



The below form is made available for general informational purposes only, and is not intended to constitute specific legal advice or to be a substitute for advice from qualified counsel.

Attachment 1

**MASTER TERMS AND CONDITIONS
SOFTWARE-AS-A-SERVICE
AGREEMENT¹**

These Master Terms and Conditions are made and entered into on this ___ day of _____, 20[] (the “**Effective Date**”), by and between [COMPANY], a [_____] corporation with its principal offices located at [_____] (“**SaaS Provider**”) and [CLIENT] with its principal office located at [_____] (“**Client**”), (each, a “**Party**” and collectively, the “**Parties**”). These Master Terms and Conditions and the Order(s), Statement(s) of Work, and Exhibits attached hereto or referencing these Master Terms and Conditions are collectively referred to as the “**Agreement.**”²

1. DEFINITIONS.

1.1 “Affiliate” means, with respect to any entity, any other present or future entity controlling, controlled by, or under common control with such entity. For the purposes of this definition, control (and its derivatives) means, with respect to any entity, the possession, direct or indirect, of the power to solely direct or cause the direction of the management or policies of such entity, whether through the ownership of voting securities (or other ownership interest), by contract or otherwise.

1.2 “Application Platform” or “Platform” means SaaS Provider’s proprietary application software and/or web-site, including all modules, functions, features identified in an Order, SOW, or otherwise generally made available by SaaS Provider to its customers, and all technology resources and infrastructure (e.g., hardware, third party software, etc.) supporting the Services. The Application Platform includes all updates, releases, improvements, and corrections to the Application Platform.

1.3 “Cardholder Data” has the meaning provided in the PCI-DSS³, including (1) with respect to a payment card or similar data, the account holder’s name, account number, service code, card validation code/value, PIN or PIN block, valid to and from dates and magnetic stripe data; and (2) information relating to a payment card transaction that is identifiable with a specific account.

1.4 “Client Data” means any proprietary or confidential content, information, data and materials of any kind, including End User Data⁴ and Cardholder Data, which is provided to or processed by SaaS Provider in connection with its provision of the Services.

¹ This form is fairly generic, and somewhat customer-favorable. Certain possible reactions to these provisions are set out in the footnotes. This form is presented solely as a starting point and would need to be tailored to each specific negotiation and fact pattern. This form is not meant to be and is not legal advice.

² The structure of this form is a master agreement with orders under it.

³ This form assumes payment is processed by the provider, and therefore credit data would need to be handled using this standard. In each case, the applicable data protection regimes would need to be considered (GLBA, HIPAA, etc.). The customer needs to understand what its data protection needs are, and provider needs to be clear on whether it can comply.

⁴ The End User Data-related provisions would need to be updated to cover GDPR and/or CCPA, as applicable.



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1.5 “Confidential Information” means any and all technical, business, client or proprietary information disclosed by one Party (the **“Disclosing Party”**) to the other Party (the **“Receiving Party”**), directly or indirectly, including, but not limited to, information regarding the Disclosing Party’s business strategies and practices, methodologies, trade secrets, know-how, pricing, technology, software, product plans, services, relationships with any third party, client lists and information regarding the Disclosing Party’s employees, clients, vendors, consultants and Affiliates regardless of whether such information is marked “confidential” or some other proprietary designation, but which by its nature is information that would reasonably be considered to be confidential information of the Disclosing Party. In the case of SaaS Provider, Confidential Information includes the Application Platform source code. In the case of Client, Confidential Information includes all Client Data and any information relating to Client’s users.

1.6 “Data Center” means the secure facility(ies) in which the servers, computer equipment and ancillary hardware used to host and operate the Application Platform reside. The primary Data Center(s) is/are located in [_____] and the secondary Data Center(s) is/are located in [_____] as of the Effective Date, as each may be updated in accordance with this Agreement.⁵

1.7 “Documentation” means SaaS Provider’s user guides and manuals relating to the Services and Application Platform, including on-line help, as updated and amended from time to time.

1.8 “End User Data” means all data and information collected from an end-user of Client or its Affiliates, including, without limitation, any personally identifiable information or Cardholder Data.

1.9 “Implementation Services” means the data migration, implementation, integration (e.g., APIs), enhancement, and development services described in an Order or SOW that SaaS Provider will complete to comply with the specifications and requirements set out in such Order or SOW.

1.10 “include” and “including” mean including without limitation.

1.11 “Intellectual Property” means all algorithms, application programming interfaces (APIs), apparatus, concepts, Confidential Information, data, databases and data collections, deliverables, designs, diagrams, documentation, drawings, flow charts, formulae, ideas and inventions (whether or not patentable or reduced to practice), know-how, materials, marketing and development plans, marks (including brand names, product names, logos and slogans), methods, models, procedures, processes, schematics, software code (in any form including source code and executable or object code), specifications, subroutines, techniques, tools, uniform resource identifiers, user interfaces, works of authorship, and other forms of technology.

1.12 “Intellectual Property Rights” means all past, present, and future rights of the following types, which may exist or be created under the laws of any jurisdiction in the world: (a) rights associated with works of authorship, including exclusive exploitation rights, copyrights, moral rights, and mask work rights; (b) trademark and trade name rights and similar rights; (c) trade secret rights; (d) patent and industrial property rights; (e) other proprietary rights in Intellectual Property of every kind and nature; and (f) rights in or relating to registrations, renewals, extensions, combinations, divisions, and reissues of, and applications for, any of the rights referred to in clauses (a) through (e) of this sentence.

1.13 “Order” means an order pursuant to which from time to time Client orders SaaS Services or rights to the Application Platform.

⁵ This gives the customer a veto right over where the data is hosted.



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1.14 “Order Start Date” means the date on which the SaaS Services commences and is set forth in the applicable Order.⁶

1.15 “Payment Brand” means the PCI Security Standards Council and any credit or debit card provider, gift card provider, or other stored value and loyalty program card provider, including, but not limited to, American Express, Visa, U.S.A., Inc., MasterCard International, Inc., Discover Financial Services, LLC, and JCB International.

1.16 “PCI DSS” means the current version of the Payment Card Industry Data Security Standard, as such may be amended, modified, supplemented, or replaced from time to time.

1.17 “Professional Services” means the services identified as such in a SOW or this Agreement. Professional Services include Implementation Services and consulting services. Professional Services do not include SaaS Services.

1.18 “SaaS Services” means the services that are ordered by Client under an Order, including (i) limited access and use rights to the Application Platform, (ii) hosting services, (iii) support services, and (iv) any other similar generally applicable services that SaaS Provider provides to its customers in accordance with the Documentation. SaaS Services do not include Professional Services.

1.19 “Security Event” is an event where: (i) End User Data or Confidential Information of Client in SaaS Provider’s or its subcontractors’ possession or control is accessed or received by an individual or entity not authorized to access or receive such information, (ii) there is a reasonable basis to believe that End User Data or Confidential Information of Client in SaaS Provider’s or its subcontractors’ possession or control may have been accessed or received by an unauthorized individual or entity, (iii) an individual or entity authorized under this Agreement to use or access End User Data or Confidential Information of Client is using, or reasonably suspected of using, any End User Data or Confidential Information of Client in a manner not authorized under this Agreement, or (iv) End User Data or Confidential Information of Client in Client’s (or its third party contractors’) possession or control is accessed (or there is a reasonable basis to believe may have been accessed) through the Application Platform in a manner or for a purpose not authorized under this Agreement or permitted under applicable laws or regulations.

1.20 “Services” means, collectively, the Professional Services and SaaS Services.

Other terms are defined in the context in which they are used throughout the Agreement.

2. SOFTWARE-AS-A-SERVICE RIGHTS, OBLIGATIONS, AND LIMITATIONS.

2.1 Provision of SaaS Services and Application Platform. Subject to the provisions of this Agreement, SaaS Provider will make available to Client and its designated Affiliates and their end users on a non-exclusive and non-transferable basis the SaaS Services, Application Platform, and Documentation in accordance with the applicable Order, Documentation, and other terms of this Agreement. Unless expressly provided otherwise, SaaS Provider will be responsible for: (i) hosting, operating, maintaining, and supporting the Application Platform; (ii) providing standard support at no

⁶ The parties need to determine whether the “go-live” date is the date on which the service term (and payment obligations) begin. The provider may want the service term to start immediately. This can be important for both parties as (for example) auto-renewals are tracked.



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additional charge (and/or specialized support if identified on an Order or SOW); (iii) making available and implementing upgrades, enhancements, and error corrections when such upgrades, enhancements and error corrections are generally made available; and (iv) providing disaster recovery and business continuity capabilities in accordance with industry standards and the plan set forth in Exhibit B (Disaster Recovery Plan) (the “**Disaster Recovery Plan**”). The Application Platform and Client Data may only be hosted at the Data Center(s) identified in this Agreement or otherwise approved by Client. SaaS Provider will furnish all equipment, computer programs, resources and services necessary for furnishing the SaaS Services and Application Platform to Client and its end users, except as expressly provided otherwise in this Agreement.

2.2 Access and Use Rights. Client will be responsible for providing its own Internet access to the Application Platform. SaaS Provider may specify reasonable procedures in the Documentation according to which Client and end users may establish and obtain such access to and use of the features and functions of the SaaS Services and Application Platform through the Internet, including, without limitation, provision of any access codes, passwords, web-sites, connectivity standards or protocols, or any other relevant procedures. Subject to the terms of this Agreement, SaaS Provider hereby grants to Client the non-transferable (except as otherwise permitted by this Agreement), non-exclusive, non-sublicensable, limited right and license to use and access the SaaS Services and Application Platform in accordance with the applicable Order(s), Documentation, and other provisions of this Agreement.⁷ Such rights and license include the right for Client, its Affiliates, and all of their employees, representatives, contractors, customers, and members, as applicable, to use and access the Application Platform in connection with their relationship to Client.

2.3 Orders. The initial Order is attached hereto as Exhibit A (Order Form) and includes all attachments thereto. If Client desires to access or use additional SaaS Services or Platform Applications and/or increase any limitation on the number of named users, concurrent users, devices, location, transactions, or other elements, as applicable (“**Unit of Measure**”), in the initial Order or any subsequent Order, the authorized representatives of the Parties will execute a new Order. The pricing for any increase in any Unit of Measure will not exceed the pricing per Unit of Measure for the prior order, subject to annual rights to escalate price as described in Section 5.3⁸. Upon SaaS Provider’s written acceptance of the new Order, which acceptance will not be unreasonably withheld, such new Order will be effective. All Orders are subject to and hereby incorporate all Exhibits and the terms of this Agreement.

2.4 Limitations on Use. Except as otherwise provided in this Agreement, Client will not: (i) sell, rent, lease, sublicense or otherwise transfer or distribute the Application Platform or Documentation or any copies of the Application Platform or Documentation; (ii) modify, translate, reverse engineer, decompile or disassemble the Application Platform; (iii) create or prepare derivative works based upon the Application Platform; (iv) create any copy of or “mirror” the Application Platform; or (v) alter, destroy or otherwise remove any proprietary notices or labels on or embedded within the Application Platform or Documentation.

⁷ This is a “license” but one that is limited to the right to access the platform, not to access the underlying technology.

⁸ This agreement gives the customer year-over-year pricing protections. The provider may want to remove any cap, unless the customer commits to some minimum term.



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2.5 Escrow. Within thirty (30) days of execution of this Agreement, Client will be added as a beneficiary to SaaS Provider’s standard Escrow Agreement reasonably acceptable to Client (or any successor escrow agreement so long as the material terms of such are substantially the same). Notwithstanding anything to the contrary, SaaS Provider will pay any costs relating to Client being a standard beneficiary under the Escrow Agreement. If Client desires any escrow verification services from the escrow agent, the costs of such services will be as mutually agreed. SaaS Provider hereby grants Client a non-exclusive right and license to copy and use any materials released under the escrow agreement to perform and provide (or have a third party contractor perform and provide) the SaaS Services and Application Platform for Client.⁹

2.6 Affiliate Participation.¹⁰ SaaS Provider agrees that Affiliates may procure additional SaaS Services and access to the Application Platform relating to their business and operations pursuant to the terms and conditions of this Agreement upon execution of an Order by an Affiliate, in which case such Affiliate will be deemed to be a party hereunder with the same rights and obligations as Client, and the terms of this Agreement will be incorporated into the Order executed by the Affiliate, but such Affiliate will be invoiced separately and will be solely responsible to SaaS Provider for its respective obligations and liabilities under this Agreement. An Affiliate or SaaS Provider may terminate this Agreement as it applies to such Affiliate in the same manner that Client or SaaS Provider may terminate this Agreement, but any such termination by an Affiliate will apply only to such Affiliate. All licenses or Services procured by Client and by all Affiliates will be aggregated for purposes of determining any volume-based price discounts under this Agreement.

3. ANCILLARY PROFESSIONAL SERVICES.

3.1 Implementation Services. SaaS Provider will provide Implementation Services as described in Exhibit C (Implementation Services) and/or the applicable Order or Statement of Work.

3.2 Additional Professional Services. Client may elect from time-to-time to obtain from SaaS Provider Professional Services relating to the Application Platform that are in addition to the SaaS Services including, customized user training, specialized support, integration, enhancements, and development pursuant to a Statement of Work (each, a “SOW”). Each SOW will describe the fees, costs and expenses payable by Client to SaaS Provider and any assumptions or dependencies relating to such Professional Services.

3.3 Changes. A Party may request a modification to the SaaS Services, Application Platform, Professional Services, or any applicable SOW or Order by written request to the other Party in accordance with the Change Control Procedures set forth in Exhibit D (Change Control Procedures). Any request for a Change Order to the Services or Application Platform that SaaS Provider intends to generally offer or provide to its other customers will not be chargeable to Client (or allocated to Client and such other customers as and if mutually agreed). Change Orders will be performed under the terms of this Agreement and the applicable SOW once mutually agreed. Changes in any SOW will become effective only when executed by authorized representatives of both Parties.

⁹ Customers frequently ask for escrows. The provider might consider pushing back and asking whether the customer as a practical matter could use the escrow. It is not simple to stand up a new instance of a cloud platform.

¹⁰ The provider should consider whether it wants to allow every affiliate to sign up for the service (and should avoid offering an enterprise license price across all affiliates). The provider also may want to specify that the affiliates must affirmatively accept the terms of the MSA.



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4. SERVICE LEVELS.

4.1 Service Levels. The SaaS Services, Application Platform, and Professional Services, as applicable, will meet or exceed (from the perspective of Client) the minimum service level standards set out in Exhibit E (Service Levels) (each a “**Service Level**” or “**SLA**” and collectively the “**Service Levels**” or “**SLAs**”). In the event any SLA is not met or exceeded, SaaS Provider will promptly notify Client, promptly take corrective action to remedy the problem, take preventative measures so that the failure does not recur, and Client will be entitled to recover the applicable amount of service level credits specified in Exhibit E (Service Levels) (“**Service Level Credits**”).

4.2 Service Level Disputes. If at any time Client reasonably disputes SaaS Provider’s determination of whether a Service Level Credit is due or the calculation of a Service Level Credit, then within ten (10) business days of SaaS Provider’s receipt of written notice of such dispute, the Parties will discuss the disputed Service Level Credit in good faith in an attempt to resolve the dispute. In the event that the Parties are unable to resolve the dispute within thirty (30) days of Client’s notice to SaaS Provider, Client may pursue any remedy available, at law or in equity. Upon Client’s reasonable request, SaaS Provider will provide Client with all reasonable information, documentation and access to the measurement and monitoring tools necessary to verify compliance by SaaS Provider with the SLAs including, without limitation, providing Client with access to or copies of all records and documentation relating to any problem giving rise to an SLA failure and related credits.

4.3 Continuous Improvement. SaaS Provider will use commercially reasonable efforts to cause the SaaS Services and Application Platform to continuously improve and evolve with changes in the industry as reasonably determined by SaaS Provider (or otherwise provided in an Order), including with respect to accepted industry practices and processes and compliance requirements, at no additional fee or expense to Client; *provided, however*, additional modules or services that SaaS Provider charges customers generally for and which Client orders will be reasonably priced and chargeable in accordance with the applicable Order and this Agreement.

5. FEES.

5.1 SaaS Fees. Client will pay to SaaS Provider the charges set forth in the applicable Order and/or Exhibit F (Pricing; Invoicing; Expense Reimbursement) for the provision and use of the SaaS Services and Application Platform (the “**SaaS Charges**”), subject to the other provisions of this Section 5 (Fees) and Exhibit F (Pricing; Invoicing; Expense Reimbursement).

5.2 Professional Services Fees. Client will pay to SaaS Provider the charges set forth in the applicable SOW and/or Exhibit C (implementation Services) for the Professional Services (the “**Professional Services Charges**”), subject to the other provisions of this Section 5 and Exhibit F (Pricing; Invoicing; Expense Reimbursement).

5.3 Automatic Renewal of SaaS Services. Within ninety (90) days of the expiration of the then current Term and any renewal term for the SaaS Services, SaaS Provider will notify Client of the upcoming expiration and any proposed charges for the renewal term.¹¹ The proposed charges for any SaaS Service renewal term will not exceed the charges for the prior year, plus the lesser of (i) 3% of such prior year’s SaaS Charges or (ii) the increase in SaaS Provider’s list prices for SaaS Charges. Except as

¹¹ This form assumes that the subscription term will auto-renew, but that the customer must be “warned” of such fact. The provider may want to push back on this as it can be difficult to manager.



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expressly provided otherwise, there will be no other increase in the SaaS Charges. The provision of and rights to the SaaS Services and Application Platform will automatically renew at the end of the initial Term and any renewal term, unless: (i) Client notifies SaaS Provider in writing at least thirty (30) days prior to the expiration of the Initial SaaS Term or the then-current renewal term that Client does not desire to renew; (ii) Client fails to pay the undisputed SaaS Charges required under this Agreement and fails to cure such non-payment within ten (10) days notice from SaaS Provider; or (iii) SaaS Provider ceases to offer any other customer services similar to the SaaS Services and applications similar to the Application Platform and provides Client at least one (1) years prior notice of SaaS Provider's intent to discontinue such services and platform for all its customers.

5.4 Payment of Fees. All SaaS Charges, Professional Service Charges, and other amounts payable by Client under this Agreement (collectively, "**Charges**"), which are not disputed in good faith, are due and payable within thirty (30) days of Client's receipt of the applicable invoice submitted in compliance with Exhibit F (Pricing; Invoicing; Expense Reimbursement). If an undisputed Charge is not paid within ten (10) days after Client's receipt of a notice from SaaS Provider of a past due Charge, a late payment fee of one percent (1.0%) of the balance due or the maximum amount permitted by law, whichever is lower, will be due and payable by Client to SaaS Provider for each month such invoice remains unpaid. Client will not have any obligation to pay any disputed amount until thirty (30) days after such dispute has been resolved and the amount owned (if any) by Client has been determined. In the event Client disputes all or any portion of the Charges in any properly submitted invoice, the Parties agree to engage in good faith efforts to promptly resolve any such dispute for at least ninety (90) days. SaaS Provider will continue to provide the Service and perform its obligations until a resolution is reached or the Agreement is terminated in accordance with its terms.

5.5 Reimbursement of Expenses. Client will reimburse SaaS Provider for any reasonable out-of-pocket expenses which comply with the Expense Reimbursement Policy set out in Exhibit F (Pricing; Invoicing; Expense Reimbursement) and are approved by Client prior to being incurred by SaaS Provider for the performance of the Professional Services. SaaS Provider will submit to Client a weekly invoice for expenses incurred in such form and detail as Client reasonably requires.

5.6 Taxes. Except for taxes based upon SaaS Provider's income or for goods or services used or consumed by SaaS Provider in connection with providing the Services under this Agreement, Client will be responsible for all sales, use, excise, duties, tariffs, or any other form of taxes (excluding withholding taxes related to SaaS Provider, its employees, agents or subcontractors) resulting from Client's use of the Application Platform or imposed, levied or assessed in connection with Client's use of the Services and Application Platform, unless Client provides SaaS Provider with a valid tax exemption certificate authorized by the appropriate taxing authority. Notwithstanding the foregoing, SaaS Provider will use reasonable, permissible efforts to minimize the tax burden to Client.

5.7 Right to Inspection. Client grants to SaaS Provider, or its independent nationally recognized accountants, upon fifteen business (15) days prior written notice, the right to reasonably examine those portions of its books, records and accounts related to this Agreement during Client's normal business hours and not more than once per year solely to verify Client's compliance with this Agreement. If any audit of Client's books and records reveals that Client has failed properly to account for and pay any amounts due and payable to SaaS Provider hereunder (an "**Underpayment**"), and the amount of any such Underpayment exceeds by five percent (5%) or more the amounts actually accounted for and paid to SaaS Provider, then Client will pay SaaS Provider all undisputed past due amounts and reimburse SaaS Provider for SaaS Provider's reasonable expenses incurred in conducting the audit.

6. OWNERSHIP.



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6.1 Ownership Rights. Except for the license and other rights granted to Client in this Agreement, SaaS Provider retains all right, title and interest in and to the Application Platform, Documentation and SaaS Provider's Confidential Information, including all Intellectual Property Rights therein. Further, Client acknowledges and agrees that the Application Platform, derivatives thereof¹², ideas, methods of operation, modifications, changes, enhancements, conversions, upgrades, additions, sub-systems and modules included in the Application Platform are proprietary material which contain valuable trade secrets of SaaS Provider.

6.2 Ownership of Client Data. SaaS Provider acknowledges and agrees that, as between the Parties, Client exclusively owns all right, title, and interest in and to Client's Confidential Information and the Client Data, including all Intellectual Property Rights therein, irrespective of whether such Client Data is stored or processed through or in the Services or Application Platform. If SaaS Provider is deemed to have any ownership interest in Client's Confidential Information or the Client Data, including any and all derivative works, enhancements, or other modifications thereto, then SaaS Provider will assign, and hereby does assign, irrevocably and royalty-free, all of such ownership interest or other rights exclusively to Client and SaaS Provider will, at Client's reasonable request and expense, complete, execute, and deliver any and all documents necessary to effect or perfect such assignments.

6.3 Return of Client Data. Upon termination of this Agreement, SaaS Provider will promptly return Client's Confidential Information and Client Data to Client. Thereafter, SaaS Provider will delete all Client Data and any related production and test environments from SaaS Provider servers primarily dedicated to Client and verify such deletion in writing to Client. SaaS Provider acknowledges that Client will have the right to terminate this Agreement immediately, without further payment to SaaS Provider, and without prejudice to Client's rights and remedies under this Agreement, in the event that SaaS Provider uses or permits the use of the Client Data other than as permitted in connection with the performance of the Service hereunder.¹³

6.4 Deliverables. Any written materials or deliverables (collectively "Deliverables") prepared for Client (excluding any derivative works to the Application Platform or Documentation)¹⁴ will be the property of Client, and SaaS Provider agrees to assign and hereby does assign to Client any and all of its rights in such Deliverables. Any Deliverable not assigned to Client is hereby licensed to Client as if it were part of the Application Platform or Documentation.

6.5 Residuals. Subject to Sections 6 (Ownership) and 8 (Confidentiality and Data Security), each Party will be free to use any general concepts, techniques, feedback, and know-how provided to it, used by it, or developed in the course of this relationship.

7. TERM OF AGREEMENT AND DEFAULT.

7.1 Term. The term of this Agreement will commence upon the Effective Date and will be coterminous with the initial Order. If any subsequent Orders or SOWs are executed by the Parties

¹² The customer should determine if it wants to own any custom-developed features.

¹³ If the provider wants any additional use rights for the Client Data, e.g., the right to create aggregate data sets, the customer should be careful to ensure that any such rights are consistent with applicable law (e.g., the CCPA) and with customer's own privacy statements to its customers.

¹⁴ The provider may want to require that only those Deliverables expressly stated to be owned by customer will be subject to this assignment.



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referencing this Agreement, this Agreement will continue in effect with respect to the term of such subsequent Orders or SOWs. The “**Term**” means the term of such initial Orders and any subsequent Orders or SOWs, including renewals and extensions. Unless otherwise agreed in writing and subject to Section 5.3 (Automatic Renewal of SaaS Services), the Term will automatically extend for additional one (1) year periods unless Client provides SaaS Provider with notice of its intent not to extend within thirty (30) days of the end of the then-current Term.

7.2 Termination by SaaS Provider. In the event that (x) Client fails to pay any Charges not disputed in good faith in accordance with this Agreement by the specified due date, and (y) Client fails to cure such failure within ten (10) days of receipt of written notice from SaaS Provider of its intention to terminate, then SaaS Provider may, by written notice to Client, terminate this Agreement in its entirety, provided the total of all such overdue Charges exceeds, in the aggregate, the average monthly Charges invoiced in the prior twelve (12) months. In addition, SaaS Provider may, by written notice to Client, terminate this Agreement in its entirety if Client (a) materially breaches (i) a provision of this Agreement relating to SaaS Provider’s Confidential Information or Intellectual Property in connection with this Agreement, or (ii) a provision of this Agreement relating to restrictions on the use of the Application Platform by third parties, and (b) fails to cure, to the extent reasonably practical, or mitigate such breach and implement safeguards to prevent similar future breaches in all other cases, within thirty (30) days of receipt of written notice from SaaS Provider of its intention to terminate. SaaS Provider acknowledges and agrees that this section sets forth SaaS Provider’s sole and exclusive right to terminate.

7.3 Termination by Client. Client will have the right to terminate this Agreement, any Order, or any SOW, in whole or in part, for cause, without penalty or payment to SaaS Provider, by giving written notice to SaaS Provider as of a date specified in the notice of termination and will further have the right to seek damages from SaaS Provider (unless expressly provided otherwise in an Order for a particular termination right):

(a) if SaaS Provider commits a material breach (including, without limitation, the failure to successfully complete any critical implementation milestone under an Order, SOW or Exhibit C (Implementation Services)), which breach remains uncured for a period of thirty (30) days after the receipt of written notice thereof from Client or that is not capable of being cured within thirty (30) days;

(b) upon the occurrence of a SLA Termination Event as described in Exhibit E (Service Levels);

(c) if SaaS Provider fails to perform its responsibilities under the Disaster Recovery Plan, if such failure is not timely cured and causes a material and adverse impact upon the operation of Client’s business;

(d) if SaaS Provider fails to comply with any provision of this Agreement and such failure results in any payment card processor, credit card processor, bank, or other financial institution (A) imposing a fee or cost on Client that it would not have otherwise incurred which SaaS Provider does not pay within ten (10) days of written demand therefor (along with reasonable documentation verifying such fee or cost), (B) imposing a fine or sanction on Client which SaaS Provider does not pay and/or fully reimburse Client for within ten (10) days of written demand therefor (along with reasonable documentation verifying such fee or cost), or (C) refusing to do business with Client, as objectively demonstrated by Client, which such refusal materially adversely impacts Client’s business operations on an ongoing basis.



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7.4 Bankruptcy. Either Party will have the right to terminate this Agreement by providing written notice to the other Party upon the occurrence of any of the following events, but only to the extent such events are not dismissed within 120 days from the date such events first occurred: (i) a receiver is appointed for the other Party; (ii) the other Party makes a general assignment of all or substantially all of its assets for the benefit of its creditors; (iii) the other Party commences or has commenced against it, proceedings under any bankruptcy law; or (iv) the other Party ceases to do business.

7.5 Equitable Remedies. Subject only to a court's finding as to the merits of Client's action relating to a breach of the Agreement by SaaS Provider, the Parties agree to injunctive relief to cause SaaS Provider to return Client Data, continue performance, and, to the extent relevant, Termination Assistance Services without requiring Client to post a bond.

7.6 Partial Terminations; Pro-Rata Refund. If Client terminates the Agreement or any Order in part to the extent and as expressly permitted hereunder, the remaining Charges under the Agreement will be reduced in accordance with the pricing methodologies set forth in this Agreement and its Exhibits or the applicable Order or SOW to the extent applicable and as otherwise equitable under the circumstances. If Client terminates the Agreement or any Order or SOW and has pre-paid any Charges, such Charges will be refunded on a pro-rata basis.

7.7 Termination Assistance. Upon Client's request, SaaS Provider will provide Termination Assistance Services (as defined below) to Client chargeable at the rates in effect under this Agreement. If this Agreement is terminated by SaaS Provider for cause, then SaaS Provider's obligation to provide Termination Assistance Services will be conditioned upon Client paying to SaaS Provider, when due, all outstanding correct invoices for Services performed prior to the commencement of any Termination Assistance Services and Client continuing to pay, when due, any and all Charges correctly invoiced due hereunder during SaaS Provider's performance of Termination Assistance Services. "**Termination Assistance Services**" will mean (a) the Services (and any replacements thereof or substitutions therefore), to the extent Client requests such Services during the Termination Assistance Period, subject to payment of Charges therefor, (b) SaaS Provider's reasonable cooperation with Client or another service provider designated by Client in the migration of Client Data stored on the Application Platform or Service to Client or another service provider designated by Client. Such data transfers will be performed via secure means and without charge. "**Termination Assistance Period**" will mean a period of time designated by Client, commencing upon termination or expiration and continuing for up to twelve (12) months thereafter, during which period SaaS Provider will provide the Termination Assistance Services in accordance with the terms and conditions of this Agreement.

7.8 Effect of Termination. Except as expressly set forth otherwise in this Agreement, upon termination of this Agreement and following expiration of any Transition Assistance Period: (i) the licenses and rights granted hereunder will be terminated and Client will immediately cease using the Application Platform, Documentation, and SaaS Provider's Confidential Information, (ii) the Application Platform (and associated hosting and support Services) will cease to be accessible to Client or to its users, (iii) upon the Disclosing Party's written request, the Receiving Party will immediately return all Confidential Information to the Disclosing Party, and (iv) Client will pay, or SaaS Provider will refund (e.g., with respect to pre-paid amounts and credits) as applicable, all accrued SaaS Charges, Professional Services Charges, and Service Level Credits within thirty (30) days of the invoice or the date termination occurred, whichever is earlier.

7.9 No Suspension. Under no circumstances may SaaS Provider suspend or terminate Client's or any Affiliate's access to or use of the Application Platform or receipt of the Service other than



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pursuant to a proper termination of this Agreement in accordance with this Section 7 (Term of Agreement and Default) and, in each such case, only after expiration of the Transition Assistance Period.

8. CONFIDENTIALITY AND DATA SECURITY.

8.1 General. During the Term of this Agreement and thereafter, each Party will treat as confidential all Confidential Information of the other Party, will not use such Confidential Information except as expressly set forth herein or otherwise authorized in writing, will implement reasonable procedures to prohibit the unauthorized use, disclosure, duplication, misuse or removal of the other Party's Confidential Information and will not disclose such Confidential Information to any third party except as may be necessary and required in connection with the rights and obligations of such Party under this Agreement, and subject to confidentiality obligations at least as protective as those set forth herein. Without limiting the foregoing, each of the Parties will use at least the same procedures and degree of care which it uses to prevent the disclosure of its own confidential information of like importance to prevent the disclosure of Confidential Information disclosed to it by the other Party under this Agreement, but in no event less than reasonable care. Except as expressly authorized in this Agreement, neither Party will copy Confidential Information of the other Party without the Disclosing Party's prior written consent.

8.2 Exclusions. Except as otherwise provided below, Confidential Information will not include, or will cease to include, as applicable, Confidential Information that the Receiving Party can document and prove: (a) is or becomes generally available to the public through no improper action or inaction by the Receiving Party; (b) was known by the Receiving Party or in the Receiving Party's possession prior to receipt of the Disclosing Party's Confidential Information as shown by the Receiving Party's business records kept in the ordinary course; (c) is disclosed with the prior written approval of the Disclosing Party; (d) was independently developed by the Receiving Party without use of or reference to the Disclosing Party's Confidential Information and provided that the Receiving Party can demonstrate such independent development by documented evidence prepared contemporaneously with such independent development; or (e) becomes known to the Receiving Party from a source other than the Disclosing Party without breach of this Agreement by the Receiving Party and otherwise not in violation of the Disclosing Party's rights. The exclusions in this section will not apply with respect to End User Data, Cardholder Data, or any other personal or private data that requires protection under applicable laws or regulations.

8.3 Court Order. The Receiving Party may disclose Confidential Information of the other Party only pursuant to the order or requirement of a court, administrative agency, or other governmental body and only provided that the Receiving Party provides prompt, advance written notice thereof to enable the Disclosing Party to seek a protective order or otherwise prevent such disclosure. In the event such a protective order is not obtained by the Disclosing Party, the Receiving Party will disclose only that portion of the Confidential Information which its legal counsel advises that it is legally required to disclose. Confidential Information so disclosed will continue to be deemed Confidential Information as between the Parties hereto.

8.4 Remedies. If either Party breaches any of its obligations with respect to confidentiality or unauthorized use or disclosure of Confidential Information hereunder, the other Party is entitled to seek equitable and injunctive relief in addition to all other remedies that may be available to protect its interest.

8.5 Return. Upon the Disclosing Party's written request, the Receiving Party will promptly return or destroy, at the Disclosing Party's option, all tangible copies of the Disclosing Party's Confidential Information.



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8.6 Data Security. SaaS Provider will: (i) protect the security and integrity of the all Client Data that is collected, accessed, stored or received by SaaS Provider in connection with the Application Platform or the performance of the Services, including, without limitation all End User Data and Cardholder Data; and (ii) develop, implement and maintain a written comprehensive security program (“**Security Program**”) with administrative, technical and physical safeguards to protect the Client Data against any unauthorized disclosure or use of such data and any anticipated or reasonably foreseeable threats or hazards to the security or integrity of such Client Data. The Security Program must comply with all applicable federal and state privacy laws. In addition, SaaS Provider: (x) acknowledges that SaaS Provider is responsible for the privacy and security of any and all Client Data (including End User Data and Cardholder Data) that SaaS Provider or any of its employees, contractors or other representatives, at any time, accesses, stores, transmits, or otherwise possesses; and (y) will comply with Exhibit G (Security Audits) and with all applicable rules, regulations, standards, and security requirements of the Payment Brands, including, without limitation, the PCI-DSS, in each case, as such may be amended, modified, supplemented, or replaced from time to time (“**Security Requirements**”). SaaS Provider will update and keep the Security Program current in light of changes in relevant technology and Security Requirements. SaaS Provider will maintain a complete audit trail of all transactions and activities associated with all End User Data and will provide Client with such audit information that covers the controls for any sites and facilities from which the Services are provided and any location where the End User Data is stored, complete an audit or self-assessment, as required, to certify SaaS Provider’s compliance with the PCI DSS and provide Client with such evidence, information, and documentation as is reasonably necessary to confirm that SaaS Provider is in compliance with all applicable Security Requirements. If during the term of the Agreement, SaaS Provider undergoes, or has reason to believe that it will undergo, an adverse change in its certification or compliance status with material data security industry standards (e.g., PCI DSS), it will promptly notify Client of such circumstances in writing.

8.7 Security Events. Without limiting any obligation of SaaS Provider herein, if at any time SaaS Provider discovers or otherwise becomes aware of any Security Event that impacts the Client, SaaS Provider will: (i) immediately notify Client of such Security Event and furnish Client with the full details of such Security Event; and (ii) cooperate with Client in any effort, action, or proceeding to protect the End User and/or Cardholder Data and to mitigate and/or remediate the impact of the Security Event, as such may be deemed necessary by Client and/or required by applicable laws or regulations, including breach notification laws and credit reporting laws. In the event of any Security Event, or at any time if requested by Client, SaaS Provider will, with prior reasonable notice, permit Client, a Payment Card Industry (“**PCI**”) representative, and/or a PCI approved third party (individually or collectively, the “**PCI Auditor**”), to conduct a thorough review of SaaS Provider’s books, records, files, computer processors, equipment, systems, physical and electronic log files, and facilities relating to the Services, to investigate or remediate a Security Event or validate and confirm SaaS Provider’s compliance with the Security Requirements (the “**Breach Audit**”). SaaS Provider will provide the PCI Auditor with full cooperation and access to enable such Breach Audit. If any Breach Audit identifies any failure of SaaS Provider to comply with the Security Requirements, SaaS Provider will promptly repair and/or remedy any such failure and deliver written notice of such efforts and remedy to Client. In any such audit above, SaaS Provider may charge Client reasonable fees for use of SaaS Provider’s personnel during such audits and determine reasonable access restrictions as required to protect other clients, except to the extent such audit arose due to a Security Event or SaaS Provider’s failure to maintain the required certifications or comply with its material security obligations under this Agreement.

8.8 End User Notice. If any disclosure, use or breach of any End User Data requires Client, under applicable laws or regulations, to make a disclosure to any third party, Client will be solely responsible for making such disclosure, including determining the content, methods, and means of such disclosure. SaaS Provider will reasonably cooperate with Client in formulating the disclosure, but SaaS



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Provider will not make any such disclosure at its own initiative without Client's prior consent. To the extent the breach is caused by or related to a breach of the Agreement by SaaS Provider (or its employees, contractors, service providers, representatives, or advisors), SaaS Provider will pay all reasonable costs and expenses of: (i) such disclosures and notification (including any legal or forensic expenses, fulfillment service expenses, or call center expense relating to the breach), and (ii) any applicable monitoring and reporting on the impacted individuals' credit records or the restoration of the impacted individuals' credit or identity.

9. PUBLICITY. All media releases, public announcements and public disclosures by either Party relating to this Agreement or the subject matter of this Agreement, or using the other Party's name or trademarks, service marks or logos, including promotional or marketing material, but not including announcements intended solely for internal distribution or disclosures to the extent required to meet legal or regulatory requirements beyond the reasonable control of the Disclosing Party, will be coordinated with and approved by the other Party prior to release, which such Party may withhold in its sole discretion. SaaS Provider will ensure that any approved publicity materials referring to Client remain current and accurate, and Client reserves the right to withdraw a previously granted approval and SaaS Provider will cease use of Client's name pending SaaS Provider's correction of any inaccurate materials.

10. INDEMNIFICATION.

10.1 Indemnification. SaaS Provider will defend, indemnify and hold Client and its successors, parents, subsidiaries, Affiliates, officers, directors, employees, users, and attorneys harmless from and against any and all losses, damages, costs, judgments, liabilities, and expenses (including reasonable attorneys' fees court costs, and disbursements and costs of investigation, litigation, settlement, judgment, interest, fines and penalties) (collectively, "**Losses**") arising out of or relating to: (i) any Security Event, (ii) any failure by SaaS Provider to comply with Section 8 (Confidentiality and Data Security), including any Security Requirement; or (iii) any third party claims, demands, or proceedings (a "**Claim**") asserting that the Application Platform, Services, or the use thereof (as permitted under this Agreement) infringes or misappropriates any third party's Intellectual Property Rights.

10.2 Procedure. Client will give SaaS Provider prompt written notice of all Claims for which indemnity is sought hereunder and will provide SaaS Provider with: (a) all related documentation in Client's possession or control relating to such Claims; and (b) reasonable assistance to SaaS Provider in the defense of such Claims. SaaS Provider will control, at SaaS Provider's sole cost and expense, the defense or settlement of all such Claims and will keep Client apprised of the status of all such Claims. Client will have the right, but not the obligation, to participate in the defense of all such Claims with counsel of Client's choice at Client's sole cost and expense. If any settlement requires any action or admission by Client, then the settlement will require Client's prior written consent. Failure by Client to provide prompt notice of a claim or to provide such control, authority, information or assistance will not relieve SaaS Provider of its obligations under this section, except to the extent that SaaS Provider is materially prejudiced by such failure.

10.3 Limitations. SaaS Provider will not have any liability or indemnification obligations to Client under Section 10.1(a)(iii) of this Agreement to the extent that any Losses arise directly as a result of: (a) use of a Application Platform or Services by Client or any third party in combination with equipment, materials, products or software not authorized by SaaS Provider where the Application Platform or Services alone would not be infringing; or (b) compliance with designs, plans, or instructions provided to SaaS Provider by Client.



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10.4 License, Replacement or Refund. If the Application Platform or Services becomes the subject of a Claim as set forth in Section 10.1(a)(iii) above or if SaaS Provider believes that the Application Platform or Services is likely to become the subject of a Claim, SaaS Provider may, at its sole discretion and expense: (i) obtain a license from such third party for the benefit of Client; (ii) replace or modify the Application Platform or Services (“**Replacement**”) so it is no longer the subject of a Claim so long as such Replacement performs substantially the same functions as the Application Platform or Services at issue; or (iii) if neither of the foregoing is commercially feasible, terminate this Agreement and refund all Charges for Implementation Services and any pre-paid SaaS Charges or Professional Services Charges (as applicable).¹⁵

11. LIMITATION OF LIABILITY.

11.1 EXCEPT AS OTHERWISE PROVIDED IN SECTION 11.3, IN NO EVENT WILL EITHER PARTY’S TOTAL AGGREGATE LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT (INCLUDING, BUT NOT LIMITED TO, CLAIMS FOR NEGLIGENCE, STRICT LIABILITY, BREACH OF CONTRACT, MISREPRESENTATION, INFRINGEMENT OR OTHER CONTRACT OR TORT CLAIMS) EXCEED THE TOTAL CHARGES PAID BY CLIENT TO SAAS PROVIDER DURING THE MOST RECENT 12 MONTH PERIOD PRIOR TO THE LAST EVENT GIVING RISE TO LIABILITY.

11.2 EXCEPT AS OTHERWISE PROVIDED IN SECTION 11.3, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF THIS AGREEMENT EVEN IF INFORMED OF THE POSSIBILITY THEREOF IN ADVANCE.

11.3 THE PARTIES EACH ACKNOWLEDGE AND AGREE THAT THE LIMITATIONS OF LIABILITY SET FORTH IN THIS SECTION 11 (LIMITATION OF LIABILITY) WILL NOT APPLY TO ANY LOSSES AS THE RESULT OF: (A) A SECURITY EVENT OR SAAS PROVIDER’S FAILURE TO COMPLY WITH SECTION 8 (CONFIDENTIALITY AND DATA SECURITY), INCLUDING ANY SECURITY REQUIREMENTS; (B) INDEMNIFICATION OBLIGATIONS HEREUNDER; (C) A WILLFUL REFUSAL BY SAAS PROVIDER TO PROVIDE TERMINATION ASSISTANCE SERVICES AS REQUIRED HEREUNDER; (D) FRAUD, WILLFUL MISCONDUCT OR GROSS NEGLIGENCE; OR (E) SERVICE LEVEL CREDITS.¹⁶

11.4 Except as otherwise expressly provided herein, all rights and remedies of the Parties are separate and cumulative. The waiver or failure of either Party to exercise in any respect any right or remedy provided herein will not be deemed a waiver of any further right or remedy hereunder.

12. REPRESENTATIONS AND WARRANTIES.

12.1 SaaS Provider represents and warrants to Client that:

¹⁵ Each party may want to consider this provision carefully. If the platform is mission-critical, the customer may want to require a minimum wind-down period. Customer also may want to require some minimum duration on the provider’s efforts to secure a license.

¹⁶ These carve-outs are fairly customer-favorable. The provider may request that, for any professional services, the sole remedy be re-performance. The provider also may want to limit its exposure under some of these categories, e.g., by specifying that for security breaches liability is uncapped only as a direct result of the failure to adhere to agreed security procedures.



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(a) SaaS Provider is the owner of or licensee of all rights necessary and appropriate to perform the Services and grant the rights hereunder to the Application Platform and other Deliverables;

(b) SaaS Provider has the power and authority to enter into this Agreement;

(c) the Services will be performed in a timely, professional and workman-like manner in accordance with industry standards, and with a degree of care, skill and expertise as is required for the provision of services of a similar nature;

(d) the Application Platform and SaaS Services will be provided and perform in all material respects¹⁷ the functions and features described in the then current Documentation and as otherwise required under the applicable Order or SOW; SaaS Provider will promptly repair or replace any non-conformity associated with the Application Platform or SaaS Service so that each are in compliance with the Documentation and this Agreement;

(e) SaaS Provider will not violate any law or regulation or any agreements with any third party as a result of performing its obligations under this Agreement;

(f) there are neither pending nor threatened, nor to the best of SaaS Provider's knowledge, contemplated, any suits, proceedings, actions, or claims which would materially effect or limit the rights granted to Client under this Agreement;

(g) prior to making available the Service or Application Platform (including any updates, upgrades, or enhancements) to Client or its Affiliates, SaaS Provider will use commercially reasonable efforts to detect and screen out any Virus or malicious code through the use of one or more current virus and malware detection programs. For purposes of this Agreement, "Virus" means a set of computer instructions which are self-replicating or self-propagating and whose purpose or effect is to contaminate software, consume computer resources, or modify, destroy, record or transmit data or programming without the intent or permission of the user, including, without limitation, Trojan horses, worms or like destructive code; and

(h) the Documentation will be sufficient to allow a user qualified in the subject matter of the application to use the Application Platform or Services.

(i) EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION AND AS PERMITTED BY LAW, WARRANTIES AS TO SATISFACTORY QUALITY, MERCHANTABILITY, ACCURACY OF RESULTS, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, ALL OF WHICH ARE EXPRESSLY DISCLAIMED. SAAS PROVIDER DOES NOT WARRANT THAT THE APPLICATION PLATFORM OR THE SERVICES WILL BE COMPLETELY ERROR FREE OR THAT THE USE OF THE APPLICATION PLATFORM WILL BE UNINTERRUPTED OR PROBLEM OR ERROR-FREE.

13. PLATFORM MODIFICATIONS. SaaS Provider will provide Client with thirty (30) days prior written notice prior to rolling out any substantive modifications to the Application Platform or Services

¹⁷ This is a functional representation. The provider may prefer to delete any functional representation, and simply point to the SLA.



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and such modification will not reduce or materially diminish the functionality of the Application Platform or Services.

14. EXCUSABLE DELAY. Neither Party will be liable to the other for any loss, damage, delay or breach in performing any obligations hereunder to the extent resulting from any cause or event beyond the control of the Party being released hereby, including acts of God, telecommunication or power suppliers, and acts or omissions of civil or military authorities, but only to the extent such Party being released did not contribute to and could not have reasonably prevented or mitigated the impact thereof (e.g., through redundancies and work-arounds which, in the case of SaaS Provider, include execution of the Disaster Recovery Plan and redundant Data Centers). Nothing herein releases SaaS Provider from performing its disaster recovery and business continuity obligations or being responsible for its contractors or subcontractors. SaaS Provider further agrees that (i) to the extent that any force majeure event prevents or hinders the use of the Services or Application Platform for more than five (5) consecutive days or ten (10) days in any calendar year, then Client may terminate and receive a refund of any pre-paid Charges and fifty percent (50%) of the Implementation Service Charges (less a reasonable allowance for straight-line amortization over a three (3) year period from first productive use), and (ii) no Charges will apply during any period in which the Services are not provided or the Application Platform is not available for use due to force majeure. The Party seeking to be released under this Section will as soon as practicable notify the other Party of the force majeure event.

15. INSURANCE. SaaS Provider will maintain, for the Term, the insurance described below.

15.1 SaaS Provider's Insurance. SaaS Provider must maintain at its sole cost and expense, the minimum valid, effective and collectible insurance of the following types and minimum coverage amounts:

(a) Workers' Compensation. Workers' compensation or qualified self-insurance in compliance with the requirements of each state in which the Services are to be performed.

(b) Employers' Liability. Employers' liability insurance with a limit of not less than \$1 million for bodily injury by accident, \$1 million for bodily injury by disease, and \$1 million for policy limits.

(c) Commercial General Liability. Commercial general liability insurance providing coverage on an occurrence form basis and including coverage for bodily injury, property damage, blanket contractual liability (including coverage for SaaS Provider's indemnification obligations under this Agreement), products liability and completed operations. The insurance must have limits of not less than \$1 million each occurrence for bodily injury and property damage and personal and advertising injury, \$2 million annual general aggregate, and \$1 million products and completed operations annual aggregate. SaaS Provider's Commercial General Liability policy or policies will provide that the insurance company has the duty to defend all insureds under the policy.

(d) Auto Liability. Auto Liability insurance with a limit of liability of not less than \$1 million for any one accident or loss for bodily injury and property damage and affording coverage for Owned, Hired, Rented and Non-Owned vehicles.

(e) Employee Dishonesty. Employee Dishonesty coverage of \$1 million endorsed to include coverage for loss arising out of or through the use of a computer system.



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(f) **Professional Liability.** Professional Liability coverage with a limit of liability of not less than \$5 million for financial loss due to error, omission, or negligence of SaaS Provider and its employees.

(g) **Cyber Security.** Cyber security and privacy liability coverage of at least \$1 million or evidence of expanded coverage for actual or alleged privacy breaches, confidentiality breaches, security breaches, and on-line media activity (including any claim made for an alleged online media activity resulting in a media hazard) within Service Provider's general liability or professional liability policies.

Where applicable, Umbrella or Excess liability insurance policies may be used to provide the limits required under this Agreement. None of the foregoing requirements as to the type and limits of insurance to be maintained by SaaS Provider is intended to, and such requirements should not be construed to, limit in any manner SaaS Provider's obligations under this Agreement.

15.2 Insurance Requirements. All insurance policies must be primary and non-contributing and must be issued by companies licensed in the state where the Services are to be performed who hold a current Policy Holder Alphabetic Category Rating of not less than "A-" and Financial Size Category Rating of not less than "VII" according to the latest edition of A.M. Best's Key Rating Guide. Any other insurance carried by Client, which may be applicable, will be deemed to be excess insurance and SaaS Provider's insurance must contain a provision that it is deemed primary and non-contributing with any insurance carried by Client. Each insurance policy required of SaaS Provider must contain a cross-liability or separation of insureds provision that provides that the insurance applies separately to each insured against whom a claim is filed and that the policies do not exclude coverage for claims or suits by one insured against the other. SaaS Provider's insurance may be provided on the basis of primary and umbrella/excess coverage as long as the primary coverage is a minimum of \$1 million and the umbrella/excess coverage is at least as broad as the coverage under the primary policy, including the coverage for all additional insureds. It is the intent of the Parties to have SaaS Provider's, and not Client's, insurance cover claims brought against either Party that arise out of or are related SaaS Provider's performance under this Agreement.

15.3 Additional Insured.¹⁸ All of SaaS Provider's insurance must not be terminated, permitted to expire, subject to non-renewal, or materially altered, except on 30 days' prior written notice to Client. Such insurance must be maintained with deductible amounts, with insurers, and with forms that are acceptable to Client and must name Client as an additional insured, with coverage provided such additional insured as broad as provided to the named insured; provided, however, that the foregoing will not apply with respect to the Workers' Compensation or Employer's Liability Insurance. Prior to execution of this Agreement SaaS Provider must furnish certificates of insurance to Client evidencing all the insurance required above. SaaS Provider will not cancel or materially alter insurance coverage without providing thirty (30) days prior written notice to Client. Notwithstanding anything else, if SaaS Provider fails to promptly provide Client with any such certificates, Client may terminate this Agreement immediately upon notice to SaaS Provider.

15.4 Subrogation. SaaS Provider hereby waives all rights of recovery against Client on account of loss or damage occasioned to SaaS Provider or others under SaaS Provider's control or for whom it is responsible to the extent such loss or damage is insured against under any of SaaS Provider's

¹⁸ Being named as an additional insured (in addition to the covenant for the vendor to maintain insurance) is normally reserved for larger transactions. The provider may resist having its policies diluted for small accounts.



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insurance policies which may be in force at the time of the loss or damage or would have been insured against if SaaS Provider had complied with its obligations under this Article.

15.5 Cooperation. SaaS Provider agrees to reasonably assist and cooperate with Client with regard to the adjustment of all claims arising out of the performance of the Services and to reasonably cooperate with Client and any insurance companies in litigation or other disputes relating to such claims.

16. GENERAL.

16.1 Waiver. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

16.2 Assignment. This Agreement will be binding on the Parties hereto and their respective successors and assigns. Neither Party may, or will have the power to, assign this Agreement without the prior written consent of the other Party, except that Client may assign its rights and obligations under this Agreement, in whole or in part, to any then-existing Affiliate of Client or in the event of any merger, sale of all or substantially all of Client's assets, or other similar transaction; provided that in no event will such assignment relieve Client of its obligations under this Agreement. Subject to and except as set forth in the foregoing, any assignment by operation of law, by order of any court, or pursuant to any plan of merger, consolidation or liquidation, and any change of control of a Party will be deemed an assignment for which prior consent is required, and any assignment made without any such consent will be void and of no effect.¹⁹

16.3 Subcontracting. SaaS Provider will not subcontract any of its obligations under this Agreement without the prior written consent of Client, which consent Client may grant or withhold in its sole discretion. As of the Effective Date, Client grants SaaS Provider the right to subcontract to ²⁰ [_____]. SaaS Provider will be fully responsible for the performance, acts, and omissions of any permitted subcontractor. SaaS Provider must include in its subcontracts flow-down provisions as necessary to fulfill its obligations under this Agreement, including those pertaining to confidentiality, security, intellectual property, and audits.

16.4 Direction and Control. SaaS Provider's personnel, whether employees, independent contractors or subcontractors, performing Services will at all times be under SaaS Provider's exclusive direction and control and will not be deemed employees of Client. SaaS Provider will be responsible for payment of its independent contractors, subcontractors and its employees' entire compensation and benefits, as applicable, including employment taxes, worker's compensation, unemployment compensation and any similar taxes associated with employment or their relationship. Client and SaaS Provider agree that neither Party will be an employee, agent, partner or joint venturer of or with the other. SaaS Provider, in furnishing the Services, is acting as Client's independent contractor. SaaS Provider will be fully responsible for the acts and omissions of its employees, contractors, subcontractors, and other delegates as if they were performed by SaaS Provider. Neither Party has any authority to represent, contract, or commit the other in any matters, except as expressly authorized in this Agreement.

¹⁹ Generally each party would want the right to assign in a change of control event. The provider will not want to risk losing a long-term account simply because it is acquired (for example).

²⁰ Pre-approved subcontractors should be included.



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16.5 Export. The Parties will not export, directly or indirectly, any technical data acquired from the other Party pursuant to this Agreement (including the Platform Application) to any country for which the U.S. Government or any agency thereof at the time of export requires an export license or other government approval without first obtaining such license or approval.

16.6 Governing Law. This Agreement is governed by and construed in all respects in accordance with the laws of the State of California, U.S.A. other than such laws, rules, regulations, statutes, and case law that would result in the application of the laws of a State other than California (without regard to conflicts of laws principles), excluding the United Nations Convention on Contracts for the International Sale of Goods.

16.7 Escalation.

(a) Except as otherwise provided below, the following procedures will be followed in any and all legal controversies or disputes arising out of or related to this Agreement (“**Disputes**”), which the parties cannot informally resolve at an operational level. The aggrieved Party will notify the other Party in writing of the nature of the Dispute with reasonable specificity. Representatives for the respective Parties will meet (telephonically or in person) within fourteen (14) business days after the date of the written notification of the Dispute to seek to reach an agreement on the Dispute and corrective action(s) to be taken by the respective Parties. If the representatives are unable to agree on corrective action, senior managers of the Parties having authority to resolve the Dispute (“**Management**”) will meet or otherwise act to facilitate an agreement within fourteen (14) business days after the date of the written report from the representatives. If Management cannot resolve the Dispute or agree upon a written plan of corrective action within seven (7) days after their initial meeting, or if the agreed-upon completion dates in the written plan of corrective action are exceeded, either Party may exercise their individual rights under law or in equity. Except as otherwise specifically in this section, neither Party will initiate litigation unless and until this Dispute resolution procedure has been employed or waived. Each Party agrees that it will continue to meet its obligations under the terms and conditions of this Agreement, except to the extent otherwise provided in Section 7 (Term of Agreement and Default). Any and all time periods set forth above may be extended by mutual consent of the Parties. The content of any and all discussions, negotiations, agreements, and/or disclosures made during this Dispute resolution process set forth in this section will be Confidential Information and as such will not be released to the public, nor will it be admissible in any court proceeding that a party or the parties may initiate pursuant to this section.

(b) Notwithstanding anything to the contrary, nothing in this section will prevent or delay either Party from exercising its right to terminate in accordance with this Agreement and each Party is authorized to institute formal proceedings at any time to: (i) avoid the expiration of any applicable limitations period, (ii) obtain equitable relief, (iii) preserve a superior position with respect to other creditors, (iv) resolve a party’s rights with respect to intellectual property, Confidential Information, or compliance, or (v) obtain injunctive relief.

16.8 Venue. Any claim, whether based on contract, tort or other legal theory (including, but not limited to, any claim of fraud or misrepresentation), arising out or relating to this Agreement or any Order or SOW, including its interpretation, performance, breach or termination, not resolved by good faith negotiations and escalation as specified above, will be brought only in the United States District Court for the Southern District of California or, if such court would not have jurisdiction over the matter, then only in the State courts located in San Diego County, California, and each of the Parties hereto submits itself to the exclusive jurisdiction and venue of such courts for the purpose of any such action.



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Service of process in any such action may be effected in the manner provided in Section 16.100 (Notices) for delivery of notices.

16.9 Interpretation. If any provision of this Agreement is found to be unenforceable, such provision will be deemed to be deleted or narrowly construed to such extent as is necessary to make it enforceable, and this Agreement will otherwise remain in full force and effect.

16.10 Notices. Except as provided in any express provision of this Agreement, any notice, request, approval, authorization, consent, demand or other communication required or permitted to be given or made pursuant to this Agreement will be in writing (except where oral notice is specifically authorized in this Agreement) and will be deemed given upon actual receipt (or independent confirmation thereof) of notice by registered or certified United States mail, return receipt requested, postage prepaid and addressed as follows:

If to Client: _____

With a copy to: _____

If to SaaS Provider: _____

A Party may from time to time change its address or designee for notification purposes by giving the other prior written notice of the new address or designee and the date, at least twenty (20) days from the date of the notice, upon which it will become effective.

16.11 Orders. All Orders and SOWs are subject to and incorporate this Agreement, including its Exhibits. If there is a conflict between (i) an Order or SOW and (ii) these Terms and Conditions, these Terms and Conditions takes precedence, unless expressly provided otherwise. In addition, these Terms and Conditions take precedence over the Exhibits.

16.12 Counterparts. This Agreement may be executed in counterparts, including execution by facsimile, pdf or other electronic transmission, which, when taken together, will be deemed to constitute one and the same Agreement.

16.13 Compliance with Laws and Regulations. SaaS Provider will perform its obligations in a manner that complies with applicable federal, state, and local laws, regulations, ordinances and codes (including identifying and procuring required permits, certificates, approvals and inspections), including laws prohibiting discrimination on the basis of race, color, religion, age, sex, ancestry, medical condition, marital status, sexual orientation, veteran status, handicap, or national origin. If a charge occurs of non-compliance by SaaS Provider with any such laws, regulations, ordinances or codes, SaaS Provider will promptly notify Client of such charge in writing.

16.14 Entire Agreement. This Agreement (including its Orders, SOWs, and Exhibits) constitute the entire agreement between SaaS Provider and Client with respect to the subject matter of this Agreement, and may only be modified by a written amendment or addendum signed by both SaaS



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Provider and Client. No employee, agent, or other representative of either SaaS Provider or Client has authority to bind the other with regard to any statement, representation, warranty, or other expression unless it is specifically included within the express terms of this Agreement or a written addendum signed by both SaaS Provider and Client. All purchase orders, prior agreements, representations, statements, proposals, negotiations, understandings, and undertakings with respect to the subject matter of this Agreement are superseded by this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Master Software-as-a-Service Agreement as of the date below.

CLIENT

SAAS PROVIDER

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____



The below form is made available for general informational purposes only, and is not intended to constitute specific legal advice or to be a substitute for advice from qualified counsel.

**EXHIBIT A
ORDER FORM**

**EXHIBIT B
DISASTER RECOVERY PLAN**

**EXHIBIT C
IMPLEMENTATION SERVICES**

**EXHIBIT D
CHANGE CONTROL PROCEDURES**

**EXHIBIT E
SERVICE LEVELS**

**EXHIBIT F
PRICING; INVOICING; EXPENSE REIMBURSEMENT**

**EXHIBIT G
SECURITY AUDIT**