any Fees or interest properly due hereunder. If such failure to pay continues for ten (10) days following written notice thereof, Company may: (a) withhold, suspend or revoke its grant of a license hereunder; and/or (b) terminate this Agreement under Section 6.2.

5.3. <u>Taxes</u>. Customer will be responsible for the payment of any and all local, state, federal, or foreign taxes, levies, and duties of any nature, including value-added, sales, use, and withholding taxes ("**Taxes**"). Customer is responsible for paying all Taxes, excluding only taxes based on Company's net income. If Company has the legal obligation to pay or collect Taxes for which Customer is responsible under this Section 5, the appropriate amount shall be invoiced to and paid by Customer unless Customer provides Company with a valid tax exemption certificate authorized by the appropriate taxing authority.

6. **Subscription Term and Termination**.

6.1. <u>Effective Date and Subscription Term</u>. Unless earlier terminated in accordance with this Section 6, this Agreement and the license granted hereunder shall be effective as of the Effective Date and shall continue through the Initial Term. The Agreement will automatically renew for additional periods equal to additional successive one (1)-year periods unless a party provides the other written notice of its intention not to renew at least thirty (30) days prior to the end of the then-current term.

6.2. <u>Termination for Cause</u>. Either party shall have the right to terminate this Agreement immediately upon written notice to the other party: (a) if the other party breaches or fails to perform or observe any material term or condition of this Agreement and such default has not been cured within thirty (30) days after written notice of such default to the other party; or (b) if the other party (i) terminates or suspends its business, (ii) becomes subject to any bankruptcy or insolvency proceeding under Federal or state statute, (iii) becomes insolvent or subject to direct control by a trustee, receiver or similar authority, or (iv) has wound up or liquidated, voluntarily or otherwise.

6.3. Effect of Termination. On the expiration or earlier termination of this Agreement: (a) all rights, licenses and authorizations granted to Customer will immediately terminate, and Customer will: (i) immediately cease all use of and other activities with respect to the affected Company IP and Documentation; (ii) within three (3) days, return to Company or, upon Company's request, destroy, and permanently erase from all devices and systems Customer directly or indirectly controls, the Company IP and Documentation and, at Company's request, Company's Confidential Information and materials containing any Confidential Information of Company; and (iii) deliver to Company a certification, in writing signed by a duly authorized representative of Customer, that the Confidential Information and all copies thereof have been returned or destroyed, and their use discontinued; provided, however, that neither Customer nor any of its representatives shall be obligated to return or destroy Confidential Information to the extent it has been electronically archived by any such party in accordance with its automated security and/or disaster recovery procedures as in effect from time to time. Nothing contained herein shall limit any other remedies that either party may have for the default of the other party under this Agreement nor relieve either party of any of its obligations incurred prior to such termination; and (b) all amounts payable by Customer to Company of any kind are immediately payable and due no later than ten (10) days after the effective date of the expiration or termination of this Agreement. If Company terminates this Agreement pursuant to Section 6.2, Company will not refund to Customer any Fees prepaid by Customer for time remaining during the Subscription Term. If Customer terminates this Agreement pursuant to Section 6.2(a), Company will provide to Customer a refund of Fees prepaid by Customer for time remaining during the Subscription Term.

6.4. Survival. Sections 1, 2.3, 2.8, 3, 5, 6.3, 6.4, 7 (for three (3) years after termination or expiration of this Agreement or, with respect to trade secrets, until such trade secrets are no longer protected as such under Applicable Laws), 8.4, 9, 10 (solely with respect to claims arising during the Subscription Term), 11 and 12 shall survive termination of this Agreement.

7. **Confidentiality**. Each party, as a receiving party, agrees to retain in confidence the non-public information and know-how disclosed to it pursuant to this Agreement which is either designated in writing as proprietary and/or confidential, if disclosed in writing, or if disclosed orally, is designated in writing (which may be via email) as confidential within thirty (30) days of the oral disclosure or should reasonably be understood to be confidential by the recipient (the "**Confidential Information**"). Notwithstanding any failure to so designate them, the Company IP, Documentation, Usage Data, and the Terms shall be Company's Confidential Information. Each party agrees to: (a) preserve and protect the confidentiality of the other party's Confidential Information, using at least the same degree of care which it uses to prevent the disclosure of its own confidential information of like importance, but in no event less than reasonable care; (b) refrain from using the other party's Confidential Information except as contemplated herein; and (c) not disclose such Confidential Information to any third party except to employees, officers, affiliates, controlling stockholders, agents, advisors, subcontractors and other representatives as is reasonably required in connection with the exercise of its rights and obligations under this Agreement (and only subject to binding use and disclosure restrictions at least as protective as those set forth herein). Each party agrees to promptly notify the other party of any unauthorized disclosure or use of any Confidential Information and to assist the other party in remedying such unauthorized use or disclosure by taking such steps as are reasonably requested. Notwithstanding the foregoing, Confidential Information shall not include information which is: (i) already publicly known without breach of this Agreement; (ii) discovered, created or independently developed by the receiving party without use of, reliance upon, or reference to, the Confidential Information of the disclosing party, as shown in records of the receiving party; (iii) otherwise known to the receiving party through no wrongful conduct of the receiving party, or (iv) required to be disclosed by law or court order; provided that the receiving party shall provide prompt notice thereof and commercially reasonable assistance to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure. Moreover, either party hereto may disclose any Confidential Information hereunder to such party's agents, attorneys and other representatives (and only subject to confidentiality obligations at least as protective as those set forth herein) or any court of competent jurisdiction as reasonably required to resolve any dispute between the parties hereto. Each party agrees and acknowledges that any breach or threatened breach of this Section 7 may cause irreparable injury to the disclosing party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, the disclosing party shall be entitled to seek injunctive relief against the threatened breach of this Agreement or the continuation of any such breach by the receiving party, without the necessity of proving actual damages or posting any bond, in addition to any other rights or remedies provided by law.

8. **Representations and Warranties.**

8.1. Performance Warranty; Sole and Exclusive Remedy. Subject to the limitations and conditions set forth in Section 8.2, Company hereby represents and warrants to Customer that, during the Subscription Term: (a) the functionality of the Company IP will not be materially decreased from the functionality of the Company IP available as of the Effective Date, when installed, operated and used as recommended in the Documentation applicable to the particular Company IP and in accordance with this Agreement (the "**Performance Warranty**"); and (b) Company will use

reasonable efforts consistent with industry standards designed to ensure that no viruses, spyware, malware, or similar items will be coded or introduced into the Company IP. Customer's sole and exclusive remedy for Company's breach of its Performance Warranty will be for Customer to submit a support request and for Company to respond to and resolve such request. The limited warranty set forth in this Section 8.1 will apply only if Customer, as of the date of notification, is in compliance with all terms and conditions of this Agreement (including the payment of all Fees then due and owing).

8.2. Exceptions. Notwithstanding any provisions to the contrary in this Agreement, the limited warranty set forth in Section 8.1 does not apply to problems arising out of or relating to: (a) Company IP that is modified or damaged by Customer or its representatives; (b) any operation or use of, or other activity relating to, the Company IP other than as specified in the Documentation applicable to the particular Company IP, including any incorporation in the Company IP of, or combination, operation or use of the Company IP in or with, any technology (including any software, hardware, firmware, system or network) or service not specified for Customer's use in the Documentation applicable to the particular Company IP; (c) Customer's failure to promptly install all Maintenance Releases that Company has previously made available to Customer (provided that Company will continue to provide support with respect to Software released three (3) calendar months immediately prior to the then-most-current release of the Software); (d) the operation of, or access to, Customer's or a third-party's system or network; (e) any beta software, software that Company makes available for testing or demonstration purposes, temporary software modules, or software for which Company does not receive a fee; (f) Customer's breach of any provision of this Agreement; or (g) a Force Majeure Event.

8.3. Customer Representations and Warranties. Customer hereby represents and warrants that: (a) its use of the Company IP and Documentation will comply with all Applicable Laws; (b) it has all necessary rights, licenses and consents, and has provided all necessary notices required by Applicable Laws to submit, transmit, provide, receive, access and/or use its Customer Inputs, including any personal information therein, and any other content it provides, receives, accesses and/or uses through or in connection with the Company IP or Documentation; (c) it is solely responsible for clearing all rights and paying all licensing fees and other costs and expenses arising in connection with the Customer Inputs; and (d) the Customer Inputs and Company's use or distribution thereof as contemplated by this Agreement will not result in (i) any violation of Applicable Laws or infringement or misappropriation of any rights of any third party, including any intellectual property right or privacy right, (ii) any liability from Company to any third party, or (iii) the payment by Company of any fees to any third party.

8.4.   DISCLAIMER. EXCEPT FOR THE WARRANTIES SET FORTH IN THIS SECTION 8, THE COMPANY IP ARE PROVIDED "AS IS" AND COMPANY HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE, OF MERCHANTABILITY, OR THAT THE COMPANY IP OR ANY RESULTS OF OR THE USE THEREOF, WILL MEET CUSTOMER'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEM OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR-FREE. ADDITIONALLY, COMPANY STRICTLY DISCLAIMS ALL WARRANTIES, WITH RESPECT TO ANY THIRD-PARTY PRODUCTS. CUSTOMER IS SOLELY RESPONSIBLE FOR ITS AND ITS AUTHORIZED USERS' INTERACTIONS AND SHARING OF INFORMATION WITH OTHER USERS. COMPANY RESERVES THE RIGHT, BUT HAS NO OBLIGATION, TO MONITOR DISPUTES BETWEEN CUSTOMER AND OTHER USERS WITHIN THE COMPANY IP. COMPANY EXPRESSLY DISCLAIMS ALL LIABILITY ARISING FROM CUSTOMER'S OR ITS AUTHORIZED USERS' INTERACTIONS WITH OTHER USERS, OR FOR ANY USER'S OR END USER'S ACTION OR INACTION.

9. **Data Processing**. To the extent that Company processes any data which is defined as "personal data," "personal information," or "sensitive data" in the General Data Protection Regulation (Regulation (EU) 2016/679) ("**GDPR**") or the California Consumer Privacy Act of 2018, as amended ("**CCPA**") ("**Personal Data**") via the Platform, Company shall do so in compliance with the Privacy Policy, which is incorporated herein by reference. If the Personal Data that Company processes relates to individuals who are data subjects entitled to the rights granted under GDPR, Customer agrees that Company does so as a data processor as defined in GDPR. If the Personal Data that Company processes relates to individuals who are California residents, and Customer is subject to CCPA, Customer agrees that Company does so as a service provider as defined in CCPA. The parties agree to comply with the provisions of any Data Processing Addendum (DPA) between them. In the event of any conflict between Company's privacy policy and a DPA, the DPA shall govern.

10. **Indemnification**.

10.1. Company Indemnity. Company shall defend or settle, at its own option and expense, any suit, claim, action, or proceeding brought against Customer by a third-party to the extent based upon a claim that the Company IP infringes any U.S. copyright or trademark or misappropriates any U.S. trade secret of such third-party, and will pay such damages or costs as are finally awarded against Customer by a court (or mediator or arbitrator, if applicable) of competent jurisdiction or are agreed to in a settlement that are attributable to such claim (provided that Company

may not enter into any settlement or dispose of any claim in a manner that requires Customer to admit any liability or that places any material obligation on Customer without its prior written consent, not to be unreasonably withheld, conditioned, or delayed).

10.2. <u>Company Options</u>. Should the Company IP become, or in the opinion of Company be likely to become, the subject of such an infringement claim, Company may, at its option: (a) procure for Customer the right to use the Company IP, as applicable, at no cost to Customer; (b) replace or modify, in whole or in part, the Company IP, as applicable to make it non-infringing; or (c) if neither (a) nor (b) are, in Company's sole and absolute discretion, commercially practicable, accept return of the Company IP, or remove the allegedly offending module thereof, and, refund the Fees paid for such Company IP or module by Customer, less an amount determined by multiplying the Fees paid for such Company IP or such module during the then-current Subscription Term by a fraction, the numerator of which is the number of months during the then-current Subscription Term during which Customer had use of the Company IP and the denominator of which is the total number of months during the then-current Subscription Term.

10.3. <u>Exclusions from Company Indemnity</u>. Company assumes no liability under this Section 10.3 for: (a) Third-Party Components or Open Source Components; (b) any Customer method or process in which the Company IP may be used; (b) any compliance with Customer's specifications; (c) modification of the Company IP other than: (i) by Company in connection with this Agreement or (ii) with Company's express written authorization and in strict accordance with Company's written specifications; (d) the combination, operation or use of the Company IP with non-Company technology, service or data; (e) use of any version of the Company IP other than the most current version or failure to timely implement any Maintenance Release, modification, update or replacement of the Company IP made available to Customer by Company; (f) use of the Company IP after Company's notice to Customer of such activity's alleged or actual infringement, misappropriation or other violation of a third-party's rights and provision of a non-infringing alternative; (g) negligence, abuse, misapplication, or misuse of the Company IP or Documentation by or on behalf of Customer, Customer's representatives, or a third-party; (h) use of the Company IP or Documentation by or on behalf of Customer that is outside the purpose, scope, or manner of use authorized by this Agreement; or (i) claims for which Customer is obligated to indemnify Company pursuant to Section 10.4, and Customer shall indemnify and hold harmless Company and its officers, directors, employees, agents, successors and assigns against any damages, losses, and expenses (including reasonable attorneys' fees) arising from any third-party action to the extent based upon a claim of any kind based on any of the foregoing factors in (a) through (i) (inclusive) above.

10.4. <u>Customer Indemnification</u>. Customer shall defend, indemnify, and hold harmless Company and its officers, directors, employees, agents, successors and assigns from and against any and all claims, damages, obligations, losses, liabilities, costs or debt, and expenses (including attorneys' fees) arising from or relating to: (a) Customer Inputs; or (b) Customer's or its Authorized Users': (i) use of and access to the Company IP in a manner inconsistent with this Agreement and Documentation; (ii) breach of Section 2 or 10.2; or (iii) Customer's violation of Applicable Law; or (iv) Customer's or its Authorized Users' negligence or willful misconduct.

10.5. <u>Indemnity Procedures</u>. The party seeking indemnification (the "**Indemnified Party**") must provide the party from whom indemnification is sought (the "**Indemnifying Party**"): (a) prompt written notice of the claim for which indemnification is sought (provided that a failure to provide such notice will not relieve the Indemnifying Party of its obligations hereunder except to the extent material prejudice results from such failure); (b) sole control over the defense and settlement of the claim (provided that the Indemnifying Party may not enter into any settlement or dispose of any claim in a manner that requires the Indemnified Party to admit any liability or that places any material obligation on the Indemnified Party without the Indemnified Party's prior written consent, not to be unreasonably withheld, conditioned, or delayed); and (c) all reasonable cooperation, at the Indemnifying Party's request and expense, in the defense and settlement of the claim.

10.6. <u>Sole Remedy for Infringement</u>. THIS SECTION 10 SETS FORTH COMPANY'S ENTIRE LIABILITY AND CUSTOMER'S SOLE REMEDY FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CONNECTION WITH THE COMPANY IP AND THIS AGREEMENT.

11. **<u>Limitation of Liability</u>**.

11.1. <u>Liability Caps</u>. EXCEPT WITH RESPECT TO EXCLUDED CLAIMS, IN NO EVENT SHALL EITHER PARTY'S TOTAL AGGREGATE LIABILITY ARISING UNDER THIS AGREEMENT EXCEED THE AMOUNT PAID OR PAYABLE BY CUSTOMER TO COMPANY HEREUNDER DURING THE ONE (1) YEAR PERIOD IMMEDIATELY PRIOR TO THE EVENT GIVING RISE TO SUCH LIABILITY.

11.2. <u>Damages Waiver</u>. NEITHER PARTY NOR ITS LICENSORS WILL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, INDIRECT, OR EXEMPLARY DAMAGES, INCLUDING LOST PROFITS, BUSINESS, CONTRACTS, REVENUE, GOODWILL, PRODUCTION, ANTICIPATED SAVINGS, LOSS OF DATA, OR COSTS OF PROCUREMENT OF

SUBSTITUTE GOODS OR SERVICES, OR FOR ANY CLAIM OR DEMAND BY ANY OTHER PARTY, HOWEVER CAUSED AND (TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAWS) UNDER ANY THEORY OF LIABILITY (INCLUDING NEGLIGENCE) EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

11.3. Excluded Claims. As used in this Agreement, "Excluded Claims" means: (a) Customer's breach of Section 2; (b) either party's breach of its confidentiality obligations under Section 7; (c) either party's indemnification obligations under Section 10 (provided that in no event shall Company's liability in connection with such obligations exceed two times (2X) the amount paid or payable by Customer to Company during the one (1) year period immediately prior to the event giving rise to the liability); and (d) the gross negligence or willful misconduct of either party or its agents.

11.4. Customer Acknowledgment. Customer acknowledges that the amounts payable hereunder are based in part on these limitations, and further agrees that these limitations shall apply notwithstanding any failure of essential purpose of any limited remedy.

12. **Miscellaneous**.

12.1. Assignment. Neither party shall assign or otherwise transfer this Agreement or any rights or obligations hereunder, in whole or in part, whether by operation of law or otherwise, to any third party without the other party's prior written consent. Any purported transfer, assignment or delegation without such prior written consent will be null and void and of no force or effect. Notwithstanding the foregoing, each party shall have the right to assign this Agreement to any successor to its business or assets to which this Agreement relates, whether by merger, sale of assets, sale of stock, reorganization or otherwise. Subject to this Section 12.1, this Agreement shall be binding upon and inure to the benefit of the parties hereto, and their respective successors and permitted assigns.

12.2. Delays. In the event that either party is prevented from performing or is unable to perform any of its obligations under this Agreement (other than any payment obligation) due to any Act of God, fire, casualty, flood, earthquake, war, strike, lockout, epidemic, destruction of production facilities, riot, insurrection, material unavailability, or any other cause beyond the reasonable control of the party invoking this Section 12.2 (each a "**Force Majeure Event**"), and if such party shall have used its commercially reasonable efforts to mitigate its effects, such party shall give prompt written notice to the other party, and the time for the performance shall be extended for the period of delay or inability to perform due to such occurrences.

12.3. Governing Law; Dispute Resolution. This Agreement shall in all respects be governed by the laws of the State of California without reference to its principles of conflicts of laws, and without regard to the United Nations Convention on the Sale of Goods. Subject to the following arbitration requirements, the parties hereby agree that all litigation arising out of this Agreement shall be subject to the exclusive jurisdiction of and venue in the federal and state courts within San Francisco, California. The parties hereby consent to the personal and exclusive jurisdiction and venue of these courts. For any dispute in connection with this Agreement, the parties agree to first attempt to mutually resolve the dispute informally via negotiation. If the dispute has not been resolved after thirty (30) days, the parties agree to resolve any claim, dispute, or controversy (excluding any claims for injunctive or other equitable relief as provided below) arising out of or in connection with or relating to this Agreement, or the breach or alleged breach, by binding arbitration by the American Arbitration Association ("**AAA**"), under the Expedited Procedures then in effect for AAA, except as provided herein. The arbitration will be conducted in San Francisco, California, unless otherwise agreed. Each party will be responsible for paying any AAA filing, administrative and arbitrator fees in accordance with AAA rules, and the award rendered by the arbitrator may include costs of arbitration, reasonable attorneys' fees and reasonable costs for expert and other witnesses. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. Nothing in this Section 12.3 shall be deemed as preventing either party from seeking injunctive, equitable or other relief from the courts as necessary to prevent the actual or threatened infringement, misappropriation, or violation of its data security, intellectual property rights or other proprietary rights.

12.4. Relationship of the Parties. Nothing in this Agreement is to be construed as creating an agency, partnership, or joint venture relationship between the parties hereto. Neither party shall have any right or authority to assume or create any obligations or to make any representations or warranties on behalf of any other party, whether express or implied, or to bind the other party in any respect whatsoever.

12.5. Publicity. Customer hereby grants to Company during the Subscription Term a non-exclusive, royalty-free, non-sublicensable license to use Customer's Marks in Company's advertising, literature and websites for the purpose of identifying Customer as a current or former Company client or affiliate. This license shall include the right to use quotes from Customer's Authorized Users regarding their satisfaction with Company and/or the Company IP. Customer shall have no right to use Company's Marks.

12.6. <u>Notices</u>. All notices permitted or required under this Agreement shall be in writing and shall be deemed to have been given: (a) when delivered in person (including by overnight courier); (b) three (3) business days after being mailed by first class, registered or certified mail, postage prepaid, to the address of the party specified in this Agreement or such other address as either party may specify in writing; or (c) when delivered (receipt return requested) by email. All email notices, and an email copy of any paper notice, to Company must be sent to [email].

12.7. <u>U.S. Government Restricted Rights</u>. If the Software is being licensed by the U.S. Government, the Software is commercial computer Software developed exclusively at private expense, and (a) if acquired by or on behalf of a civilian agency, shall be subject to the terms of this computer Software license as specified in 48 C.F.R. 12.212 of the Federal Acquisition Regulations and its successors; and (b) if acquired by or on behalf of units of the Department of Defense ("**DOD**") shall be subject to the terms of this commercial computer Software license as specified in 48 C.F.R. 227.7202-2, DOD FAR Supplement and its successors.

12.8. <u>Export Law Assurances</u>. Customer understands that the Company IP is or may be subject to export control laws and regulations. CUSTOMER MAY NOT DOWNLOAD OR OTHERWISE EXPORT OR RE-EXPORT THE COMPANY IP OR ANY TECHNICAL OR OTHER DATA PROVIDED IN CONNECTION THEREWITH OR ANY UNDERLYING INFORMATION OR TECHNOLOGY EXCEPT IN FULL COMPLIANCE WITH APPLICABLE LAWS, IN PARTICULAR, BUT WITHOUT LIMITATION, UNITED STATES EXPORT CONTROL LAWS. NONE OF THE COMPANY IP OR ANY UNDERLYING INFORMATION OR TECHNOLOGY MAY BE DOWNLOADED OR OTHERWISE EXPORTED OR RE- EXPORTED: (A) INTO (OR TO A NATIONAL OR RESIDENT OF) ANY COUNTRY TO WHICH THE UNITED STATES HAS EMBARGOED GOODS; OR (B) TO ANYONE ON THE U.S. TREASURY DEPARTMENT'S LIST OF SPECIALLY DESIGNATED NATIONALS OR THE U.S. COMMERCE DEPARTMENT'S LIST OF PROHIBITED COUNTRIES OR DEBARRED OR DENIED PERSONS OR ENTITIES. CUSTOMER HEREBY AGREES TO THE FOREGOING AND REPRESENTS AND WARRANTS THAT CUSTOMER IS NOT LOCATED IN, UNDER CONTROL OF, OR A NATIONAL OR RESIDENT OF ANY SUCH COUNTRY OR ON ANY SUCH LIST.

12.9. <u>Counterparts</u>. This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

12.10. <u>Interpretation</u>. The words "hereof," "herein," and "hereunder" and words of similar import, when used in this Agreement, will refer to this Agreement as a whole and not to any particular provision of this Agreement. Terms defined in the singular will have correlative meanings when used in the plural, and vice versa. The headings herein are for convenience of reference only, do not constitute part of this Agreement and will not be deemed to limit or otherwise affect any of the provisions hereof. Where a reference in this Agreement is made to a section, exhibit or schedule, such reference will be to a Section or Exhibit to this Agreement unless otherwise indicated. Whenever the words "include," "includes" or "including" are used in this Agreement, they will be deemed to be followed by the words "without limitation," unless preceded by the word "not."

12.11. <u>Advice of Legal Counsel</u>. Each party acknowledges and represents that, in executing this Agreement, it has had the opportunity to seek advice as to its legal rights from legal counsel and that the person signing on its behalf has read and understood all of the Terms. This Agreement shall not be construed against any party by reason of the drafting or preparation thereof.

12.12. <u>Costs</u>. If any action at law or in equity (including arbitration) is necessary to enforce or interpret the Terms, the prevailing party shall be entitled to reasonable attorney's fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.

12.13. <u>Entire Agreement; Modification; Waiver; Severability</u>. This Agreement represents the entire agreement between the parties, and supersedes all prior agreements and understandings, written or oral, with respect to the matters covered by this Agreement, and is not intended to confer upon any third party any rights or remedies hereunder. Customer acknowledges that it has not entered in this Agreement based on any representations other than those contained herein. Except as otherwise provided herein, no modification of or amendment to this Agreement, nor any waiver of any rights under this Agreement, shall be effective unless in writing and signed by both parties. No online (click wrap, browse wrap, or other) posted terms, nor any ordering documents, apply. The waiver of one breach or default or any delay in exercising any rights shall not constitute a waiver of any subsequent breach or default. If any provision of this Agreement is held invalid or unenforceable under Applicable Laws by a court of competent jurisdiction, it shall be replaced with the valid provision that most closely reflects the intent of the parties and the remaining provisions of the Agreement will remain in full force and effect.