

# Terms of Service

IMPORTANT: IF CUSTOMER DOES NOT AGREE TO ALL OF THESE TERMS AND CONDITIONS, CUSTOMER MAY NOT ACCESS OR USE RAINFOREST SERVICES. BY CHECKING THE ACCEPTANCE BOX OR USING ALL OR ANY PORTION OF THE SOFTWARE, YOU ARE ACCEPTING ALL OF THE TERMS AND CONDITIONS OF THIS AGREEMENT.

This Rainforest Subscription Terms of Service (“**Agreement**”) is between Rainforest and the customer (individual or entity) that has purchased a subscription to Rainforest Services (“**Customer**” or “**you**” or “**your**”). “**Rainforest**” means the Rainforest entity designated on the applicable Ordering Document (as defined below). If you are an individual using Rainforest Services on behalf of a corporation, partnership or other entity, then that entity will be the Customer, and you represent and warrant that you are authorized to enter into this Agreement on behalf of such entity and bind such entity to the terms and conditions of this Agreement. The “**Effective Date**” of this Agreement is the date which is the earlier of (a) Customer’s initial access to Rainforest Services through any online provisioning, registration or order process or (b) the effective date of the first Ordering Document referencing this Agreement.

This Agreement permits the parties to enter into order forms referencing this Agreement (“**Ordering Document(s)**”), which set forth the services ordered by Customer, specify the fees payable by Customer and may contain other terms and conditions. This Agreement includes any and all attachments and referenced policies, including without limitation the Rainforest Services Support Policy and all Ordering Documents entered into between the parties.

From time to time, Rainforest may modify this Agreement. Unless otherwise specified by Rainforest, changes become effective for existing subscription Customers upon renewal of the then-current Subscription Term. Rainforest will use reasonable efforts to notify Customer of the changes through communications through Rainforest Services, email, or other means. Customer may be required to click to accept the modified Agreement before using Rainforest Services in a renewal Subscription Term, and in any event continued use of Rainforest Services during the renewal Subscription Term will constitute Customer’s acceptance of the version of the Agreement in effect at the time the renewal Subscription Term begins.

**Each party expressly agrees that this Agreement is legally binding upon it.**

# 1. RAINFOREST SERVICES

**1.1. Provision of Products.** Rainforest Services is a hosted service permitting Customer to access and use Rainforest's cloud-based QA-as-a-service products and services (the "**Rainforest Services**"). The Rainforest Services are described more fully in the then-current version of any supporting technical documentation provided to Customer by Rainforest ("**Documentation**"). Rainforest Services are provided on a subscription basis for a set term designated herein or in the applicable Ordering Document (each, a "**Subscription Term**").

**1.2. Access to Products.** Subject to the terms and conditions of the Agreement, Rainforest hereby grants to Customer a non-exclusive, non-transferable, worldwide right during the applicable Subscription Term to access and use Rainforest Services solely for Customer's business purposes and pursuant to the Documentation and any restrictions designated in the applicable Ordering Document.

**1.3. Permitted Users.** As part of the registration process, Customer will identify an administrative user name and password for Customer's Rainforest account. Customer may use the administrative user name and password to create standard users (each with a user password) up to the maximum number, if any, designated in the Ordering Documents. Use of and access to Rainforest Services is permitted only by the number of users specified in the applicable Ordering Document, if a maximum number is designated therein (each, with the administrative user, the "**Permitted Users**"). The Permitted Users will receive user IDs and passwords to access Rainforest Services. These credentials are granted to individual, named persons and may not be shared. Customer will ensure that all Permitted Users keep these credentials strictly confidential. Customer is responsible for any and all actions taken by Permitted Users or by anyone using Customer's accounts and passwords. Subject to the terms and conditions of this Agreement, in addition to Customer's employees, Customer may permit (a) its independent contractors and consultants who are not competitors of Rainforest ("**Contractors**") and (b) Customer's Affiliates to serve as Permitted Users. Customer will remain responsible for compliance by each of its Permitted Users with all of the terms and conditions of this Agreement, and any use of Rainforest Services by Permitted Users must be for the sole benefit of Customer. Use of Rainforest Services by all Permitted Users in the aggregate must be within the restrictions in the applicable Ordering Document. "**Affiliate**" means each legal entity that is directly or indirectly controlled by Customer on or after the Effective Date, for so long as such entity remains directly or indirectly controlled by Customer (where "**controlled**" means the ownership of, or the power to vote, directly or indirectly, a majority of any class of voting securities of a corporation or limited liability company, or the ownership of any general partnership interest in any general or limited partnership).

**1.4. Third-Party Code.** The Software may contain or be provided with components which are licensed from third parties ("**Third Party Code**"), including components subject to the terms and conditions of "open source" software licenses ("**Open Source Software**"). Open Source Software may be identified in the Documentation, or in a list of the Open Source Software provided to Customer upon written request. To the extent required by the license that accompanies the Open Source Software, the terms of such license will apply in lieu of the terms of this Agreement with respect to such Open Source Software, including, without limitation, any provisions governing access to source code, modification or reverse engineering.

**1.5. General Restrictions.** Customer shall not: (a) rent, lease, copy, sell, provide access to or sublicense Rainforest Services to a third party, (b) reverse engineer, decompile, disassemble, or otherwise seek to obtain the source code or APIs to Rainforest Services, except to the extent expressly permitted by applicable law (and then only upon advance notice to Rainforest), (c) modify Rainforest Services or any Documentation, or create any derivative product from any of the foregoing, (d) remove or obscure any product identification, proprietary, copyright or other notices contained in Rainforest Services (including any reports or data printed via the use of Rainforest Services), (e) incorporate Rainforest Services into any other offering (whether software as a service or otherwise), (f) use Rainforest Services to develop a product which is competitive with any Rainforest product offering or (g) publicly disseminate information or analysis regarding the performance of Rainforest Services.

**1.6 Trial Services.** If you receive free access or a trial or evaluation subscription to the Rainforest Services (a "**Trial Subscription**"), then you may use the Rainforest Services in accordance with the terms and conditions of this Agreement for a period of fourteen (14) days or such other period granted by Rainforest (the "**Trial Period**"). Trial Subscriptions are permitted solely for Customer's use to determine whether to purchase a paid subscription to the Rainforest Services. Trial Subscriptions may not include all functionality and features accessible as part of a paid subscription. If Customer does not enter into a paid subscription for Rainforest Services, this Agreement and Customer's right to access and use the Rainforest Services will terminate at the end of the Trial Period. Rainforest has the right to terminate a Trial Subscription at any time for any reason. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, RAINFOREST WILL HAVE NO WARRANTY, INDEMNITY, SUPPORT, OR OTHER OBLIGATIONS WITH RESPECT TO TRIAL SUBSCRIPTIONS.

## 2. CUSTOMER DATA AND CUSTOMER OBLIGATIONS

**2.1. Customer Data.** “**Customer Data**” means any business information or other data which Customer inputs, or provides to Rainforest for inputting, into Rainforest Services.

**2.2. Customer Obligations.** Customer shall ensure that Customer’s use of Rainforest Services and all Customer Data is at all times compliant with Customer’s privacy policies and all applicable local, state, federal and international law, regulations and conventions, including without limitation those related to data privacy, international communications and the exportation of technical or personal data. Customer is solely responsible for the accuracy, content and legality of all Customer Data. Customer represents and warrants to Rainforest that Customer has sufficient rights in the Customer Data to authorize Rainforest to process, distribute and display the Customer Data as contemplated by this Agreement, and that the Customer Data and its use hereunder will not violate or infringe the rights of any third party.

**2.3. Rights in Customer Data.** As between the parties, Customer shall retain all right, title and interest (including any and all intellectual property rights) in and to the Customer Data as provided to Rainforest. Subject to the terms of this Agreement, Customer hereby grants to Rainforest a non-exclusive, worldwide, royalty-free right to use, copy, store, transmit, distribute, perform and display (including publicly), modify and create derivative works of the Customer Data solely to the extent necessary to provide Rainforest Services. Customer owns all right, title and interest in and to any test scripts that Customer provides as part of the Services.

**2.4. Aggregated Anonymous Data.** In addition to the license rights in Section 2.3, Rainforest may aggregate Customer’s metadata and usage data so that the results are non-personally identifiable with respect to Customer (“Aggregated Anonymous Data”). The Aggregated Anonymous Data will be deemed Rainforest Technology, and Customer acknowledges that Rainforest may use the Aggregated Anonymous Data (i) for its own internal, statistical analysis, (ii) to develop and improve Rainforest Services and (iii) to create and distribute reports and other materials regarding use of Rainforest Services. For clarity, nothing in this Section 2.4 gives Rainforest the right to publicly identify Customer as the source of any Aggregated Anonymous Data without Customer’s prior written condition.

## 3. OWNERSHIP

**3.1. Rainforest Technology.** This is a subscription agreement for use of Rainforest Services and not an agreement for sale. Customer acknowledges that it is obtaining only a limited right to use Rainforest Services on a hosted basis and that irrespective of any use of the words “purchase”, “sale” or like terms hereunder no ownership rights are being conveyed to Customer. Customer agrees that

Rainforest or its suppliers retain all right, title and interest (including all patent, copyright, trade secret and other intellectual property rights) in and to Rainforest Services, the Documentation, any other Rainforest deliverables and any and all related and underlying software (including interfaces), databases (including data models, structures, Aggregated Anonymous Data and any other non-Customer specific data and statistical data), technology, reports and documentation and all copies, modifications and derivative works thereof (including any changes which incorporate any Feedback) (collectively, "Rainforest Technology"). Further, Customer acknowledges that Rainforest Services is offered as an on-line, hosted solution, and that Customer has no right to obtain a copy of the Rainforest Services code itself. Nothing in this Section 3.1 shall be deemed as granting Rainforest ownership of Customer Data or in any way impacting Customer's ownership of Customer Data.

**3.2. Feedback.** Customer, from time to time, may submit comments, information, questions, data, ideas, descriptions of processes, or other information to Rainforest ("Feedback"). Rainforest may in connection with any of its products or services freely use, copy, disclose, license, distribute and exploit any Feedback in any manner without any obligation, royalty or restriction based on intellectual property rights or otherwise.

## 4. SUBSCRIPTION TERM, FEES & PAYMENT

**4.1. Subscription Term.** Unless otherwise specified on the applicable Ordering Document, each Subscription Term shall begin on the effective date of the applicable Ordering Document and expire twelve (12) months thereafter ("**Initial Subscription Term**"). Thereafter, the Initial Term will automatically be renewed for successive one-year renewal terms from the end of the Initial Term unless Customer or Rainforest provides written notice of its intent not to renew no later than 60 days prior to the end of the current Term (each, a "**Renewal Subscription Term**"). The Initial Term and any Renewal Term are collectively referred to as the "**Subscription Term.**" If Customer's subscription is not renewed, Customer's access to Rainforest Services will terminate at the end of the then-current Subscription Term.

**4.2. Fees and Payment.** All fees are as set forth in the Ordering Document and shall be paid by Customer within thirty (30) days of the effective date of the applicable Ordering Document, unless otherwise specified in such Ordering Document. During the applicable Subscription Term, you authorize Rainforest to charge your payment instrument in accordance with this Agreement the applicable Ordering Document. Except as expressly set forth in Section 6 (Limited Warranty) and Section 9.1 (Rainforest Indemnification for Intellectual Property Infringement), all fees due under the

Agreement are non-cancelable and the sums paid non-refundable. Rainforest may change the price of the Rainforest Services that Customer has selected. If the price of a specific Rainforest Service is increased, then Rainforest will provide Customer with written notice via email and/or publication on the Rainforest website at least seventy-five (75) days prior to the Renewal Subscription Term in which the price increase shall apply. Should the Rainforest Services continue beyond the Initial Subscription Term, the fees for the Renewal Subscription Term may be increased no more than five percent (5%) per year or as mutually agreed by the parties in writing. Unless timely provided with a valid certificate of exemption or other evidence that items are not taxable, Rainforest will invoice Customer for all applicable taxes including, but not limited to, VAT, GST, sales tax, consumption tax and service tax. Customer will make all payments free and clear of, and without reduction for, any withholding or other taxes; any such taxes imposed on payments by Customer hereunder will be Customer's sole responsibility. Any late payments shall be subject to a service charge equal to 1.5% per month of the amount due or the maximum amount allowed by law, whichever is less.

**4.3. Disputed Fees.** If Customer believes that Rainforest has billed Customer incorrectly, Customer must contact Rainforest no later than 60 days after the closing date on the first billing statement in which the alleged error or problem appeared, in order to receive an adjustment or credit. Inquiries should be directed to Rainforest's customer support department.

**4.4. Suspension of Services.** If Customer's account is thirty (30) days or more overdue, in addition to any of its other rights or remedies (including but not limited to any termination rights set forth herein), Rainforest reserves the right to suspend Customer's access to Rainforest Services without liability to Customer until such amounts are paid in full.

**4.5 Payment Processing.** Rainforest's payment page is powered by third-party payment processor, Stripe, Inc. and its affiliates ("**Stripe**"). RAINFOREST DOES NOT PROCESS PAYMENT FOR ANY PURCHASES. Payment processing via bank account, credit card or debit card for the Rainforest Services are provided by Stripe and are subject to the Stripe terms and conditions and other policies available at <https://stripe.com/legal> and Stripe's Global Privacy Policy available at: <https://stripe.com/privacy> (collectively, the "**Stripe Agreements**"). By agreeing to the terms of this Agreement and the applicable Ordering Document, Customers also agree to be bound by the Stripe Agreements, as the same may be modified by Stripe from time to time. As a condition of Rainforest enabling payment processing services through Stripe, you represent and warrant to Rainforest that all information you provide about your payment instruments and/or bank accounts is true and that you are authorized to use such payment instrument and/or bank account, as applicable. You also authorize Rainforest to share such information and other transaction information related to your payment for Rainforest Services with Stripe. You will promptly update your account information with any changes (for example, a change in your billing address or credit card expiration date) that may

occur. Rainforest assumes no liability or responsibility for any payments you make for the Rainforest Services.

## 5. TERM AND TERMINATION

**5.1. Term.** This Agreement is effective as of the Effective Date and expires on the date of expiration or termination of all Subscription Terms. The Subscription Term with respect to services under an Ordering Document shall be as set forth in such Ordering Document and shall commence, unless otherwise expressly provided in such Ordering Document, upon the effective date of the Ordering Document.

**5.2. Termination for Cause.** Either party may terminate this Agreement (including all related Ordering Documents and Subscription Terms) if the other party (a) fails to cure any material breach of this Agreement (including a failure to pay fees) within thirty (30) days after written notice; (b) ceases operation without a successor; or (c) seeks protection under any bankruptcy, receivership, trust deed, creditors' arrangement, composition, or comparable proceeding, or if any such proceeding is instituted against that party (and not dismissed within sixty (60) days thereafter).

**5.3. Effect of Termination.** Upon any termination or expiration of this Agreement, Customer shall immediately cease any and all use of and access to Rainforest Services and delete (or, at Rainforest's request, return) any and all copies of the Documentation, any Rainforest passwords or access codes and any other Rainforest Confidential Information in its possession. Customer acknowledges that, except as exported or printed prior to termination or expiration by Customer as may be permitted through the functionality of Rainforest Services, following termination or expiration it shall have no further access to any Customer Data input into Rainforest Services, and that Rainforest may delete any such data at any time. Except where an exclusive remedy is specified in this Agreement, the exercise by either party of any remedy under this Agreement, including termination, will be without prejudice to any other remedies it may have under this Agreement, by law, or otherwise.

**5.4. Survival.** The following Sections shall survive any expiration or termination of this Agreement: Sections 1.5 (General Restrictions), 1.6 (Trial Services), 2.6 (Aggregated Anonymous Data), 3 (Ownership), 4.2 (Fees and Payment), 4.5 (Payment Processing) 5 (Term and Termination), 6.3(Warranty Disclaimer), 8 (Limitation of Remedies and Damages), 9.2 (Indemnification by Customer), 10 (Confidential Information) and 13 (General Terms).

# 6. LIMITED WARRANTY

**6.1. Limited Warranty.** Rainforest warrants, for Customer's benefit only, that Rainforest Services will operate in substantial conformity with the applicable Documentation. Rainforest does not warrant that Customer's use of Rainforest Services will be uninterrupted or error-free, nor does Rainforest warrant that it will review the Customer Data for accuracy or that it will preserve or maintain the Customer Data without loss. Rainforest's sole liability (and Customer's sole and exclusive remedy) for any breach of this warranty shall be, in Rainforest's sole discretion and at no charge to Customer, to use commercially reasonable efforts to correct the reported non-conformity, or if Rainforest determines such remedy to be impracticable, to allow Customer to terminate the applicable Subscription Term and receive as its sole remedy a refund of: (a) the monthly subscription fees specified in the applicable Ordering Document which are allocable to the thirty (30) day period prior to the date the warranty claim was made and (b) any fees Customer has pre-paid for use of Rainforest Services or related services it has not received as of the date of the warranty claim. The limited warranty set forth in this Section 6.1 shall not apply: (i) unless Customer makes a claim within thirty (30) days of the date on which the condition giving rise to the claim first appeared, (ii) if the error was caused by misuse, unauthorized modifications or third-party hardware, software or services or (iii) to use provided on a no-charge or evaluation basis.

**6.2. Exclusions.** The above warranty shall not apply: (i) if Rainforest Services is used with hardware or software not authorized in the Documentation; or (ii) other use provided on a no charge or evaluation basis.

**6.3. Warranty Disclaimer.** EXCEPT FOR THE LIMITED WARRANTY IN SECTION 6.1, RAINFOREST SERVICES AND ALL SERVICES, INCLUDING WITHOUT LIMITATION THE THIRD-PARTY CODE ARE PROVIDED "AS IS". RAINFOREST DOES NOT GUARANTEE ANY RESULTS FROM USING THE SERVICES. RAINFOREST DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE OR MEET CUSTOMER'S REQUIREMENTS; NOR DOES IT MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. NEITHER RAINFOREST NOR ANY OF ITS SUPPLIERS MAKES ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NONINFRINGEMENT. CUSTOMER MAY HAVE OTHER STATUTORY RIGHTS. HOWEVER, TO THE FULL EXTENT PERMITTED BY LAW, ANY STATUTORILY REQUIRED WARRANTIES SHALL BE LIMITED AS PROVIDED HEREIN. RAINFOREST SHALL NOT BE LIABLE FOR DELAYS, INTERRUPTIONS, SERVICE FAILURES AND OTHER PROBLEMS INHERENT IN USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS OR OTHER SYSTEMS OUTSIDE THE REASONABLE CONTROL OF RAINFOREST.



## 7. SUPPORT AND MAINTENANCE; PERFORMANCE STANDARDS.

During the Subscription Term, Rainforest Services are subject to the support and maintenance and performance standards terms set forth at <https://www.rainforestqa.com/mas2018>

## 8. LIMITATION OF REMEDIES AND DAMAGES

**8.1. Liability.** IN SECTION 8 (LIMITATION OF REMEDIES AND DAMAGES), “LIABILITY” MEANS ANY LIABILITY, WHETHER UNDER CONTRACT, TORT, OR OTHERWISE.

**8.2. Limitations.** SUBJECT TO SECTION 8.3 (EXCEPTIONS TO LIMITATIONS):

(a) NEITHER PARTY WILL HAVE ANY LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT FOR: (1) THE OTHER PARTY’S LOST REVENUES; (2) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY; (3) INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSSES (WHETHER OR NOT FORESEEABLE OR CONTEMPLATED BY THE PARTIES AT THE EFFECTIVE DATE); OR (4) EXEMPLARY OR PUNITIVE DAMAGES; EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF ANY OF THE FOREGOING TYPES OF LOSSES OR DAMAGES; AND

(b) EACH PARTY’S AGGREGATE LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT WILL NOT EXCEED THE AMOUNT CUSTOMER PAID TO RAINFOREST UNDER THIS AGREEMENT FOR THE 12 MONTHS PRECEDING THE SUBJECT CLAIM.

**8.3. Exceptions to Limitations.** NOTHING IN THIS AGREEMENT EXCLUDES OR LIMITS EITHER PARTY’S LIABILITY FOR: (A) DEATH OR PERSONAL INJURY RESULTING FROM ITS GROSS NEGLIGENCE OR THE GROSS NEGLIGENCE OF ITS PERSONNEL; (B) FRAUD OR FRAUDULENT MISREPRESENTATION; (C) BREACH OF SECTION 10 (CONFIDENTIAL INFORMATION) OR SECTION 11 (DATA SECURITY); (D) OBLIGATIONS UNDER SECTION 4.2

(FEES AND PAYMENT) AND SECTION 9 (INDEMNIFICATION); OR (E) MATTERS FOR WHICH LIABILITY CANNOT BE EXCLUDED OR LIMITED UNDER APPLICABLE LAW.

**8.4. Failure of Essential Purpose.** The parties agree that the limitations specified in this Section 8 will survive and apply even if any limited remedy specified in this Agreement is found to have failed of its essential purpose.

## 9. INDEMNIFICATION

**9.1. Rainforest Indemnification for Intellectual Property Infringement.** Subject to Section 9.3 (Procedures) and the remainder of this Section 9.1, Rainforest shall (a) defend Customer from and against any claim by a third party alleging that Rainforest Services, when used as authorized under this Agreement, directly infringes such third party's U.S. patent, U.S. copyright, or U.S. trademark and (b) in relation to such claim, indemnify and hold harmless Customer from any damages and costs finally awarded or agreed to in settlement by Rainforest (including reasonable attorneys' fees). If Customer's use of Rainforest Services is, or in Rainforest's opinion is likely to be, enjoined due to the type of infringement specified above, if required by settlement, or if Rainforest determines such actions are reasonably necessary to avoid material liability, Rainforest may, in its sole discretion: (i) substitute substantially functionally similar products or services; (ii) procure for Customer the right to continue using Rainforest Services; or if (i) and (ii) are not commercially reasonable, (iii) terminate the Agreement and refund to Customer the fees paid by Customer for the portion of the Subscription Term which was paid by Customer but not rendered by Rainforest. The foregoing indemnification obligation of Rainforest shall not apply: (1) if Rainforest Services is modified by any party other than Rainforest, but solely to the extent the alleged infringement is caused by such modification; (2) Rainforest Services is combined with other non-Rainforest Services services or processes not authorized by Rainforest, but solely to the extent the alleged infringement is caused by such combination; (3) to any unauthorized use of Rainforest Services; (4) to any action arising as a result of Customer Data or any third-party components contained within or uploaded to Rainforest Services; or (5) if Customer settles or makes any admissions with respect to a claim without Rainforest's prior written consent. THIS SECTION 9.1 SETS FORTH RAINFOREST'S SOLE LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO ANY CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT.

**9.2. Indemnification by Customer.** Subject to Section 9.3 (Procedures), Customer shall defend, indemnify and hold harmless Rainforest and its employees, agents, successors and assigns from and against any and all losses, damages, liabilities, costs and expenses arising from any claim based on or arising from: (a) the Customer Data, including without limitation any claim based on Customer's

breach or alleged breach of Section 2.2 (Customer Obligations) or alleging that the Customer Data infringes upon any valid patent, copyright, trademark, trade secret, or other proprietary right of, or otherwise harms, such third party; or (b) Customer's use of Rainforest Services in violation of this Agreement.

**9.3. Procedures.** The obligations of each indemnifying party are conditioned upon receiving from the party seeking indemnification: (i) prompt written notice of the claim (but in any event notice in sufficient time for the indemnifying party to respond without prejudice); (ii) the exclusive right to control and direct the investigation, defense and settlement (if applicable) of such claim; and (iii) all reasonable necessary cooperation of the indemnified party.

## 10. CONFIDENTIAL INFORMATION

Each party (as "**Receiving Party**") agrees that all code, inventions, know-how, business, technical and financial information it obtains from the disclosing party ("**Disclosing Party**") constitute the confidential property of the Disclosing Party ("**Confidential Information**"), provided that it is identified as confidential at the time of disclosure or should be reasonably known by the Receiving Party to be Confidential Information due to the nature of the information disclosed and the circumstances surrounding the disclosure. Any Rainforest Technology, performance information relating to Rainforest Services, and the terms and conditions of this Agreement shall be deemed Confidential Information of Rainforest without any marking or further designation. Customer Data shall be deemed Customer's Confidential Information without any marking or further designation. Except as expressly authorized herein, the Receiving Party will hold in confidence and not use or disclose any Confidential Information. The Receiving Party's nondisclosure obligation shall not apply to information which the Receiving Party can document: (i) was rightfully in its possession or known to it prior to receipt of the Confidential Information; (ii) is or has become public knowledge through no fault of the Receiving Party; (iii) is rightfully obtained by the Receiving Party from a third party without breach of any confidentiality obligation; or (iv) is independently developed by employees of the Receiving Party who had no access to such information. The Receiving Party may also disclose Confidential Information if so required pursuant to a regulation, law or court order, but only to the minimum extent required to comply with such regulation or order and with advance notice to the Disclosing Party. The Receiving Party acknowledges that disclosure of Confidential Information could cause substantial harm for which damages alone would not be a sufficient remedy, and therefore upon any such disclosure by the Receiving Party the Disclosing Party shall be entitled to seek appropriate equitable relief in addition to whatever other remedies it might have at law.

# 11. DATA SECURITY

Rainforest will take reasonable technical and organizational measures designed to keep the Customer Data secure and to protect it against accidental loss or unlawful destruction, alteration, disclosure or access. Customer acknowledges and agrees that no personally identifiable information is required for the Rainforest Services and will use its commercially reasonable efforts to prevent sharing of such information with the Rainforest Services and Rainforest.

# 12. PREMIUM SUPPORT

Rainforest shall provide Premium Support and other the professional services ("**Premium Support**") as may be described in an applicable Ordering Document or statement of work. The parties acknowledge that the scope of the Premium Support provided hereunder consists solely of either or both of: (a) assistance with setup, deployment, and/or optimization of the Rainforest Services, and (b) customizations to the Rainforest Services. Customer shall have a license right to use any deliverables (including any documentation or other work product) delivered as part of the Premium Support ("**Deliverables**") solely in connection with Customer's permitted use of the Rainforest Services, subject to all the same use restriction terms (including in Section 2.1), and subject to any additional terms and conditions provided with the Deliverables. Customer may order Premium Support under an Ordering Document or statement of work describing the work to be performed, fees and any applicable milestones, dependencies and other technical specifications or related information. Each Ordering Document or statement of work, as applicable, must be signed by both parties before Rainforest shall commence work under such document. Customer will reimburse Rainforest for reasonable travel and lodging expenses as incurred, at cost.

# 13. GENERAL TERMS

**13.1. Assignment.** This Agreement will bind and inure to the benefit of each party's permitted successors and assigns. Neither party may assign this Agreement except upon the advance written consent of the other party, except that (a) either party may assign this Agreement in connection with a merger, reorganization, acquisition or other transfer of all or substantially all of such party's assets or voting securities and (b) Rainforest may assign this Agreement to any direct or indirect parent, subsidiary or affiliate company. For any assignment by Customer as permitted in the previous

sentence: (i) the assignee must not be a direct competitor of Rainforest; (ii) Customer must provide prompt written notice of the assignment to Rainforest; and (iii) the assignee must be capable of fully performing Customer's obligations under this Agreement and must agree to be bound by the terms and conditions of this Agreement. Any attempt to transfer or assign this Agreement except as expressly authorized under this Section 13.1 will be null and void.

**13.2. Insurance.** Rainforest will maintain, with financially sound and reputable insurers, insurance with respect to its business against such casualties and contingencies, of such types, on such terms and in such amounts (including deductibles) as is customary in the case of entities of established reputations engaged in the same or a similar business and similarly situated. Any insurance maintained by Rainforest shall be primary and any insurance carried by Customer shall be secondary and non-contributory to that carried by Rainforest.

**13.3. Severability.** If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited to the minimum extent necessary so that this Agreement shall otherwise remain in effect.

**13.4. Governing Law; Jurisdiction and Venue.** Excluding conflict of laws rules, this Agreement shall be governed by and construed under the laws of the State of California, U.S.A. All disputes arising out of or in relation to this Agreement shall be submitted to the exclusive jurisdiction of the courts of San Francisco, California. Nothing in this section shall restrict Rainforest's right to bring an action (including for example a motion for injunctive relief) against Customer in the jurisdiction where Customer's place of business is located. The United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transactions Act, as currently enacted by any jurisdiction or as may be codified or amended from time to time by any jurisdiction, do not apply to this Agreement.

**13.5. Attorneys' Fees and Costs.** The prevailing party in any action to enforce this Agreement will be entitled to recover its attorneys' fees and costs in connection with such action.

**13.6. Rainforest's Customer List.** Customer agrees that Rainforest may disclose Customer as a customer of Rainforest and use Customer's name and logo on Rainforest's web site and in Rainforest's promotional materials.

**13.7. Notice.** Any notice or communication required or permitted under this Agreement shall be in writing to the parties at the addresses set forth on the Ordering Document or at such other address as may be given in writing by either party to the other in accordance with this paragraph and shall be deemed to have been received by the addressee: (i) if given by hand, immediately upon receipt; (ii) if

given by overnight courier service, the first business day following dispatch or (iii) if given by registered or certified mail, postage prepaid and return receipt requested, the second business day after such notice is deposited in the mail.

**13.8. Amendments; Waivers.** No supplement, modification, or amendment of this Agreement shall be binding, unless executed in writing by a duly authorized representative of each party to this Agreement. No waiver will be implied from conduct or failure to enforce or exercise rights under this Agreement, nor will any waiver be effective unless in a writing signed by a duly authorized representative on behalf of the party claimed to have waived. No provision of any purchase order or other business form employed by Customer, including any electronic invoicing portals and vendor registration processes, will supersede the terms and conditions of this Agreement, and any such document relating to this Agreement shall be for administrative purposes only and shall have no legal effect. Rainforest may modify the Rainforest Services Support policy discussed in Section 7 from time to time to reflect process improvements or changing practices. However, the modifications will not materially decrease Rainforest's support or security obligations as compared to those in effect as of the effective date of the then-current Subscription Term.

**13.9. Entire Agreement.** This Agreement (including each Ordering Document, and any other mutually agreed exhibits or attachments) is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this Agreement. Customer acknowledges that Rainforest Services is an on-line, subscription-based product, and that in order to provide improved customer experience Rainforest may make changes to Rainforest Services and Rainforest will update the Documentation accordingly.

**13.10. Audit Rights.** Upon Rainforest's written request, Customer shall furnish Rainforest with a signed certification certifying that Rainforest Services is being used pursuant to the terms of this Agreement, including any access and user limitations. With prior reasonable notice of at least 10 days, Rainforest may audit the use of Rainforest Services by Customer provided such audit is during regular business hours. Customer is responsible for such audit costs only in the event the audit reveals that Customer's use of Rainforest Services is not in accordance with the permitted scope of use.

**13.11. Force Majeure.** Neither party shall be liable to the other for any delay or failure to perform any obligation under this Agreement (except for a failure to pay fees) if the delay or failure is due to unforeseen events which occur after the signing of this Agreement and which are beyond the reasonable control of such party, such as a strike, blockade, war, act of terrorism, riot, natural disaster, failure or diminishment of power or telecommunications or data networks or services, or refusal of a license by a government agency.

**13.12. Subcontractors.** Rainforest may use the services of subcontractors for performance of services under this Agreement, provided that Rainforest remains responsible for (i) compliance of any such subcontractor with the terms of this Agreement and (ii) the overall performance of Rainforest Services as required under this Agreement.

**13.13. Third Party Beneficiaries.** No third party is intended to be a beneficiary of this Agreement entitled to enforce its terms directly.

**13.14. Independent Contractors.** The parties to this Agreement are independent contractors. There is no relationship of partnership, joint venture, employment, franchise or agency created hereby between the parties. Neither party will have the power to bind the other or incur obligations on the other party's behalf without the other party's prior written consent.

**13.15. Government End-Users.** Rainforest Services is based upon commercial computer software. If the user or licensee of Rainforest Services is an agency, department or other entity of the United States Government, the use, duplication, reproduction, release, modification, disclosure or transfer of Rainforest Services, or any related documentation of any kind, including technical data and manuals, is restricted by a license agreement or by this Agreement in accordance with Federal Acquisition Regulation 12.212 for civilian purposes and Defense Federal Acquisition Regulation Supplement 227.7202 for military purposes. Rainforest Services was developed fully at private expense. All other use is prohibited.

**13.16. Export Control.** In its use of Rainforest Services, Customer agrees to comply with all export and import laws and regulations of the United States and other applicable jurisdictions. Without limiting the foregoing, (i) Customer represents and warrants that it is not listed on any U.S. government list of prohibited or restricted parties or located in (or a national of) a country that is subject to a U.S. government embargo or that has been designated by the U.S. government as a "terrorist supporting" country and (ii) Customer shall not (and shall not permit any of its Permitted Users or others to) access or use the Rainforest Services in violation of any U.S. export embargo, prohibition or restriction.