

WELCOME



Continuing Legal Education Arm
of the Pennsylvania Bar Association

Negotiating Software & Technology Contracts

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Key Issues and Principles

Three Primary Concerns

- Payment for performance
- Fair allocation of risk and responsibility
- Avoid surprises

The Performance Principle

The customer should receive the expected service, product or software in order for the vendor to receive what it expects and wants – payment.

- Effort is not enough, results count.
- Acceptance testing is important.
- Issues can arise even for out-of-the-box software (e.g., compatibility).

The Performance Principle

Payment should be tied to performance, not merely delivery of the software or execution of the agreement.

- If the software is unsatisfactory and things do not work out, the vendor should be held accountable.
- Incorporate monetary consequences, such as a refund or prospective maintenance and support fee credits.

The Performance Principle

Consider pushing back on mutual termination for convenience provisions.

- Vendors' termination rights should not go beyond rights to quit for non-payment or when there is no outstanding Statement of Work (“SOW”).
- Customers should consider pushing to remove the vendor's right to terminate for convenience.

The Performance Principle

For customers, try to include terms related to acceptance procedures and support/maintenance obligations in the master service agreement (“MSA”) or other primary agreement with the vendor.

- It may be fine to cover these kinds of terms in the SOW, too.

The Performance Principle

Customer clients should review representations and warranties carefully to ensure adequate coverage.

- It is worth pushing for certain representations and warranties in a software agreement.
 - E.g., most current, no bugs/viruses, no self-help embedded, etc.
- These can be added to either the main agreement or an applicable SOW.

Fair Allocation of Risk and Responsibility

- Any limitation of liability (“LOL”) dollar amount should be mutual and tied to payments made under the agreement.
 - Not just the last 12 months.
- Include a floor or minimum LOL amount, in case one party causes harm to the other before payment occurs.

Fair Allocation of Risk and Responsibility

Be careful if a Vendor's proposed limitation of liability is too low and one-sided in the vendor's favor.

- If the LOL is based on the amount paid by the customer, the Vendor could cause harm on day one and be exposed to zero liability.
- Counter this by pushing for a certain monetary amount as the floor in the event the LOL is triggered.
- Include a general exception for personal injury, property damage, indemnification and confidentiality.

Fair Allocation of Risk and Responsibility

Avoid terms that compensate the Vendor for down time or a lack of service availability.

- Push for an ability to terminate if there the Vendor repeatedly fails to hit service availability goals, or if there is a critical failure in service availability for an extended time.
- Consider adding an extension to the time the Vendor can perform.

Fair Allocation of Risk and Responsibility

Be wary of insurance terms that allow for the Vendor to determine coverage amounts and deductibles in its sole and absolute discretion.

- The quality of the carrier should be rated “A” or better.
- Limit the deductible to \$25k and waive subrogation.
- Vendor’s insurance should be primary.
- Specify the types of coverages, including errors & omissions (“E&O”) and employee theft, among others.

Avoid Surprises

Avoid narrow confidentiality terms that require covered items to be marked “confidential.”

- Consider adding language for equitable remedies in the event a confidentiality term is breached.

Be aware of the growing number of statutory privacy obligations (e.g., healthcare, finance, GDPR, CCPA).

- Maybe add general privacy compliance language to cover issues related to protected health information and other personally identifiable information.

Avoid Surprises

Software contracts can contain surprises with regard to payments and pricing. For example, draft contracts may provide for an automatic price increase after certain time intervals (e.g., 5% increase every 12 months).

- Try to cap these with a fixed fee or “not to exceed” arrangement rather than payment on a time and materials basis.
- Other alternatives include:
 - Negotiating rates on each SOW.
 - Ask for a menu of fees by expertise of personnel, then set a rolling 12-month cap (e.g., the lesser of 2-3% or the percentage change in the Consumer Price Index (“CPI”) over the prior 12 months).

Avoid Surprises

Be wary of payment terms with shorter timing such as ten days following the date of the invoice.

- Many clients will need at least 45 days following the date of receipt of the invoice.
- 10 days may pass from the date the invoice is printed to the date it is received.
- Some institutional clients may take up to 60 days to pay, and are not willing to pay for late charges or interest, so flag such terms for clients when you see them.

Avoid Surprises

Try to keep costs down on travel and other expenses.

- Consider asking for a fixed budget.
- This can be used to avoid any need to micro-manage vendor reimbursements.



Impact of New Data Privacy and Security Laws on Vendor Agreements

Data Processing Agreements (DPAs) and the General Data Protection Regulation (GDPR)

For contracts that involve services directed to the collection and use of personal data from natural persons located in the E.U., a DPA must be executed between the Customer and Vendor.

- DPAs are required between controllers and processors of personal data under the GDPR.
- These agreements focus on data security and the technical and organizational measures (TOMs) the parties implement to protect personal data.

DPAs – Controllers and Processors

Data controller: The entity that determines the purposes and means for processing collected personal data.

- This will typically be the customer, but that is not automatically the case depending on the nature of the services.

Data processor: Any entity which processes personal data on behalf of the controller.

DPAs – Typical Contents

Due to strict requirements under the GDPR, DPAs tend to follow a somewhat standardized format, including terms related to:

- Communication of data subject requests (e.g., opt-outs, requests for access or rectification, data portability, etc.);
- Where and how the personal data is stored, including how it will be secured for any cross-border transfers – the EU’s Standard Contractual Clauses are useful for transfers into the U.S.;
- Security obligations including any specific TOMs the processor/vendor will undertake to prevent unauthorized access to stored personal data;
- The extent to which subprocessing is permitted and under what conditions;
- What actions must be taken in the event of a breach, including notification timing and insurance coverage; and
- How liability is split between the parties.

DPAs – California Consumer Privacy Act (CCPA)

The CCPA introduces other contractual requirements for a vendor to qualify as a “service provider.” These requirements focus on the purposes of processing rather than security concerns, and can be incorporated into most DPAs. More specifically, the vendor must sign a contract/DPA that:

- Prohibits the vendor receiving personal information from:
 - “Selling” the personal information as defined under the CCPA;
 - Retaining, using, or disclosing information for purposes other than those specified in the contract/DPA;
 - Retaining, using, or disclosing the information outside of the direct business relationship between the vendor and the business/customer; and
- Includes a certification from the vendor that it understands these restrictions and will comply with them.

DPAs – California Consumer Privacy Act (CCPA)

A vendor that does not sign a contract with the foregoing requirements is treated as a “third party” under the CCPA rather than a “service provider” and is exposed to a bit more liability.

- Service providers generally are not liable for the obligations of the business/customer under the CCPA.
- Third parties do not receive this protection and are liable for any CCPA violations they commit.
- The business/customer is generally insulated from liability for actions taken by both service providers *and* third parties, unless it has actual knowledge, or reason to believe, that the vendor intends to commit a CCPA violation.

Processing Consumer/Data Subject Requests

Both the CCPA and the GDPR give individuals the right to submit requests regarding the collection and handling of their personal information/data.

- Individuals can request to opt-out of certain processing, and they can request access to or the deletion of their collected information, among other things.
- These requests need to be verified as legitimate before responding to them to avoid an unauthorized access or deletion.
- Any DPA or contract between a vendor and its customer should cover how the parties will relay and act upon these requests.
- How will the parties verify these requests?

Cross-Border Transfers of Personal Data

The GDPR places special restrictions on the international transfer of personal data, which can require the use of specialized contract provisions for transfers into the U.S.

- It is generally okay to transfer personal data into jurisdictions the EU Commission views as having data security regulations that ensure an adequate level of protection.
- The U.S. is not one of these jurisdictions.
- Check to see if the business and vendor are compliant with the EU-U.S. Privacy Shield Framework, but if not, certain Standard Contractual Clauses approved by the EU Commission should be added as an addendum to the DPA – see https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en.

GDPR-CCPA Enforcement and Penalties

These laws can pose substantial penalties for noncompliance, so these contractual requirements cannot be taken lightly.

- Penalties for severe violations under the GDPR can be as high as 20 million euros or 4% of an entity's global annual turnover, whichever is greater.
- The CCPA imposes fines on a per violation basis that can add up quickly given the law's myriad requirements – up to \$7,500 per violation if intentional.
- The CCPA also includes a private right of action related to data breaches that has potential for class action suits.

Other Data Privacy Considerations

- Include representations and warranties related to:
 - Compliance with the CCPA, GDPR, HIPAA, Graham-Leach-Bliley Act or any other applicable data privacy/security laws or regulations.
 - Implementing, using, and maintaining industry standard security practices and procedures.
 - Prompt notification in the event of a data breach.
- Exclusion of damages or fines related to data protection and security from any cap on the limitation of liability.

Other Data Privacy Considerations

- Consider adding a section to main agreement that outlines the parties' data protection and security obligations.
 - Compliance with applicable laws.
 - Commitment to execute DPA.
 - Specifics regarding what data safeguards will be used.
 - Details regarding breach notification procedure.
 - Audit rights.
- Indemnification against claims due to failure to meet data protection and security obligations.

What About Non-Personal Data?

Aggregated, encrypted, or otherwise de-identified personal information or other data can have a lot of value for businesses and vendors.

- Vendors such as analytics companies and cloud service providers often seek to use their Customer's data in an aggregate form to provide statistics and data analysis to industry groups and marketers.
- However, the Customer may see this data as proprietary and confidential, regardless of whether it is personally identifiable, aggregated, or totally anonymized.
- Customer may wish to limit the Vendor's rights to use such data to purposes necessary for the provision of services.
- What if the contract is silent about how aggregated data is used? Does the Vendor need the Customer's permission?



Negotiating Issues Common to Software and Technology Contracts

Identifying the Customer

Who is the Customer?

Vendor Subscription Order Form

The following are the terms proposed by Vendor, of _____ (“Vendor”) to the customer specified below (“Customer”), for subscription to Vendor's online image management service.

Customer Details	
Full Legal Name	
Full Address	
Contact Person	
Billing Address	
Billing Email Address	

Identifying the Customer

Will Customer affiliates have rights to use the service?

Vendor Subscription Order Form

The following are the terms proposed by Vendor, of _____ (“Vendor”) to the customer specified below (“Customer”), for subscription to Vendor's online image management service.

Customer Details	
Full Legal Name	
Full Address	
Contact Person	
Billing Address	
Billing Email Address	

Length of Subscription Term and Renewal

Will term be extended to a three-year subscription?

Terms of Subscription	
Subscription Start Date	**TBD On a date mutually agreed between Vendor and Customer
Subscription Period	This subscription shall start on **TBD the Subscription Start Date and remain in effect for an initial period of one year three years and shall thereafter be automatically renewed for consecutive 1-year periods each, unless either party Customer notifies the other party Vendor, in writing, at least 30 days prior to the expiration of initial period or any renewed period that it does not wish to renew the subscription.
Permitted Use	Customer may use the Service to manage media solely for the following services, websites and mobile apps owned or operated by Customer:

Length of Subscription Term and Renewal

Why does only the Customer have a right of non-renewal?

Terms of Subscription	
Subscription Start Date	**TBD On a date mutually agreed between Vendor and Customer
Subscription Period	This subscription shall start on **TBD the Subscription Start Date and remain in effect for an initial period of one year three years and shall thereafter be automatically renewed for consecutive 1-year periods each, unless either party Customer notifies the other party Vendor, in writing, at least 30 days prior to the expiration of initial period or any renewed period that it does not wish to renew the subscription.
Permitted Use	Customer may use the Service to manage media solely for the following services, websites and mobile apps owned or operated by Customer:

Permitted Use

Should permitted use be restricted only to named websites?

Terms of Subscription	
Subscription Start Date	**TBD On a date mutually agreed between Vendor and Customer
Subscription Period	This subscription shall start on **TBD the Subscription Start Date and remain in effect for an initial period of one year three years and shall thereafter be automatically renewed for consecutive 1-year periods each, unless either party Customer notifies the other party Vendor, in writing, at least 30 days prior to the expiration of initial period or any renewed period that it does not wish to renew the subscription.
Permitted Use	Customer may use the Service to manage media solely for the following services, websites and mobile apps owned or operated by Customer:

Subscription Fees

What factors are considered to determine these fees?

Subscription Plan, Fees, and Payment Term			
Vendor's Enterprise Plan. Basic coverage:			
Number of monthly units ¹	8	Vendor users:	5
Vendor sub-accounts:	5	Custom domain SSL:	1
Type of Support Plan:	Gold		
Fees:			Time of Billing
One time set-up fee:	US\$ **TBD		Subscription Start Date
Platform Access Fee:	US\$ **TBD		Annual
Basic Fee for Plan Coverage	US\$ **TBD per year		
Additional Vendor user cost	US\$ 30 per month		
Additional custom domain SSL	US\$ 150 per domain per month		Annual
Additional unit cost	US\$ **TBD per unit or a portion thereof		
<p>All undisputed billings shall be monthly in advance, except for the initial three months, which will be paid upon execution of this Subscription Order Form, and excess coverage fee which will be billed in arrears in respect of the excess usage during the immediately preceding period. Payments will be by wire transfer to a bank account designated by Vendor, within 1530 days from receipt of Vendor's invoice.</p>			

Payment Period

Are monthly payments acceptable?

Subscription Plan, Fees, and Payment Term			
Vendor's Enterprise Plan. Basic coverage:			
Number of monthly units ¹	8	Vendor users:	5
Vendor sub-accounts:	5	Custom domain SSL:	1
Type of Support Plan:	Gold		
Fees:			Time of Billing
One time set-up fee:	US\$ **TBD		Subscription Start Date
Platform Access Fee:	US\$ **TBD		Annual
Basic Fee for Plan Coverage	US\$ **TBD per year		
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Additional unit cost	US\$ **TBD per unit or a portion thereof		
<p>All undisputed billings shall be monthly in advance, except for the initial three months, which will be paid upon execution of this Subscription Order Form, and excess coverage fee which will be billed in arrears in respect of the excess usage during the immediately preceding period. Payments will be by wire transfer to a bank account designated by Vendor, within 1530 days from receipt of Vendor's invoice.</p>			

Payment Period

Is 30 days sufficient for payment to be made after invoice?

Subscription Plan, Fees, and Payment Term			
Vendor's Enterprise Plan. Basic coverage:			
Number of monthly units ¹	8	Vendor users:	5
Vendor sub-accounts:	5	Custom domain SSL:	1
Type of Support Plan:	Gold		
Fees:			Time of Billing
One time set-up fee:	US\$ **TBD		Subscription Start Date
Platform Access Fee:	US\$ **TBD		Annual
Basic Fee for Plan Coverage	US\$ **TBD per year		
Additional Vendor user cost	US\$ 30 per month		
Additional custom domain SSL	US\$ 150 per domain per month		Annual
Additional unit cost	US\$ **TBD per unit or a portion thereof		
<p>All undisputed billings shall be monthly in advance, except for the initial three months, which will be paid upon execution of this Subscription Order Form, and excess coverage fee which will be billed in arrears in respect of the excess usage during the immediately preceding period. Payments will be by wire transfer to a bank account designated by Vendor, within 30 days from receipt of Vendor's invoice.</p>			

Terms of Use

Are these restrictions on Customer use overly broad?

Use of the Service; Restrictions.

- (a) ~~Use of the Service; Restrictions~~ Customer will be solely responsible, to the exclusion of Vendor and its affiliates, for all acts and omissions associated with the access and use of the Service through Customer's account, including if done by Customer's employees, agents, contractors or any other third party authorized by Customer to use the Services (collectively, "Users") and for any content that is uploaded, stored, administrated, edited, delivered, made available, distributed or otherwise processed by Customer or the Users as part of the Service ("Contributed Content"). Customer warrants that: (i) it ~~and its Users~~ will not, and its will direct Users not to, access or use the Service in order to develop a similar or competitive product or service to the Service or for any illegal, ~~harmful~~, or fraudulent ~~or offensive~~ purpose or to transmit, store, display, distribute or otherwise make available content that is illegal, ~~harmful, indecent, obscene,~~ defamatory, libelous, abusive, harassing, threatening, fraudulent, ~~offensive,~~ enables online gambling ~~or inconsistent with the generally accepted practices of the Internet community,~~ including without limitation promoting or facilitating pornography, offering or disseminating fraudulent goods, services, schemes, or promotions, spamming, make-money-fast schemes, ~~ponzi~~ and pyramid schemes, phishing, or pharming, and use of content or technology that may damage, interfere with, surreptitiously intercept, or expropriate any system, program, or data, including viruses, Trojan horses, worms, ~~time bombs, or cancelbots~~ and (ii) the Contributed Content and Customer's and its Users' use of the Service shall not infringe upon any third party rights or violate any applicable law. Customer shall indemnify Vendor and its affiliates and hold them harmless upon first demand against any expense, damage or loss caused to them as a result of a breach of such warranties or a third party claim alleging facts which if true would constitute such breach.

Terms of Use – Consideration; Payments

Any objections to being charged interest for late payment before notice and an opportunity to cure?

- (d) If an invoiced amount is not received by Vendor by its due date then, without derogating from any other remedies available to it, Vendor may charge late payment interest at a rate of 1.5% of the unpaid amount per month, or the maximum rate permitted by applicable law, if lower.
- (d)(e) Fees are exclusive of all taxes, levies, or duties imposed by taxing authorities, and any wire transfer fees, and Customer shall be responsible for payment of all such applicable taxes, levies, or duties and fees, free of any withholding.

Terms of Use – Consideration; Payments

Is this definition of taxes overly broad?

- (d) If an invoiced amount is not received by Vendor by its due date then, without derogating from any other remedies available to it, Vendor may charge late payment interest at a rate of 1.5% of the unpaid amount per month, or the maximum rate permitted by applicable law, if lower.
- ~~(d)~~(e) Fees are exclusive of all taxes, levies, or duties imposed by taxing authorities, and any wire transfer fees, and **Customer shall be responsible for payment of all such applicable taxes, levies, or duties and fees**, free of any withholding.

Terms of Use – Consideration; Payments

Should there be a cap on annual increases?

- (f) Vendor may increase fees after the initial term of this Subscription Agreement no more frequently than once in any 12-month period by the lesser of (i) 2% or (ii) the percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, for all items (1982-84=100) for the 12-month period ending on the anniversary of the date of this Agreement (the “CPI Index”). If the CPI Index should be discontinued at any time during the term of this Agreement, Vendor shall select a substitute index which most closely approximates the CPI Index and which is reasonably acceptable to Customer. Upon agreement as to such substitute index, all references to CPI Index shall be deemed to refer thereto. If the CPI Index shall not be published for the month required for comparison hereunder, the CPI Index published for the month closest and prior thereto shall be used.
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Terms of Use – Technical Support; Privacy

Are there terms in the privacy policy that cause any issues?

Technical Support and SLA; Privacy and Data Protection. Vendor shall provide to Customer technical support services and service levels in accordance with Exhibit A hereto. In addition, Vendor provides the Service subject to Vendor's privacy policy and data processing rules, which can be found at the following web page: <http://www.vendorwebsite.com/privacy>

Terms of Use – Limited Warranties

*Should there be a warranty against viruses
and other disabling devices?*

Limited Warranties; Disclaimer. Vendor warrants that the Service shall operate in substantial compliance with its functional specifications as specified from time to time in the standard documentation made available by Vendor at <https://vendorwebsite.com/documentation> and in case of failure to so operate Vendor shall use commercially reasonable efforts to remedy such failure as soon as practicable, given the nature and effect of such failure. In addition, Vendor represents and warrants that the Service shall not infringe upon any third party rights or violate any applicable law. Vendor shall indemnify Customer and its affiliates and hold them harmless upon first demand against any expense, damage or loss caused to them as a result of a breach of such warranties or a third party claim alleging facts which if true would constitute such breach. EXCEPT FOR THE ABOVE EXPRESS WARRANTY, THE SERVICE IS PROVIDED WITHOUT ANY WARRANTIES AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, VENDOR AND ITS AFFILIATES DISCLAIM ALL WARRANTIES WITH RESPECT TO THE SERVICE, WHETHER EXPRESS OR IMPLIED, ARISING BY LAW, CUSTOM, PRIOR ORAL OR WRITTEN STATEMENTS, OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, QUALITY, LIKELY-RESULT, OR FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT.

Terms of Use – Indemnification Procedure

Which party will actually undertake the defense and when?

2. Indemnification Procedure.

- (a) A party entitled to indemnification under this Subscription Agreement must (i) give the indemnifying party prompt written notice of any such claim to avoid actual prejudice, (ii) afford the indemnifying party full and complete control over the defense of any such claim so long as the indemnifying party promptly undertakes such defense to avoid actual prejudice to the indemnified party with competent counsel reasonably acceptable to the indemnified party, and (iii) provide reasonable cooperation to the indemnifying party in the defense of any such claim, at the cost and expense of the indemnifying party. The indemnifying party may not enter into any settlement or compromise, or consent to the entry of any judgment, that includes, or in connection with which the indemnified party would be required to incur or admit liability, obligation or culpability without the indemnified party's advance written consent. Under any settlement, the indemnifying party will not be entitled to commit the indemnified party to the payment of any monetary amounts that will not be paid by the indemnifying party and under which the indemnified party receives a complete release.

Terms of Use – Limitation of Liability

Any issues with a mutual disclaimer of consequential damages?

3. LIMITATION OF LIABILITY.

- (a) **VENDOR AND ITS AFFILIATES WILL NOT BE LIABLE TO CUSTOMER, AND CUSTOMER WILL NOT BE LIABLE TO VENDOR AND ITS AFFILIATES FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGE,** COSTS, EXPENSES AND PAYMENTS OR FOR ANY LOSS OF PROFIT OF LOSS OF DATA, EITHER IN TORT (INCLUDING WITHOUT LIMITATION NEGLIGENCE), CONTRACT (INCLUDING PRE-CONTRACTUAL STATEMENTS), STRICT LIABILITY, STATUTORY LIABILITY OR ANY OTHER CAUSE OF ACTION, ARISING FROM, OR IN CONNECTION WITH THE SUBSCRIPTION AGREEMENT OR THE SERVICE, WHETHER OR NOT ~~VENDOR-THE RESPONSIBLE PARTY~~ OR ANY SUCH AFFILIATE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE, LOSS, COSTS, EXPENSES OR PAYMENTS.

Terms of Use – Limitation of Liability

Is this amount too low for direct damages?

(a)(b) ~~VENDOR AND ITS AFFILIATES' AGGREGATE LIABILITY TO CUSTOMER, AND CUSTOMER'S LIABILITY TO VENDOR AND ITS AFFILIATES, FOR ANY AND ALL CLAIMS OR CAUSES OF ACTION ARISING UNDER THIS SUBSCRIPTION AGREEMENT OR IN CONNECTION WITH THE SERVICE, WHETHER ARISING OUT OF BREACH OF CONTRACT (INCLUDING PRE-CONTRACTUAL STATEMENTS), TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, STATUTORY LIABILITY OR ANY OTHER CAUSE OF ACTION, SHALL NOT EXCEED THE GREATER OF (I) THE TOTAL AMOUNT ACTUALLY RECEIVED BY VENDOR FROM THE CUSTOMER DURING THE TWELVE (12) MONTHS BEFORE THE OCCURRENCE OF THE EVENTS GIVING RISE TO SUCH LIABILITY. NOTWITHSTANDING ANYTHING ELSE IN THIS SUBSCRIPTION AGREEMENT, VENDOR WILL NOT EXCLUDE OR LIMIT ITS LIABILITY FOR DEATH OR PERSONAL INJURY RESULTING FROM SUCH ITS NEGLIGENCE; FRAUD OR FRAUDULENT MISREPRESENTATION; OR ANY OTHER LIABILITY WHICH MAY NOT BE LIMITED UNDER APPLICABLE LAW., OR (II) \$78,000.~~

Terms of Use – Limitation of Liability

Should the indemnity be excluded from the limitation of liability cap?

- (c) Notwithstanding the above, (i) a party's liability for personal injury, including death, will be unlimited to the extent caused by that party's negligence or willful misconduct; (ii) a party's liability for physical damage to tangible real or personal property will be the amount of direct damages, to the extent caused by that party's negligence or willful misconduct; (iii) a party's obligation to indemnify for infringement is not limited by this Agreement; (iv) a party's liability for violating the other's intellectual property rights or for breaching the provisions regarding confidentiality or the protection of data (e.g., data breach liability) is not limited by this Agreement; and (v) a party's criminal or fraudulent misconduct is not limited by this Agreement.

Terms of Use – Term and Termination

Why is the right of non-renewal removed from the Vendor?

4. Term and Termination of Subscription Agreement

~~(b)~~(a) Term and Termination of Subscription Agreement—The Service shall be provided to Customer for an initial period of ~~one year~~ **three years** beginning on the Subscription Start Date specified in the Order Form and shall thereafter be automatically renewed for consecutive 1-year periods each, **unless either party** ~~Customer~~ **notifies the other party** Vendor in writing at least 30 days prior to the expiration of the initial period or any renewed period that it does not wish to renew the subscription, in which case the Subscription Agreement shall expire at the end of the then applicable subscription period.

Terms of Use – Term and Termination

Why is the Vendor able to unilaterally change the terms when the Customer's only recourse is a 10-day opt-out from the whole deal?

- (b) In addition, either party shall be entitled to terminate the Subscription Agreement in case of a breach by the other party which is not curable, or, if curable, is not cured by the other party within 14 days from receipt of the first party's written notice thereof (Vendor shall be entitled to suspend the Service or any portion thereof during the time such breach by Customer has occurred and has not yet been cured). **Vendor must notify Customer of any change by Vendor of the terms or conditions applicable to Customer under this Subscription Agreement, and such change will only become effective ten business days following Customer's receipt of notice of such change, unless during such ten-day period Customer notifies Vendor it rejects such change, in which case this Agreement shall end as of the date specified in the notice of rejection.**

Terms of Use – Term and Termination

Why allow for a three month trial period?

- (c) **The initial three months of the initial term of this Subscription Agreement shall be a trial period.** Accordingly, Customer may terminate this Subscription Agreement during such three-month period for any reason, or no reason, by providing Vendor no less than ten business days notice.

Terms of Use – Term and Termination

*Who will pay for these transition services
and how will they be priced?*

- (e) Upon the termination or expiration of this Agreement for any reason, Vendor shall provide such cooperation and assistance as is necessary to allow the Services to continue without interruption or adverse effect and to facilitate the orderly and timely transfer of Services and all Customer's Contributed Content in usable format to Customer or its designee.
-

Terms of Use – Confidentiality

Why was the definition of Confidential Information changed?

5. Confidentiality.

- ~~(e)(a) Confidentiality. Both during the period of the subscription and thereafter, each party undertakes not to reproduce, copy, or disclose to any third party and not use any Confidential Information of the other party, except, in case of Vendor, solely for purposes of providing the Service and fulfilling its obligations hereunder to Customer. during the term of this Subscription Agreement.~~
- (b) ~~Each~~ party shall maintain the confidentiality of the other party's Confidential Information with the same degree of care as it maintains its own Confidential Information, but in no case less than reasonable care. **“Confidential Information”** ~~means any information identified as “confidential” or “proprietary,” either by legend on written or electronically stored material, or which ought reasonably to be recognized as confidential or proprietary by virtue of its nature or the circumstances of its disclosure.~~
- (c) **“Confidential Information”** means any non-public information of a party (the “Disclosing Party”) delivered or otherwise disclosed (whether verbally, visually, electronically, in writing, or by any other means, in any other medium, however documented (or not documented), and whether prepared by the Disclosing Party to the other party (the “Receiving Party), whether already so disclosed, or now, or in the future, by or on behalf of the Disclosing Party.

Terms of Use – Confidentiality

Why were the exclusions from the definition of Confidential Information expanded?

- (d) ~~The foregoing~~ following will not be considered as Confidential Information of a party: (a) information already known to the ~~other party~~ Receiving Party without an obligation of confidentiality, (b) information that is or becomes publicly known other than through a breach by the ~~receiving party~~ Receiving Party of this Agreement, ~~or~~ (c) information that is independently developed by the ~~receiving party~~ Receiving Party or its affiliates, (iv) to the extent necessary to comply with applicable law, (v) used to enforce or defend rights under this Subscription Agreement, (vi) is developed by the Receiving Party independently of, or was known by Receiving Party prior to, any disclosure of such information made by Disclosing Party from a source not bound by a confidential obligation; (vii) is required to perform the function of this Agreement; or (viii) is authorized to be disclosed by Disclosing Party.

Terms of Use – Miscellaneous

Why change governing law and venue?

3-6. Miscellaneous. This Subscription Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous negotiations, discussions or agreements, whether written or oral, between the parties regarding the subject matter contained herein. If the Vendor entity contracting under the Order Form is Vendor Ltd., an Israeli company, then this Subscription Agreement shall be governed by the laws of the State of Israel, excluding its conflict of laws rules, and the courts in Tel Aviv, Israel, shall have exclusive jurisdiction over any matter arising in connection with this Subscription Agreement. **If the Vendor entity contracting under the Order Form is Vendor, a Delaware corporation, then this Subscription Agreement shall be governed by the laws of the State of ~~California~~Delaware, excluding its conflict of laws rules, and the courts in the ~~Santa Clara~~New Castle County, ~~California~~Delaware, shall have exclusive jurisdiction over any matter arising in connection with this Subscription Agreement.** If the Vendor entity contracting under the Order Form is Vendor UK Ltd., a company incorporated under the laws of England and Wales, then this Subscription Agreement shall be governed by the laws of England and Wales, excluding its conflict of laws rules, and the courts in London, England, shall have exclusive jurisdiction over any matter arising in connection with this Subscription Agreement. This Subscription Agreement may not be assigned

Terms of Use – Miscellaneous

Why is the Vendor not allowed to assign the Agreement? What if the Vendor is acquired by another entity or wishes to assign the Agreement to an affiliate?

Wales, excluding its conflict of laws rules, and the courts in London, England, shall have exclusive jurisdiction over any matter arising in connection with this Subscription Agreement. ~~This Subscription Agreement may not be assigned by Customer or a party without the prior written consent of Vendor.~~ ~~the other party and any assignment without such prior written consent will be void.~~ ~~Vendor may freely assign its rights and obligations herein.~~ Subject to any provisions herein with regard to assignment, all covenants and agreements herein shall bind and inure to the benefit of the respective heirs, executors, administrators, successors and assigns of the parties hereto. This Subscription Agreement may not be amended or modified, except by the written consent of both parties hereto. No failure or delay

Terms of Use – Miscellaneous

What about a basic listing of the Customer as one of many different entities that use Vendor's services?

Vendor. The Order Form may be executed in counterparts, which taken together shall form one binding legal instrument. The parties hereby consent to the use of electronic signatures in connection with the execution of the Order Form, and further agree that electronic signatures to the Order Form shall be legally binding with the same force and effect as manually executed signatures. **Neither party shall use the name, logo or trademark of the other party (or of any of the other party's affiliates) in any form of publicity or promotional or advertising material, or in any communications with the media without the other's prior written consent to the specific contemplated use. No such use by Vendor shall state or imply that Customer endorses Vendor or the Service. Customer may terminate this Subscription Agreement and seek injunctive relief immediately if Vendor violates this provision. Any consent to use the name, logo or trademark of a party shall terminate upon termination of this Subscription Agreement.**

Terms of Use – Notices

Should there be more specific permitted means for providing notice? Can email or fax be used?

7. Notices. Any notices, requests, demands and other communications that are required or may be given under this Agreement must be **in writing, may be sent in any commercially reasonable manner that provides proof of delivery** (or refusal to accept delivery) to the address set forth above for Customer and for Vendor at 3434 Western Highway, Suite 111 Santa Clara, CA 12345, and will be considered to have been given when received, when delivery is refused or when the sender can otherwise demonstrate delivery or refusal to accept delivery. A party may change such party's address by giving notice of the change to the other party in accordance with this Section.

Terms of Use – Service-level Agreement

What is the effect of only using service extension as a remedy for failure to meet service availability requirements?

SLA:

Vendor strives for a 100% Uptime. If Uptime falls below 99.9% in a given subscription month, Vendor will offer a free extension of Customer's subscription period of five (5) days per each subscription month during which Uptime fell below 99.9% ("Service Extension"). "Uptime" means the percentage of time in a subscription month that Vendor's management console and Vendor's API services are available for access, as measured by Vendor and can be seen on the Service's online status dashboard. Service Extension will not be awarded in the following circumstances: (a) circumstances beyond Vendor reasonable control, including but not limited to network issues outside of Vendor's control (including DNS and connectivity problems), war, terrorism, labor disturbance, interruption of telecommunications, failure of third party software or services, or acts of God; (b) acts or omissions by Customer or its users; (c) downtime for maintenance that has been advised to Customer at least 72 hours in advance; and (d) downtime resulting from individual periods of non-availability lasting less than five (5) minutes. To receive a Service Extension, Customer must submit a request by sending an e-mail message to: support@vendorwebsite.com within ten (10) days of the end of the subscription month with respect to which Customer claims the Service Extension. The request must include supporting documentation, such as log files showing the non-availability of the Service. This SLA is Customer's sole and exclusive remedy for any downtime experienced.

Terms of Use – Service-level Agreement

Should Customer push for a right to terminate if Vendor fails repeatedly to meet the Uptime promised under the SLA, or if there is a critical failure in the service's availability?

SLA:

Vendor strives for a 100% Uptime. If Uptime falls below 99.9% in a given subscription month, Vendor will offer a free extension of Customer's subscription period of five (5) days per each subscription month during which Uptime fell below 99.9% ("Service Extension"). "Uptime" means the percentage of time in a subscription month that Vendor's management console and Vendor's API services are available for access, as measured by Vendor and can be seen on the Service's online status dashboard. Service Extension will not be awarded in the following circumstances: (a) circumstances beyond Vendor reasonable control, including but not limited to network issues outside of Vendor's control (including DNS and connectivity problems), war, terrorism, labor disturbance, interruption of telecommunications, failure of third party software or services, or acts of God; (b) acts or omissions by Customer or its users; (c) downtime for maintenance that has been advised to Customer at least 72 hours in advance; and (d) downtime resulting from individual periods of non-availability lasting less than five (5) minutes. To receive a Service Extension, Customer must submit a request by sending an e-mail message to: support@vendorwebsite.com within ten (10) days of the end of the subscription month with respect to which Customer claims the Service Extension. The request must include supporting documentation, such as log files showing the non-availability of the Service. **This SLA is Customer's sole and exclusive remedy for any downtime experienced.**



A Closer Look at Terms Common In Software and Technology Contracts

General Principles

- Goals:
 - Vendor wants to make a sale.
 - Customer wants benefit of licensed software, SaaS, PaaS, or other technology product or service.
- Apparent dealkillers:
 - My way or the highway – this is our form and we don't negotiate.
 - With some large cloud service and other technology providers – negotiation is not possible or very limited.

General Principles

- Always read the boilerplate.
 - Avoid glossing over technical terms or descriptions you don't know – ask or bring in someone who knows.
 - If you don't understand it, how will a judge?
- Questions when representing the Customer:
 - What does Customer expect from licensed software, SaaS, PaaS, or other technology product or service?
 - How critical is this application to business processes?
 - How important is this license or sale for the Vendor?

Identity of Customer; User Restrictions

- Vendor concern: Wants to limit transfer or expanded use without additional license or other fee.
- Customer concern: Wants right to use for whole enterprise, and have it scale with growth.

Scope of License Grant

- Points of Negotiation:
 - Customer affiliates included vs. not included?
 - Exclusive vs. nonexclusive?
 - Limited term vs. perpetual?
 - Worldwide vs. limited territory?
 - Internal use vs. Customer end-users or third parties?
 - One user/one device/one location vs. multiple users/multiple devices or cores/multiple locations?
 - Copies for backup and disaster recovery?
 - Transaction volume limitations?

Other Scope Issues

- Customer right to have access to source code:
 - Generally NOT available for marketed products with configuration ability built-in.
 - Needed where Customer has internal IT capability and needs ability to modify underlying code.
 - Vendor will offer future source code modification thru maintenance and support (15% - 22% annual cost).
 - Source code escrows if Vendor fails.

Other Scope Issues

- Is subcontracting, outsourcing of IT, or other support services permitted?
 - Even if not expressly prohibited, look for other terms that could imply a prohibition on third-party access to Vendor's software or documentation (e.g., confidentiality or non-disclosure terms).
 - The Vendor's support services may be an essential part of the pricing for the license or sale.
 - Vendor may require access rights to install security patches and other updates.
 - Is use of Vendor's software limited to particular facility(ies)?

Ownership of IP

- Vendor concerns:
 - Wants clear ownership of its own programs.
 - Related new programs or work product being used or exploited by Customer beyond original scope.
 - Protection of pre-existing tools, programs, know-how.
 - Control of middleware or connector software, and supporting or enhancement code, that make Vendor programs more marketable.
 - Effect of ambiguous ownership on future sale of Vendor.

Ownership of IP

- Customer concerns:
 - For custom software, Customer wants what it paid for – expects right to exploit in intended field and expansion to other fields.
 - Wants to preserve competitive advantage by controlling middleware or enhancements.
 - Wants ownership of Customer data and possibly improvements or enhancements written by Customer directly, or by third parties for Customer.

Maintenance and Support

- Vendor concerns:
 - Cash flow from ongoing updates and support.
 - Right to cease maintenance; to increase fee w/o limit.
 - Limit exposure from failure of software to perform, from software obsolescence or failure to upgrade.
 - Service-level Agreement as part of maintenance - limit exposure to “best efforts” to resolve problems, or if specific fixes are agreed to, sole remedy is termination (i.e., no damages claim from Customer).

Maintenance and Support

- Customer concerns:
 - Reduced fee based on discounted price for software.
 - Cap on annual increase in fee, (e.g., set % or CPI).
 - SLA (fee credits and right to terminate where breach).
 - Software to continue to perform and meet specs.
 - Standard upgrades and bug fixes; upgrades for compatibility with new software and hardware.
 - Right to terminate maintenance and right to resume.
 - No Vendor unilateral termination of maintenance.
 - Consulting and/or customization professional services.

Hosted or Cloud-based Software

- Vendor concerns:
 - Subscription model – terminate if not renewed or failure to pay fee.
 - No liability for loss of access, loss of data, or security breach.
 - Prohibit Customer’s wrongful, illegal or abusive use (e.g., Acceptable Use Policy).
 - Vendor, by hosting, has less problem with compatibility, upgrades, installation, control of copying.

Hosted or Cloud-based Software

- Customer concerns:
 - Availability (uptime) and responsiveness (SLA).
 - What happens at end of subscription or renewal term – how does data get transferred or returned?
 - Loss of access, loss of data, security breach – limited insurance coverage for losses of service function
 - No ability in most circumstances to modify, improve, enhance or adapt software to Customer's needs.
 - If access is unavailable, can Customer continue to conduct business?

Representations and Warranties

- Vendor concerns:
 - Disclaimer of any warranty vs. limited to conformance to published specs (assuming proper environment, compatible software and hardware, used in accordance with documentation).
 - Limit duration of warranty in time (typically 90 days from delivery to Customer).
 - Concern about changes in Customer's software operating systems, hardware, and telecommunications standards.

Representations and Warranties

- Customer concerns:
 - Ownership; right to license or sublicense; authority to enter into license or agreement.
 - Software will perform in accordance with published specs, Vendor's proposal, and documentation.
 - Software will work with Customer's existing system.
 - No infringement of third party IP rights.
 - No viruses or other malware or harmful code.
 - Warranty term, commencement of term, and continued warranty if maintenance contract.

Indemnification

- Vendor concerns:
 - May want general indemnity for any breach of agreement by Customer.
 - Vendor may want to limit its indemnity to IP reps and to third-party claims only.
 - Avoidance of defense obligation or costs.
 - Limit exposure on breach of indemnity to direct damages and liability limit in dollars, usually to what was paid by Customer for license/product/service, or over limited time.

Indemnification

- Customer concerns:
 - Indemnity for breach (rarely given), violation of reps and warranties (not uncommon), and infringement claims (quite common).
 - Indemnity to include obligation to defend, and to pay legal costs of defense.
 - Wants broad indemnity, not necessarily limited to third-party claims, and then wants indemnification obligation NOT to be limited by any disclaimer as to liability for consequential damages or limitation of liability to specific dollar amount.

Disclaimers

- Vendor wants broad disclaimer without any exceptions; typical disclaimers for UCC implied warranties, no consequential damages.
- Vendor may want contract statute of limitation on all claims under contract by Customer (usually tries to limit claims to one or two year period).
- Customer wants exception for specified warranties contained in the license agreement, exception (as to consequential damages disclaimer) for claims based on willful misconduct, breach of confidentiality or indemnification provisions.

Limitations of Liability

- Vendor usually will try to limit liability arising under the license agreement to low dollar amount, or tie to amount received by Vendor for specific service over limited period (e.g., 12 months).
- Customer prefers no LOL, but if there is a limitation, then it should be mutual and dollar limit should be realistic in relation to risk of damage involved. If tied to amount paid by Customer, should cover amount “paid or to be paid” over term (or specified floor amount).
- Customer wants to exclude from limit any indemnification obligations (defense cost in an IP case would likely swamp most dollar limits), liabilities for breach of confidentiality provisions, willful misconduct, gross negligence, and sometimes breach of reps and warranties (e.g., virus or data breach liability).

Effect of Termination

- Vendor concerns:
 - Ends on expiration or earlier termination (Vendor has leverage to force renewal or extract more fees).
 - Wants to prevent Customer from using software after termination and does not want to be bound to provide transition or migration services (leverage issue), particularly if Customer breaches.

Effect of Termination

- Customer concerns:
 - Wants perpetual license (no expiration date), or sufficient time (no sudden termination) to acquire replacement software/platform/service and migrate data.
 - Wants assistance from Vendor to get migration of data to new software or service provider, regardless of reason for termination – cooperation obligation and cost can be covered in license or agreement.

Remedies – Vendor Concerns

- Wants all remedies at law or in equity.
- Wants to terminate all use of software, return of all copies; injunctive relief; collect unpaid amounts.
- If Vendor breaches, there should be “commercially reasonable efforts” to fix; if not fixable, no liability beyond refund of prepaid maintenance fees.
- No consequential damages; limit damages to specific dollar amount or price “paid” by Customer over the preceding 12 or 6 months for a specific module.
- Usually wants waiver of right to jury trial.

Remedies – Customer Concerns

- Limit damages to fees through date of termination.
- Avoid disruption from termination of license or agreement; no sudden turn off and needs assistance with migration.
- SLA with objective metrics, rapid response and teeth - termination if problem cannot be fixed within a specific time, or occurs repeatedly.
- Exclusion of consequential damages to be mutual.
- No dollar limit on liability, or reasonable dollar limit.
 - Damage limit that is equal to Vendor insurance coverage?
- Exceptions to dollar limit:
 - Indemnification; confidentiality breach; willful misconduct or gross negligence.

Insurance

- Vendor concerns:
 - Usually does not want insurance provision.
 - May try to limit required coverage to general liability.
- Customer concerns:
 - Wants Vendor to have and maintain coverage.
 - Wants evidence of coverage; info on deductibles; errors and omissions coverage; cybersecurity.
 - Wants coverage on acts of Vendor employees.
 - Liability not limited to insurance proceeds.

Insurance – Hosted and Cloud-based Issues

- Vendor concerns:
 - May have insurance, but problem of being overwhelmed by multiple service user claims.
 - May try to contractually limit liability beyond reconstruction or recovery of lost data; liability for business interruption too great to assume.
- Customer concerns:
 - Customer may need special insurance coverage.
 - Customer's insurance usually does not cover damages or business interruption where the failure or casualty affects software operated or services provided from location and equipment not owned by Customer.

Governing Law and Jurisdiction

- Vendor wants its own state's law to apply, and exclusive jurisdiction and venue in its own state.
 - Vendor has argument that it otherwise would be forced to defend or enforce its license agreement in many different jurisdictions under many different laws.
- Customer wants home jurisdiction, because it will be more expensive to litigate or arbitrate elsewhere.
 - In most cases, Licensee will lose, unless Licensee has particular economic clout, or Licensor is hungry for business and is willing to concede to get order.
- Consider neutral jurisdiction – DE or NY.

Boilerplate Clauses

- It is a mistake to ignore these clauses.
- Negotiated provisions:
 - Assignment clause – consider effect on sale by party; effect on scope of licensed users.
 - Integration clause – may create problem if multiple agreements used to document deal (prioritization problem).
 - Export clause – relevant?; foreign access problem.
 - No-hire clause – non-targeted solicitation issue; failure of maintenance problem.

Acceptance Testing

All Deliverables and Services are subject to acceptance testing by Customer. Testing may occur in test and live production environments, and before and after any “go-live” date. Unless an SOW expressly specifies otherwise, the procedure for testing and acceptance shall be as set forth in this Section.

The period for acceptance testing will begin when the parties mutually agree that the Deliverable or Service (“**Test Item**”) is ready for testing, and will continue for up to 90 days thereafter (the “**Test Period**”). If Customer notifies Vendor during the Test Period of any failure of the Test Item to meet acceptance testing criteria established by the parties in an SOW, or project implementation plan, and if no specific criteria have been established, to the reasonable satisfaction of Customer, and in all events in accordance with the applicable criteria set forth in Exhibits B and C (the “**Test Criteria**”), the Test Period will be suspended from the date of such notification and will not begin to run again until Vendor has made necessary corrections. If such a suspension of the Test Period occurs, Customer will have the balance of such Test Period (or up to 30 days after implementation of the corrections, whichever is longer) to complete testing.

If implementation or acceptance testing are to occur in stages or phases, all interim Test Items accepted by Customer shall be deemed conditionally, not finally, accepted, until all Test Items to be provided under the SOW have been fully installed, configured, tested, and accepted. Conditional acceptance of a Test Item may be designated as a payment milestone in an SOW, but shall be subject to Customer’s rights to refunds or credits if the entire Test Item fails to achieve Final Acceptance.

Acceptance Testing

“**Final Acceptance**” means (i) Customer has notified Vendor in writing that the Test Items have satisfied the Test Criteria and Customer expressly accepts them, or (ii) Customer continues to use the Test Items after the Test Period in a production environment and has not notified Vendor within ten business days after the end of the Test Period of the failure of the Test Items to satisfy the Test Criteria.

If any material failure to meet Test Criteria during the Test Period remains uncorrected for more than 30 days after Customer notifies Vendor of such failure, or if the Test Item fails to achieve Final Acceptance within ten business days after the originally scheduled end of the Test Period, then Customer may terminate the applicable SOW, reject any or all of the Test Items provided under that SOW, and receive a full refund from Vendor of all amounts paid for the rejected items and related services.

Any failure by Customer to notify Vendor in connection with the Test Period of any particulars in which Customer deems any Test Item nonconforming or defective shall not in any way be deemed a waiver or otherwise excuse Vendor from its warranty with respect to those items.

IP License – Favoring Vendor

1. Intellectual Property Rights.

1.1 Definitions.

1.1.1 “**Background Intellectual Property**” means all intellectual property that is owned or controlled by Vendor and that is created prior to this Agreement or contemporaneously with this Agreement, but not arising from the performance of the Services.

1.1.2 “**Foreground Intellectual Property**” means all intellectual property arising from the performance of the Services.

1.2 License to Background Intellectual Property. Upon final payment by Customer of all amounts due under the applicable Statement of Work, and provided that Customer is not otherwise in default of any provision of this Agreement, Vendor will grant to Customer a perpetual, non-exclusive, transferable, royalty-free, paid-up, worldwide license with the right to sublicense, under all of Background Intellectual Property necessary for Customer and its subsidiaries to use and freely exploit Foreground Intellectual Property without restriction.

IP License – Favoring Vendor

1.3 License to Foreground Intellectual Property. Upon final payment by Customer of all amounts due under the applicable Statement of Work, and provided that Customer is not otherwise in default of any provision of this Agreement, Vendor will assign to Customer Vendor's Foreground Intellectual Property. In addition, all Services, whether or not eligible for copyright protection in any country, will be deemed work made for hire and will become the sole intellectual property of Customer upon final payment by Customer of all amounts due under the applicable Statement of Work, and provided that Customer is not otherwise in default of any provision of this Agreement. If any such work is deemed for any reason not to be a work made for hire, then Vendor agrees to assign and does hereby assign all rights, title, and interest in the copyright in such work, and all extensions and renewals thereof, to Customer, and agrees to provide all assistance reasonably requested by Customer in the establishment, preservation, and enforcement of its copyright in such work, such assistance to be provided at Customer's reasonable expense but without any additional compensation. Vendor agrees to waive all moral rights relating to the work developed or produced, including, without limitation, any and all rights of identification of authorship and any and all rights of approval, restriction, or limitation on use or subsequent modifications. Foreground Intellectual Property will be deemed Customer Confidential Information.

IP License – Favoring Vendor

1.4 Use of Names and Trademarks. Neither party will have the right under this Agreement to use the name, trademarks or trade names of the other without prior approval; *provided, however*, Customer agrees that Vendor has authority to use its name on a listing of its customers, but Customer's prior permission is required for Vendor to make any description of the Services to third parties.

Data Security

10.1 Vendor represents and warrants that it has in place physical, administrative, technical, electronic and operational safeguards and procedures consistent with best practices and industry standards and with the applicable laws, rules and regulations, and the credit card company data security requirements as such laws and requirements may be amended, and regulations promulgated thereunder applicable to Vendor to protect the confidentiality of all such Confidential Information of Customer (“**Customer Information**”) to at least the same degree that Vendor protects its own sensitive data, but in no event with less than a reasonable degree of care, which measures shall include as applicable:

10.1.1 access controls on information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing Customer Information to unauthorized individuals who may seek to obtain this information through fraudulent means;

Data Security

10.1.2 access restrictions at physical locations containing Customer Information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

10.1.3 encryption of electronic Customer Information while in transit if specified in an SOW attached hereto;

10.1.4 procedures designed to ensure that information system modifications are consistent with the information security measures;

10.1.5 segregation of duties, and employee background checks for employees with responsibilities for or access to Customer Information, which background checks include verification of identity including social security number for United States citizens, criminal background check, secondary education, and prior employers, and a prohibited party search (OFAC);

Data Security

10.1.6 monitoring systems and procedures to detect actual and attempted attacks on or intrusions into information systems;

10.1.7 response programs that specify actions to be taken when Vendor detects unauthorized access to information systems, including immediate reports to Customer; and

10.1.8 measures to protect against destruction, loss or damage of Customer Information due to potential environmental hazards, such as fire and water damage or technological failures.

Data Security

10.2 Vendor agrees to disclose to Customer the occurrence of any misuse or wrongful disclosure of Customer Information, including but not limited to system breaches that may adversely affect Customer or Customer's employees, customers or vendors (a "**Data Breach**"). To the extent that the Data Breach resulted from acts or omissions of Vendor or its contractors, Vendor shall be responsible for all costs reasonably incurred by Customer or Vendor Contractor arising from, relating to or in connection with the Data Breach.

Data Security

10.3 Vendor will, (a) with reasonable advance notice, or as otherwise approved by Vendor, or (b) as required by governmental regulating authorities, allow Customer or Customer's auditors, including internal audit staff, inspectors and other representatives as Customer may designate in writing, access at all reasonable times to the applicable Vendor operations center, to Vendor's personnel providing the Services, and to logs relating to the Services for the purpose of performing audits and inspection to verify the integrity of Customer Information and to examine Customer's performance of the Services hereunder. Customer will provide the scope of such audit and such audits will be limited to audits of (i) practices and procedures, (ii) systems, (iii) general controls and security practices and procedures, and (iv) backup procedures. The parties hereto agree to make appropriate arrangements to provide that any audit will not unreasonably interfere with Vendor's ability to perform the Services, nor with Vendor's provision of services to other customers, and will be subject to Vendor's routine security and confidentiality procedures, practices, and policies. Customer audits will be at Customer's expense.

Data Security

10.4 Vendor shall promptly make available to Customer a summary copy of applicable and available current third-party data processing audits or reviews (e.g., SSAE19) relevant to the Services. All the information provided to Customer under this Section shall be Confidential Information of Vendor and shall be treated as such by the Customer.

10.5 Vendor maintains and during the term of this Agreement will maintain cyber security insurance in the amount of no less than 10% of its gross revenues or \$10 million, whichever is greater, with an insurer having an AM Best Rating of “A” or its functional equivalent that is licensed or permitted to conduct business in the State/Commonwealth of _____. Any such insurance policy (i) shall provide coverage for cyber incidents, including data breaches, business interruption, and network damage, (ii) shall not be modified, altered or canceled without 30 days prior written notice to Customer; (iii) shall not have a deductible greater than \$25,000; and (iv) shall be primary and not contributing with any insurance coverage maintained by Customer.

Thanks!

Any questions?