|  |  |
| --- | --- |
| C:\Users\DTollen\My ShareSync\Law Practice\Tech Contracts Academy\Admin\Identity\Logo\TCA_TM Logo_FINAL\PNG\Tech-Contracts-Academy-Logo_TM_Color_FINAL.png  <https://TechContracts.com/> | **THE TECH CONTRACTS HANDBOOK**  **Cloud Computing Agreements, Software Licenses, and Other IT Contracts for Lawyers and Businesspeople**  Second Edition  **by David W. Tollen**  (ABA Publishing - Intellectual Property Law Section of the American Bar Association; 2015) |

***Form Contract***

**Hybrid Cloud Agreement w/ Professional Services**

***SaaS + On-Premise Software; Professional Services for Implementation & Customization; Vendor-Friendly; System Access for Customer’s Own Customers/Clients; Ink Signature***

*You may use the form contract below subject to the “Terms of Use” posted at* [*https://techcontracts.com/terms-of-use-and-privacy-policy/*](https://techcontracts.com/terms-of-use-and-privacy-policy/)*. In addition to the Terms of Use, PLEASE READ THE FOLLOWING DISCLAIMER BEFORE USING THE FORM CONTRACT:*

***NEITHER TECH CONTRACTS ACADEMY, LLC™ NOR THE AUTHOR OR PUBLISHER, OR ANYONE AFFILIATED WITH THEM, REPRESENTS THAT THE FORM CONTRACT BELOW WILL MEET YOUR SPECIFIC GOALS, PROTECT YOUR SPECIFIC INTERESTS, OR WITHSTAND CHALLENGES TO ITS LEGAL OR FACTUAL SUFFICIENCY. The form contract below is general in nature and may not be sufficient for a specific contractual, technological, or legal problem or dispute. THE FORM IS NOT PROVIDED WITH ANY GUARANTY, WARRANTY, OR REPRESENTATION AS TO QUALITY OR SUITABILITY FOR ANY PARTICULAR PURPOSE. Publication of the form does not constitute the practice of law and is not legal counsel or advice. Neither Tech Contracts Academy, LLC™ or the author or the publisher of this website or* The Tech Contracts Handbook*, or anyone affiliated with them, is rendering a legal or other professional service. The form should not be relied upon as a substitute for consultation with an attorney.***

*Note that this document uses Microsoft Word multi-level bullets/numbering for section numbers and cross-referencing features for section references.*

*Please delete all text above the following dotted line, as well as the line itself and the page-break following it, before using this form.*

------------------------------------

**HYBRID CLOUD SUBSCRIPTION & LICENSE AGREEMENT**

This Hybrid Cloud Subscription and License Agreement (this “Agreement”) is by and between \_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ whose principal place of business is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Vendor”) and \_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ whose principal place of business is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Customer”). This Agreement includes *Attachments A* and *B* hereto, as well as the AUP, Privacy Policy, SLA, and any current or future Order or SoW (all as defined below in Article 1), and all such documents are incorporated by this reference. This Agreement is effective as of \_\_\_\_\_\_\_\_\_\_\_ (the “Effective Date”).

Vendor provides a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ computer system (the “System”) which consists of technology hosted on Vendor’s computers and accessed remotely, via the cloud, as well as software hosted on customers’ computers. Vendor also provides professional services related to implementation, installation, and customization of the System. The parties have agreed that Vendor will provide the System to Customer, as well as such professional services as the parties may agree, now and pursuant to future statements of work. Therefore, in consideration for the commitments set forth below, the adequacy of which consideration the parties hereby acknowledge, the parties agree as follows.

1. **DEFINITIONS.** The following capitalized terms will have the following meanings whenever used in this Agreement.
   1. “AUP” means Vendor’s acceptable use policy currently posted at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
   2. “Customer’s Clients” means any of Customer’s clients or customers or other third parties Customer gives access to the System, including without limitation such companies’ agents and employees.
   3. “Customer Data” means data in electronic form managed or stored by the System, including without limitation data related to Customer’s Clients, other Users, and Customer’s Clients’ own customers.
   4. “Deliverables” means any software or other deliverable created pursuant to Professional Services.
   5. “Documentation” means Vendor's standard manual related to use of the System, as well as \_\_\_\_\_\_\_\_\_\_\_\_\_\_.
   6. “On-Premise Software” means such elements of the System as Customer is to run on its computers.
   7. “Order” means an order for access to the System, executed as follows: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
   8. “Privacy Policy” means Vendor’s privacy policy, currently posted at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
   9. “Professional Services” means such Vendor services as are set forth in an SoW.
   10. “SaaS” means such elements of the System as Vendor hosts on its computers.
   11. “SoW” means a statement of work on the form attached hereto as *Attachment A* executed by each party.
   12. “SLA” means Vendor’s standard service level agreement, currently posted at \_\_\_\_\_\_\_\_\_\_\_.
   13. “Term” is defined in Section 13.1 below.
   14. “User” means any company or individual who uses the System on Customer’s behalf or through Customer’s account or passwords, whether authorized or not, including without limitation Customer’s Clients and their employees and agents.
2. **SAAS & USE OF THE SYSTEM IN GENERAL.**
   1. Use of the System. During the Term, Customer may access and use the SaaS pursuant to the terms of any outstanding Order, including such features and functions as the Order requires.
   2. Service Levels. Vendor shall provide the remedies listed in the SLA for any failure of the System listed in the SLA. Such remedies are Customer’s sole remedy for any failure of the System, and Customer recognizes and agrees that if the SLA does not list a remedy for a given failure, it has no remedy. Credits issued pursuant to the SLA apply to outstanding or future invoices only and are forfeit upon termination of this Agreement. Vendor is not required to issue refunds or to make payments against such credits under any circumstances, including without limitation after termination of this Agreement.
   3. Documentation: Customer may reproduce and use the Documentation solely as necessary to support Users’ use of the System.
   4. System Revisions. Vendor may revise the SLA or the features and functions of the SaaS at any time, provided no such revision materially reduces features or functionality provided pursuant to an Order.
   5. Customer’s Clients. Subject to the provisions below of this Section 2.5, Customer may authorize Customer’s Clients to access and use the System in such numbers and according to such restrictions as are set forth in the applicable Order, solely for the following purposes: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. Customer shall provide complete name and contact information for each proposed Customer’s Client upon or before providing such access, and update such information as soon as it become aware of a change. Customer shall make no representations or warranties regarding the System or any other matter, to Customer’s Clients or Users or any other third party, from or on behalf of Vendor, and Customer shall not create or purport to create any obligations or liabilities for Vendor. Customer will be jointly and severally liable to Vendor for Customer’s Clients’ acts and omissions related to the System. Vendor will have no obligation to provide support or other services, SLA remedies, or other remedies to Customer’s Clients.
3. **ON-PREMISE SOFTWARE.**
   1. License. Vendor hereby grants Customer a nonexclusive license to reproduce and use the On-Premise Software, in such quantities as are set forth on the applicable Order, as necessary for Customer’s internal business purposes and solely as a component of the System, provided Customer complies with the restrictions set forth below in Section 3.2 (*Restrictions on Software Rights*). Such internal business purposes do not include use by any parent, subsidiary, or affiliate of Customer, or any other third party other than Customer’s Clients as specifically authorized in this Agreement, and Customer shall not permit any such use.
   2. Restrictions on Software Rights. Copies of the On-Premise Software created or transferred pursuant to this Agreement are licensed, not sold, and Customer receives no title to or ownership of any copy or of the On-Premise Software itself. Furthermore, Customer receives no rights to the On-Premise Software other than those specifically granted in Section 3.1 above. Without limiting the generality of the foregoing, Customer shall not: (a) modify, create derivative works from, distribute, publicly display, publicly perform, or sublicense the On-Premise Software; (b) use the On-Premise Software in any way forbidden by Section 7.1 below; or (c) reverse engineer, decompile, disassemble, or otherwise attempt to derive any of the On-Premise Software’s source code.
   3. Delivery. Vendor shall provide the On-Premise Software to Customer, through a reasonable system of electronic download, within \_\_\_\_\_ days of the Effective Date.
   4. Hosting & Management. Customer shall host and manage the On-Premise Software as required on *Attachment B*. Vendor will have no responsibility or liability for any failure of the System, including without limitation pursuant to the SLA, resulting from Customer’s failure to comply with the requirements of *Attachment B*.
4. **PROFESSIONAL SERVICES.** 
   1. Provision of Professional Services. Vendor shall provide the Professional Services, and Customer shall provide any assistance and cooperation necessary or convenient to facilitate the Professional Services, or called for in an SoW.
   2. Deliverables.
      1. *Acceptance & Rejection*. Deliverables will be considered accepted (“Acceptance”) (a) when Customer provides Vendor written notice of acceptance or (b) \_\_\_ days after delivery, if Customer has not first provided Vendor with written notice of rejection. Customer may reject a Deliverable only in the event that it materially deviates from its specifications and requirements listed in the applicable SoW and only via written notice setting forth the nature of such deviation. In the event of such rejection, Vendor shall correct the deviation and redeliver the Deliverable within \_\_\_ days. After redelivery pursuant to the previous sentence, the parties shall again follow the acceptance procedures set forth in this Subsection 4.2(a). This Subsection 4.2(a), in conjunction with Customer’s right to terminate for material breach where applicable, sets forth Customer’s only remedy and Vendor’s only liability for failure of Deliverables.
      2. *Incorporation of Deliverables*. Upon Acceptance, each Deliverable will constitute an element of the SaaS or On-Premise Software, as specified in the applicable SoW, and will thereafter be subject to this Agreement’s terms regarding SaaS or On-Premise Software, including without limitation license and indemnity terms. Vendor retains ownership of all Deliverables, and Customer receives no right, title, or interest in or to Deliverables except as specifically set forth in this Agreement.
5. **FEES & REIMBURSEMENT.**
   1. Types of Fees. Customer shall: (a) pay Vendor the fee set forth in each Order (the “Subscription Fee”) for each Term, as well as such fees as are set forth in each SoW (“Professional Service Fees”); and (b) reimburse such expenses as Vendor reasonably incurs in provision of Professional Services. Amounts listed in SoW’s are estimates of Professional Services fees and will not be binding, except to the extent that the SoW specifically provides to the contrary.
   2. Invoices, No Refunds. Vendor’s invoices are due within 30 days of issuance. For late payment, Customer shall pay interest charges from the time the payment was due at the rate that is the lower of \_\_\_% per month or the highest rate permissible under applicable law. Vendor will not be required to refund Subscription Fees or Professional Service Fees under any circumstances.
   3. Taxes. Amounts due under this Agreement are payable to Vendor without deduction and are net of any tax, tariff, duty, or assessment imposed by any government authority (national, state, provincial, or local), including without limitation any sales, use, excise, ad valorem, property, withholding, or value added tax withheld at the source. If applicable law requires withholding or deduction of such taxes or duties, Customer shall separately pay Vendor the withheld or deducted amount. However, the preceding two sentences do not apply to taxes based on Vendor’s net income.
6. **CUSTOMER DATA & PRIVACY.**
   1. Use of Customer Data. Unless it receives Customer’s prior written consent, Vendor: (a) shall not access, process, or otherwise use Customer Data other than as necessary to facilitate the System; and (b) shall not intentionally grant any third party access to Customer Data, including without limitation Vendor’s other customers, except subcontractors that are subject to a reasonable nondisclosure agreement. Notwithstanding the foregoing, Vendor may disclose Customer Data as required by applicable law or by proper legal or governmental authority. Vendor shall give Customer prompt notice of any such legal or governmental demand and reasonably cooperate with Customer in any effort to seek a protective order or otherwise to contest such required disclosure, at Customer’s expense. As between the parties, Customer retains ownership of Customer Data.
   2. Data Security Audits. Vendor represents that it will retain a certified public accounting firm to perform an annual audit of the System’s data protection features and to provide a SOC 2 Type II report, pursuant to the standards of the American Institute of Certified Public Accountants (the “AICPA”), or such other report as AICPA may promulgate to replace SOC 2 Type II. Reasonably promptly after Customer’s request, Vendor shall provide a copy of its most recent such report, provided such report will be Vendor’s Confidential Information pursuant to Article 9 below.
   3. Privacy Policy. The Privacy Policy applies only to the System and does not apply to any third party website or service linked to the System or recommended or referred to through the System or by Vendor’s staff.
   4. Risk of Exposure. Customer recognizes and agrees that hosting data online involves risks of unauthorized disclosure or exposure and that, in accessing and using the System, Customer assumes such risks. Vendor offers no representation, warranty, or guarantee that Customer Data will not be exposed or disclosed through errors or the actions of third parties.
   5. Data Accuracy. Vendor will have no responsibility or liability for the accuracy of data uploaded to the System by Customer, including without limitation Customer Data and any other data uploaded by Users.
   6. Data Deletion. Vendor may permanently erase Customer Data if Customer’s account is delinquent, suspended, or terminated for 30 days or more.
   7. Excluded Data. Customer represents and warrants that Customer Data does not and will not include, and Customer has not and shall not upload or transmit to Vendor's computers or other media, any data (“Excluded Data”) regulated pursuant to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the "Excluded Data Laws"). CUSTOMER RECOGNIZES AND AGREES THAT: (a) VENDOR HAS NO LIABILITY FOR ANY FAILURE TO PROVIDE PROTECTIONS SET FORTH IN THE EXCLUDED DATA LAWS OR OTHERWISE TO PROTECT EXCLUDED DATA; AND (b) VENDOR’S SYSTEMS ARE NOT INTENDED FOR MANAGEMENT OR PROTECTION OF EXCLUDED DATA AND MAY NOT PROVIDE ADEQUATE OR LEGALLY REQUIRED SECURITY FOR EXCLUDED DATA.
   8. Aggregate & Anonymized Data. Notwithstanding the provisions above of this Article 6, Vendor may use, reproduce, sell, publicize, or otherwise exploit Aggregate Data in any way, in its sole discretion. (“Aggregate Data” refers to Customer Data with the following removed: personally identifiable information and the names and addresses of Customer and any of its Users.)
7. **CUSTOMER’S RESPONSIBILITIES & RESTRICTIONS.**
   1. Acceptable Use. Customer shall comply with the AUP. Customer shall not: (a) use the System for service bureau or time-sharing purposes or in any other way allow third parties to exploit the System, except Customer’s Clients as specifically authorized by this Agreement; (b) provide System passwords or other log-in information to any third party, except Customer’s Clients as specifically authorized by this Agreement; (c) share non-public System features or content with any third party; (d) access the System in order to build a competitive product or service, to build a product using similar ideas, features, functions or graphics of the System, or to copy any ideas, features, functions or graphics of the System; or (e) engage in web scraping or data scraping on or related to the System, including without limitation collection of information through any software that simulates human activity or any bot or web crawler. In the event that it suspects any breach of the requirements of this Section 7.1, including without limitation by Users, Vendor may suspend Customer’s access to the System without advanced notice, in addition to such other remedies as Vendor may have. Neither this Agreement nor the AUP requires that Vendor take any action against Customer or any User or other third party for violating the AUP, this Section 7.1, or this Agreement, but Vendor is free to take any such action it sees fit.
   2. Unauthorized Access. Customer shall take reasonable steps to prevent unauthorized access to the System, including without limitation by protecting its passwords and other log-in information. Customer shall notify Vendor immediately of any known or suspected unauthorized use of the System or breach of its security and shall use best efforts to stop said breach.
   3. Compliance with Laws. In its use of the System, Customer shall comply with all applicable laws, including without limitation laws governing the protection of personally identifiable information and other laws applicable to the protection of Customer Data.
   4. Customer’s Clients & Other Users; System Access. Customer is responsible and liable for: (a) Customer’s Clients’ and other Users’ use of the System, including without limitation unauthorized User conduct and any User conduct that would violate the AUP or the requirements of this Agreement applicable to Customer; and (b) any use of the System through Customer’s account, whether authorized or unauthorized.
8. **IP & FEEDBACK.** 
   1. IP Rights in the System. Vendor retains all right, title, and interest in and to the System, including without limitation all software used to provide the System and all graphics, user interfaces, logos, and trademarks reproduced through the System. This Agreement does not grant Customer any intellectual property license or rights in or to the System or any of its components, except to the limited extent that this Agreement specifically sets forth Customer license rights to On-Premise Software or Documentation. Customer recognizes that the System and its components are protected by copyright and other laws.
   2. Feedback. Vendor has not agreed to and does not agree to treat as confidential any Feedback (as defined below) that Customer, Customer’s Clients, or other Users provide to Vendor, and nothing in this Agreement or in the parties’ dealings arising out of or related to this Agreement will restrict Vendor’s right to use, profit from, disclose, publish, keep secret, or otherwise exploit Feedback, without compensating or crediting Customer or the Customer’s Client or other User in question. Customer hereby grants Vendor a perpetual, irrevocable right and license to exploit Feedback in any and every way. Notwithstanding any contrary provision of Article 9 below (*Confidential Information*), Feedback will not constitute Customer’s Confidential Information. (“Feedback” refers to any suggestion or idea for improving or otherwise modifying any of Vendor’s products or services.)
9. **CONFIDENTIAL INFORMATION.** “Confidential Information” refers to the following items Vendor discloses to Customer: (a) any document Vendor marks “Confidential”; (b) any information Vendor orally designates as “Confidential” at the time of disclosure, provided Vendor confirms such designation in writing within \_\_ business days; (c) the On-Premise, Software, Documentation, and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, whether or not marked or designated confidential; and (d) any other nonpublic, sensitive information Customer should reasonably consider a trade secret or otherwise confidential. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in Customer’s possession at the time of disclosure; (ii) is independently developed by Customer without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of Customer’s improper action or inaction; or (iv) is approved for release in writing by Vendor.
   1. Nondisclosure*.* Customer shall not use Confidential Information for any purpose other than \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Purpose”). Customer: (a) shall not disclose Confidential Information to any employee or contractor of Customer unless such person needs access in order to facilitate the Purpose and executes a nondisclosure agreement with Customer with terms no less restrictive than those of this Article 9; and (b) shall not disclose Confidential Information to any other third party without Vendor’s prior written consent. Without limiting the generality of the foregoing, Customer shall protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. Customer shall promptly notify Vendor of any misuse or misappropriation of Confidential Information that comes to Customer’s attention. Notwithstanding the foregoing, Customer may disclose Confidential Information as required by applicable law or by proper legal or governmental authority. Customer shall give Vendor prompt notice of any such legal or governmental demand and reasonably cooperate with Vendor in any effort to seek a protective order or otherwise to contest such required disclosure, at Vendor’s expense.
   2. Injunction. Customer agrees that breach of this Article 9 would cause Vendor irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, Vendor will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.
   3. Termination & Return. With respect to each item of Confidential Information, the obligations of Section 9.1 above (*Nondisclosure*) will terminate \_\_\_\_\_\_\_\_\_\_\_ after the date of disclosure; provided that such obligations related to Confidential Information constituting Vendor’s trade secrets will continue so long as such information remains subject to trade secret protection pursuant to applicable law. Upon termination of this Agreement, Customer shall return all copies of Confidential Information to Vendor or certify, in writing, the destruction thereof.
   4. Retention of Rights. This Agreement does not transfer ownership of Confidential Information or grant a license thereto. Vendor will retain all right, title, and interest in and to all Confidential Information.
   5. Exception & Immunity. Pursuant to the Defend Trade Secrets Act of 2016, 18 USC Section 1833(b) (the “DTSA”), Customer is on notice and acknowledges that, notwithstanding the foregoing or any other provision of this Agreement:
      1. *IMMUNITY*. An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that- (A) is made- (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.
      2. *USE OF TRADE SECRET INFORMATION IN ANTI-RETALIATION LAWSUIT*. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual- (A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order.
10. **REPRESENTATIONS & WARRANTIES.** 
    1. From Vendor.
       1. *Re IP Rights in the System*. Subject to the next sentence, Vendor represents and warrants that it is the owner of the System and of each and every component thereof, or the recipient of a valid license thereto, and that it has and will maintain the full power and authority to grant the rights to use the System set forth in this Agreement without the further consent of any third party. Vendor’s representations and warranties in the preceding sentence do not apply to the extent that the infringement arises out of any of the conditions listed in Subsections 11.1(a) through 11.1(f) below. In the event of a breach of the warranty in this Subsection 10.1(a), Vendor, at its own expense, shall promptly take the following actions: (i) secure for Customer the right to continue using the System; (ii) replace or modify the System to make it noninfringing; or (iii) terminate the infringing features of the Service, including licenses to affected On-Premise Software, and refund to Customer any prepaid fees for such features, in proportion to the portion of the Term left after such termination, in which case Customer shall cease all use of affected On-Premise Software and erase any copies thereof. In conjunction with Customer’s right to terminate for breach where applicable, the preceding sentence states Vendor’s sole obligation and liability, and Customer’s sole remedy, for breach of the warranty in this Subsection 10.1(a) and for potential or actual intellectual property infringement by the System.
       2. *Re Professional Services*. Vendor represents and warrants that the Deliverables will conform to their specifications set forth in the applicable SoW for a period of \_\_\_\_\_ following Acceptance (as defined in Subsection 4.2(a) above).
    2. From Customer.
       1. *Re Customer Itself*. Customer represents and warrants that: (i) it has the full right and authority to enter into, execute, and perform its obligations under this Agreement and that no pending or threatened claim or litigation known to it would have a material adverse impact on its ability to perform as required by this Agreement; (ii) it has accurately identified itself and it has not provided any inaccurate information about itself to Vendor or through the System; and (iii) it is a corporation, the sole proprietorship of an individual 18 years or older, or another entity authorized to do business pursuant to applicable law.
       2. *Re Customer’s Clients*. Customer represents and warrants that, to the best of its knowledge: (i) Customer shall accurately identify each Customer’s Client and shall not provide any inaccurate information about a Customer’s Client or other User to or through the System; and (ii) each Customer’s Client will be a corporation, the sole proprietorship of an individual 18 years or older, or another entity authorized to do business pursuant to applicable law.
    3. Warranty Disclaimers. Except to the extent set forth in the SLA and in Section 10.1 above, CUSTOMER ACCEPTS THE SYSTEM “AS IS” AND AS AVAILABLE. And except as set forth above in this Article 10, VENDOR PROVIDES NO REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR ANY IMPLIED WARRANTY ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE, OR USAGE OF TRADE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING: (a) VENDOR DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM WILL PERFORM WITHOUT INTERRUPTION OR ERROR; AND (b) VENDOR DOES NOT REPRESENT OR WARRANT THAT THE SYSTEM IS SECURE FROM HACKING OR OTHER UNAUTHORIZED INTRUSION OR THAT CUSTOMER DATA WILL REMAIN PRIVATE OR SECURE.
11. **INDEMNIFICATION.**
    1. From Vendor. Vendor shall defend and indemnify Customer and Customer’s Associates (as defined below in Section 11.3) against any “Indemnified Claim,” meaning any third party claim, suit, or proceeding arising out of, related to, or alleging direct infringement of any patent, copyright, trade secret, or other intellectual property right by the System. Vendor’s obligations set forth in this Section 11.1 do not apply to the extent that an Indemnified Claim arises out of: (a) Customer’s breach of this Agreement; (b) revisions to the On-Premise Software or other System components made without Vendor’s written consent; (c) Customer’s failure to incorporate On-Premise Software updates or upgrades that would have avoided the alleged infringement, provided Vendor offered such updates or upgrades without charges not otherwise required pursuant to this Agreement; (d) Vendor’s modification of On-Premise Software in compliance with specifications provided by Customer, including without limitation Deliverables to the extent created based on such specifications; (e) any Deliverable, if the SoW or a disclosure provided at or before delivery states that such Deliverable incorporates third party software or other assets; or (f) use of the System in combination with hardware or software not provided by Vendor. In the event of an Indemnified Claim, Vendor may exercise the remedies in Subsections 10.1(a)(i) through 10.1(a)(iii) above, including without limitation its right therein to terminate licenses and require return of the Software.
    2. From Customer. Customer shall indemnify and defend Vendor and Vendor’s Associates (as defined below in Section 11.3) against any “Indemnified Claim,” meaning any third party claim, suit, or proceeding arising out of or related to Customer's alleged or actual use of, misuse of, or failure to use the System, including without limitation: (a) claims by Customer’s Clients or other Users or by Customer's or Customer’s Clients’ employees; (b) claims related to unauthorized disclosure or exposure of personally identifiable information or other private information, including Customer Data; (c) claims related to infringement or violation of a copyright, trademark, trade secret, or privacy or confidentiality right by written material, images, logos or other content uploaded to the System through Customer’s account, including without limitation by Customer Data; (d) claims that use of the System through Customer’s account, including by Customer’s Clients or other Users, harasses, defames, or defrauds a third party or violates the CAN-Spam Act of 2003 or any other law or restriction on electronic advertising; and (e) infringement claims arising out of or related to the conditions listed in Subsections 11.1(a) through 11.1(f) above. Indemnified Claims pursuant to the preceding sentence also include (f) claims related to the injury to or death of any individual, or any loss of or damage to real or tangible personal property, caused by the act or omission of Customer or of any of its agents, subcontractors, or employees. Indemnified Claims listed above in this Section 11.2 include, without limitation, claims arising out of or related to Vendor’s negligence, but they exclude any claim that would constitute an Indemnified Claims pursuant to Section 11.1 above.
    3. Litigation & Additional Terms. The obligations of the indemnifying party (“Indemnitor”) pursuant to Section 11.1 or 11.2 above: (a) include retention and payment of attorneys and payment of court costs, as well as settlement at Indemnitor’s expense and payment of judgments; and (b) will be excused to the extent that the other contracting party’s (“Indemnified Party’s”) or any of such Indemnified Party’s Associates’ failure to provide prompt notice of the Indemnified Claim or reasonably to cooperate materially prejudices the defense. Indemnitor will control the defense of any Indemnified Claim, including appeals, negotiations, and any settlement or compromise thereof; provided Indemnified Party will have the right, not to be exercised unreasonably, to reject any settlement or compromise that requires that it admit wrongdoing or liability or subjects it to any ongoing affirmative obligations. (A party’s “Associates” are its officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns.)
12. **LIMITATION OF LIABILITY.**
    1. Dollar Cap. VENDOR’S CUMULATIVE LIABILTY FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED $\_\_\_\_\_\_.
    2. Excluded Damages. Except with regard to breaches of Article 9 (*Confidential Information*), IN NO EVENT WILL VENDOR BE LIABLE FOR LOST PROFITS OR LOSS OF BUSINESS OR FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT.
    3. Clarifications & Disclaimers. THE LIABILITIES LIMITED BY THIS ARTICLE 12 APPLY: (a) TO LIABILITY FOR NEGLIGENCE; (b) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE; (c) EVEN IF VENDOR IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (d) EVEN IF CUSTOMER’S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. If applicable law limits the application of the provisions of this Article 12, Vendor’s liability will be limited to the maximum extent permissible. For the avoidance of doubt, Vendor’s liability limits and other rights set forth in this Article 12 apply likewise to Vendor’s affiliates, licensors, suppliers, advertisers, agents, sponsors, directors, officers, employees, consultants, and other representatives.
13. **TERM & TERMINATION.**
    1. Term. The term of this Agreement (the “Term”) will commence on the Effective Date and continue for the period set forth in the Order or, if none, for \_\_\_\_. Thereafter, the Term will renew for successive \_\_\_\_\_ periods, unless either party refuses such renewal by written notice 30 or more days before the renewal date.
    2. Termination for Cause. Either party may terminate this Agreement for the other’s material breach by written notice specifying in detail the nature of the breach, effective in 30 days unless the other party first cures such breach, or effective immediately if the breach is not subject to cure. Without limiting Vendor’s other rights and remedies, Vendor may suspend or terminate a Customer’s Client’s or other User’s access to the System at any time, without advanced notice, if Vendor reasonably concludes such Customer’s Client or other User has conducted itself in a way that is not consistent with the requirements of the AUP or the other requirements of this Agreement or in a way that subjects Vendor to potential liability.
    3. Effects of Termination. Upon termination of this Agreement, Customer shall cease all use of the System and delete, destroy, or return all copies of the Documentation and On-Premise Software in its possession or control. The following provisions will survive termination or expiration of this Agreement: (a) any obligation of Customer to pay fees incurred before termination; (b) Articles and Sections 3.2 (*Restrictions on Software Rights*) 8 (*IP & Feedback*), 9 (*Confidential Information*), 10.2 (*Warranty Disclaimers*), 11 (*Indemnification*), and 12 (*Limitation of Liability*); and (c) any other provision of this Agreement that must survive to fulfill its essential purpose.
14. **MISCELLANEOUS.**
    1. Independent Contractors. The parties are independent contractors and shall so represent themselves in all regards. Neither party is the agent of the other, and neither may make commitments on the other’s behalf.
    2. Notices. Vendor may send notices pursuant to this Agreement to Customer’s email address provided by Customer, and such notices will be deemed received 24 hours after they are sent. Customer may send notices pursuant to this Agreement to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and such notices will be deemed received 72 hours after they are sent. In addition, Customer is on notice and agrees that: (a) for claims of copyright infringement, the complaining party may contact \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_; and (b) Vendor will terminate the accounts of subscribers who are repeat copyright infringers.
    3. Force Majeure. No delay, failure, or default, other than a failure to pay fees when due, will constitute a breach of this Agreement to the extent caused by acts of war, terrorism, hurricanes, earthquakes, other acts of God or of nature, strikes or other labor disputes, riots or other acts of civil disorder, embargoes, or other causes beyond the performing party’s reasonable control.
    4. Assignment & Successors. Customer may not assign this Agreement or any of its rights or obligations hereunder without Vendor’s express written consent. Except to the extent forbidden in this Section 14.4, this Agreement will be binding upon and inure to the benefit of the parties’ respective successors and assigns.
    5. Severability. To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.
    6. No Waiver. Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than by an authorized representative in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any other breach of this Agreement.
    7. Choice of Law & Jurisdiction: This Agreement will be governed solely by the internal laws of the State of \_\_\_\_\_\_\_\_\_\_\_\_, including without limitation applicable federal law, without reference to: (a) any conflicts of law principle that would apply the substantive laws of another jurisdiction to the parties’ rights or duties; (b) the 1980 United Nations Convention on Contracts for the International Sale of Goods; or (c) other international laws. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of \_\_\_\_\_\_\_\_\_\_ [city or county], \_\_\_\_\_\_\_\_\_ [state]. This Section 14.7 governs all claims arising out of or related to this Agreement, including without limitation tort claims.
    8. Conflicts. In the event of any conflict among the attachments to this Agreement and this main body, the following order of precedence will govern, with lower numbers governing over higher ones: (1) this main body of this Agreement; (2) any SoW, with more recent Statements of Work taking precedence over later ones; and (3) any Vendor policy posted online, including without limitation the AUP or Privacy Policy. No SoW or other attachment incorporated into this Agreement after execution of this main body will be construed to amend this main body or any earlier attachment unless it specifically states its intent to do so and cites the section or sections amended.
    9. Construction. The parties agree that the terms of this Agreement result from negotiations between them. This Agreement will not be construed in favor of or against either party by reason of authorship.
    10. Technology Export. Customer shall not: (a) permit any third party to access or use the System in violation of any U.S. law or regulation; or (b) export any software provided by Vendor or otherwise remove it from the United States except in compliance with all applicable U.S. laws and regulations. Without limiting the generality of the foregoing, Customer shall not permit any third party to access or use the System in, or export such software to, a country subject to a United States embargo (as of the Effective Date, Cuba, Iran, North Korea, Sudan, and Syria).
    11. Entire Agreement. This Agreement sets forth the entire agreement of the parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to its subject matter. Neither party has relied upon any such prior or contemporaneous communications.
    12. Execution in Counterparts. This Agreement may be executed in one or more counterparts. Each counterpart will be an original, but all such counterparts will constitute a single instrument.
    13. Amendment. This Agreement may not be amended except through a written agreement by authorized representatives of each party. Notwithstanding the foregoing provisions of this Section 14.13, Vendor may revise the Privacy Policy and AUP at any time by posting a new version of either at the Website, and such new version will become effective on the date it is posted; provided if such amendment materially reduces Customer’s rights or protections, notice and consent will be subject to the requirements above in this Section 14.13.

IN WITNESS THEREOF, the parties have executed this Agreement as of the Effective Date.

|  |  |
| --- | --- |
| **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ CUSTOMER** | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ VENDOR** |
|  |  |
| By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (signature) | By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (signature) |
| Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (print) | Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (print) |
| Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**ATTACHMENT A  
Statement of Work Form**

**STATEMENT OF WORK NUMBER \_\_\_\_  
To Hybrid Cloud Subscription & License Agreement**

**Project Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

This Statement of Work Number \_\_ (this “SoW”) is entered into pursuant to the \_\_\_\_\_\_\_\_\_\_\_\_\_\_ [date] Hybrid Cloud Subscription & License Agreement (the “Agreement”) by and between \_\_\_\_\_\_\_\_\_\_\_ (“Vendor”) and \_\_\_\_\_\_\_\_\_\_\_\_\_ (“Customer”).

This SoW is incorporated into the Agreement. In the event of any conflict with this SoW, the main body of the Agreement will govern. The provisions of this SoW govern only the subject matter hereof and not any other subject matter covered by the Agreement. Capitalized terms not otherwise defined in this SoW will have the meanings given in the main body of the Agreement.

I. Professional Services & Deliverables. Vendor shall provide the following services: [Insert description of professional services. Include technical specifications for any Deliverables, or include reference to specifications attached to this SoW. Specify whether each Deliverable will be SaaS or On-Premise Software.]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

II. Customer Cooperation. Customer shall reasonably cooperate with Vendor in the provision of services and shall provide the following assistance: [Insert description of Customer responsibilities, or insert “N/A” if not applicable.]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

III. Payment. Customer shall pay Vendor as follows: [Insert payment schedule. Insert any payment/invoicing terms not already covered in main body of Agreement.]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

IV. Additional Provisions. In addition, the parties agree as follows: [Insert additional terms (e.g., termination date) or “N/A” if not applicable.]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

This SoW is effective as of the latest date of execution set forth below.

|  |  |
| --- | --- |
| **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ CUSTOMER** | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ VENDOR** |
|  |  |
| By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (signature) | By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (signature) |
| Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (print) | Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (print) |
| Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**ATTACHMENT B  
Customer’s Obligations for Hosting and Management of On-Premise Software**

***[Insert.]***