

THE INFORMATION IN THIS BOX IS NOT A PART OF THE CONTRACT AND IS FOR COUNTY USE ONLY



Contract Number  
**22-346**

SAP Number

## Innovation and Technology Department

Department Contract Representative	Jennifer Mancebo
Telephone Number	909-388-5579
Contractor	KLDiscovery Ontrack, LLC
Contractor Representative	Eleonora Smith
Telephone Number	952-562-2159
Contract Term	5/24/22 – 5/23/27
Original Contract Amount	Non-financial
Amendment Amount	N/A
Total Contract Amount	Non-financial
Cost Center	1200604048

**Briefly describe the general nature of the contract:** *Ontrack PowerControls Maintenance Agreement with KLDiscovery Ontrack, LLC for maintenance of software to search, recover and restore data from Microsoft Exchange, SharePoint and SQL environments for the period of May 24, 2022 through May 23, 2027.*

### FOR COUNTY USE ONLY

Approved as to Legal Form

► *Bonnie Uphold*  
Bonnie Uphold, County Counsel

Date 5-13-2022

Reviewed for Contract Compliance

►

Date

Reviewed/Approved by Department

►

Date

## ONTRACK® POWERCONTROLS™ MAINTENANCE AGREEMENT

This Ontrack® PowerControls™ Maintenance Agreement ("Maintenance Agreement") is entered into between KLDISCOVERY Ontrack, LLC ("Ontrack") and the entity specified in the Order ("Customer"). Each shall be a "Party" or collectively the "Parties." Capitalized terms not defined herein shall have the meaning set forth in the Ontrack Terms of Sale for purchases and/or the Ontrack® PowerControls™ End User License Agreement ("EULA") executed between the parties for the Ontrack® PowerControls™ Software (the "Software").

### 1. Maintenance Services

1.1 In accordance with the terms of this Maintenance Agreement, Ontrack will provide the following in relation to the then current version of the Software (collectively, "Maintenance Services"):

1.1.1 Updates. Ontrack will make available to Customer downloads of Software updates or upgrades ("Updates") in the form the Software was originally provided to Customer, including Documentation, as Ontrack makes such Updates for the Software available for general release. "Update" shall include means any modification, correction or addition to the Software or Documentation, including updates and enhancements that Ontrack makes generally available to its customers without additional charge. Customer shall incorporate the Updates as soon as practicable and acknowledges that failure to incorporate any such Update may result in usability issues or security vulnerabilities in the Software for which Ontrack shall not be responsible.

1.1.2 Patches. For Customers currently paid up and in good standing on the applicable Maintenance Agreement, Ontrack will make available to Customer those Patches which have been published and made generally available. "Patch(es)" means additional programming code to be integrated with the Software to correct an error in the standard functioning of the Software or to alleviate its effects ("Error").

1.1.3 Support. Ontrack shall provide live telephone and email support to Customers with a valid license to the Software to which Ontrack: (a) can determine if a problem Customer is encountering is attributable to an Error; and (b) to assist in resolving Errors reported by Customer that occur during normal usage of the Software ("Live Support"). Any Live Support described herein shall be offered to Customer only during the normal business hours of the Ontrack Technical Support team, 8:00 AM to 6:00 PM US Central Time, Monday to Friday, excluding Ontrack's recognized holidays. All support and maintenance shall be conducted in the English language only. Ontrack will use reasonable commercial efforts to remedy Errors reported by Customer to Ontrack. Such remedy may consist of corrected portion(s) of the Software, Patches, or communication to Customer of a workaround that gives Customer the ability to achieve substantially the same functionality as would be obtained without the Error, as determined by Ontrack.

1.1.4 Ontrack Updates, Patches and bug fixes are only effective on the latest version of the Software. For clarity, the latest version of the Software is a version of the Software that has been updated with all the most current Updates and Patches released or made available for such version of the

Software. If Customer has not incorporated all available Updates, Patches and bug fixes to the Software, any subsequently released Patches, Updates or bug fixes may not be effective or usable on such Software.

1.1.5 Ontrack shall have no obligation to investigate or correct problems (including Errors) that cannot be reproduced by Ontrack based on information provided by Customer; or that are due to a breach by Customer of the terms of the EULA; or that cannot be remedied due either to the operational characteristics of the computer equipment on which the Software is used; or to modifications to the Software made by Customer or any third party. Ontrack will use commercially reasonable efforts to provide the Maintenance Services under this Maintenance Agreement; however, Customer acknowledges that Ontrack cannot guarantee that every question, problem, issue or Error reported by Customer can or will be resolved. Nothing in this Agreement shall expand or add to any warranty for the Software set forth in the EULA.

### 2. Maintenance Fee and Payment

2.1 Customer will pay Ontrack the non-refundable fee(s) set forth in the customer Order within 30 (thirty) days of acceptance of the Order by Ontrack. Customer is responsible for the payment of any goods or sales taxes included on the Order. Ontrack will accept purchase order numbers ("PO") provided the PO is provided prior to maintenance activation. Ontrack reserves the right to suspend any maintenance or provide any technical support, including Software Updates, if payment is not made when due.

### 3. Term and Termination.

3.1 Term. This Maintenance Agreement shall commence on execution by the parties and continue for a period of five (5) years.

3.2 Termination. Customer and Ontrack each reserve the right to terminate this Maintenance Agreement, for any reason, with a thirty (30) day written notice of termination. Such termination may include all or part of the services described herein. Upon such termination, payment will be made to Ontrack for services rendered and expenses reasonably incurred prior to the effective date of termination. Upon receipt of termination notice Ontrack shall promptly discontinue services unless the notice directs otherwise. This Maintenance Agreement shall terminate: (i) immediately upon termination or expiration of Customer's right to use the Software, including a breach by Customer of either this Maintenance Agreement or the EULA; (ii) immediately upon expiration of the then-current term of maintenance as specified in the Order. (iii) immediately upon Customer's failure to pay in accordance with this Maintenance Agreement; or (iv) on written notice by Ontrack if Customer has breached this Maintenance Agreement or the EULA and such breach is not cured within 14 (fourteen) days.

### 4. Warranty and Remedies

4.1 Ontrack warrants that the Maintenance Services shall be provided to generally accepted industry standards, provided that: (a) the Software has not been modified, changed, or

altered by anyone other than Ontrack ; (b) the operating environment, including both hardware and systems software, meets Ontrack's recommended specifications; (c) the computer hardware is in good operational order and is installed in a suitable operating environment; (d) Customer promptly notifies Ontrack of any technical problem relating to the Software; (e) Customer provides adequate troubleshooting information and access so that the Ontrack can identify and address the problems; and (f) all fees due to Ontrack have been paid.

4.2 THERE ARE NO OTHER WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THIS MAINTENANCE AGREEMENT, AND THE MAINTENANCE SERVICES TO BE PROVIDED BY ONTRACK UNDER IT INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER ACKNOWLEDGES AND AGREES THAT UNDER NO CIRCUMSTANCES SHALL ONTRACK OR ANY OF ITS AGENTS BE LIABLE FOR ANY LOSS, COST, EXPENSE, OR DAMAGE TO CUSTOMER IN ANY AMOUNT WHICH EXCEEDS THE ANNUAL MAINTENANCE FEE SET FORTH IN ANY ORDER. IN NO EVENT SHALL ONTRACK OR ANY OF ITS AGENTS BE LIABLE TO CUSTOMER FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY, SPECIAL, CONSEQUENTIAL DAMAGES OR SIMILAR DAMAGES, INCLUDING ANY LOST PROFITS OR LOST DATA ARISING OUT OF THE USE OR INABILITY TO USE THE SOFTWARE EVEN IF ONTRACK OR ITS AGENTS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

4.3 ONTRACK WILL NOT BE LIABLE FOR ANY LOSS, DAMAGE, EXPENSE, OR COST, INCLUDING REASONABLE ATTORNEYS' FEES, ARISING OUT OF ANY CLAIM, DEMAND, PROCEEDING OR LAWSUIT RELATED TO CUSTOMER'S UNAUTHORIZED USE OR MISUSE OF THE SOFTWARE AND/OR THE MAINTENANCE SERVICES BY CUSTOMER.

## **5. Customer Responsibilities**

5.1 The Maintenance Services are dependent upon the cooperation of Customer and the quality of information that Customer can provide. Therefore, Customer agrees to provide, at its own cost, all reasonable assistance and cooperation as requested by Ontrack during the provisioning of the Maintenance Services.

5.2 Customers shall notify Ontrack of problems by email or phone and will provide all relevant information known to Customer, and as requested by Ontrack, as well as sufficient support and access to the user of the Software to determine if a problem is attributable to an Error and, if applicable, to correct any Errors and determine if an Error has been corrected. Such problem notice must

contain sufficient information on computer-readable media, if practicable, for Ontrack to reproduce the problem. Thereafter, Customer will keep Ontrack notified of any additions or changes to such information. Customer shall promptly respond to Ontrack requests for additional information or assistance.

## **6. Confidentiality**

6.1 In the event either party obtains access to the Confidential Information (defined below) of the other party in the course of performing this Maintenance Agreement, the party obtaining such information shall maintain the confidentiality of such information in the same manner it maintains the confidentiality of its own similar Confidential Information, but in no event with less than reasonable care. "Confidential Information" of either party means any nonpublic information disclosed on written or magnetic media during the Maintenance Services that is marked "confidential" or with a similar legend at the time of disclosure to the receiving party, and falls within a recognized exemption to the San Bernardino County Sunshine Ordinance, County Code of Ordinances Section 19.0101, California Government Code 54950, and California Public Records Act (Government Code Section 6250). Notwithstanding the foregoing, all Updates, Patches, and any software that may be provided by Ontrack pursuant to this Maintenance Agreement shall be deemed Confidential Information without regard to whether such items are marked "confidential" or with a similar legend.

Confidential information shall not include any information that is (a) published or otherwise available to the public other than by breach of this Maintenance Agreement; (b) rightfully received by the receiving party from a third party without confidentiality limitations; (c) independently developed by the receiving party without reference to the Confidential Information; (d) known to the receiving party prior to its first receipt of such information from the disclosing party; or (e) hereinafter disclosed by the disclosing party to a third party without restriction on disclosure. If any Confidential Information must be disclosed to any third party by reason of legal, accounting or regulatory requirements beyond the reasonable control of the receiving party, the receiving party shall, to the extent legally permissible, promptly notify the disclosing party of the order or request and permit the disclosing party (at its own expense) to seek an appropriate protective order. Unless the subpoena or process is timely limited, quashed or extended, the receiving Party will then be entitled to comply with the request to the extent permitted by law and is limited solely to the information sought. This Maintenance Agreement shall not be construed to prohibit, and Ontrack shall be entitled to use for any purpose, including without limitation use in development, manufacture, promotion, sale, support and maintenance of Ontrack's or its customers' products and services any information received from Customer in association with the support services described in this Maintenance Agreement that may be retained as knowhow, ideas, processes or expertise in the unaided memories of Ontrack's personnel.

## **7. Right to Work Product**

7.1 All Updates, Patches, Live Support, Error corrections, enhancements, new releases, and any other work product created by Ontrack in connection with the Maintenance Services provided hereunder ("Work Product") are and shall remain the exclusive property of Ontrack. Such Work Product shall be considered as Software, and subject to the terms and conditions contained herein and in the EULA.

## **8. General**

8.1 Each party acknowledges that this Maintenance Agreement is the complete and exclusive statement of the agreement between the parties as to the Maintenance Services, and shall supersede all prior proposals, understandings and all other agreements, oral and written,

between the parties relating to the Maintenance Services. If there is a conflict between the terms contained in this Maintenance Agreement and the terms of the EULA, the terms of the EULA shall prevail. This Maintenance Agreement may not be modified or altered except by a written instrument duly executed by the Parties.

8.2 This Maintenance Agreement shall be governed by **THE LAWS OF THE STATE OF CALIFORNIA**. The parties acknowledge and agree that this Maintenance Agreement was entered into and intended to be performed in San Bernardino County, California. The parties agree that the venue of any action or claim brought by any party to this Maintenance Agreement will be the Superior Court of California, San Bernardino County, San Bernardino District. Each party hereby waives any law or rule of the court, which would allow them to request or demand a change of venue. If any action or claim concerning this Maintenance Agreement is brought by any third party and filed in another venue, the parties hereto agree to use their best efforts to obtain a change of venue to the Superior Court of California, San Bernardino County, San Bernardino District. If any legal action is instituted to enforce any party's rights hereunder, each party shall bear its own costs and attorney fees, regardless of who is the prevailing party. This paragraph shall not apply to those costs and attorney fees directly arising from a third-party legal action against a party hereto and payable under Indemnification and Insurance Requirements in accordance with the limitation of liability provisions found in the Terms of Sale.

8.3 If any provision of this Maintenance Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall in no way be affected or impaired thereby.

8.4 Neither party may subcontract, assign, or transfer its rights, duties or obligations under this Maintenance Agreement to any person or entity, in whole or in part, without the prior written consent of the other party.

8.5 The waiver or failure of either party to exercise, in any respect, any one right provided for herein shall not be deemed a waiver of any other right granted hereunder.

**8.6 In accordance with the limitation of liability provisions found in the Terms of Sale**, Ontrack agrees to indemnify, defend (with counsel reasonably approved by Customer) and hold harmless Customer and its authorized officers, employees, agents and volunteers from any and all claims, actions, losses, damages and/or liability arising out of these Terms of Sale from any cause whatsoever, including the acts, errors or omissions of any person and for any costs or expenses incurred by Customer on account of any claim except where such indemnification is prohibited by law. This indemnification provision shall be apportioned based on the degree of fault of indemnities. Ontrack's indemnification obligation will be apportioned based on to Customer's "active" as well as "passive" negligence but Ontrack will have no duty to indemnify with regard to Customer's "sole negligence", fraud, violation of law, or "willful misconduct" within the meaning of California Civil Code section 2782. Without in anyway affecting any indemnity obligations provided herein and in addition thereto, Ontrack shall secure and maintain throughout the contract term the types of insurance with limits as shown and in accordance with the requirements set forth in Attachment 1, as attached hereto and incorporated herein

8.7 This Agreement may be executed in any number of counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute one and the same Agreement. The parties shall be entitled to sign and transmit an electronic signature of this Agreement (whether by facsimile, PDF or other email transmission), which signature shall be binding on the party whose name is contained therein. Each party providing an electronic signature agrees to promptly execute and deliver to the other party an original signed Agreement upon request..



IN WITNESS WHEREOF, San Bernardino County and the Contractor have each caused this Maintenance Agreement to be subscribed by its respective duly authorized officers, on its behalf.

SAN BERNARDINO COUNTY

►   
Curt Hagman, Chairman, Board of Supervisors

Dated:

**MAY 24 2022**

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD

By  Lynna Monell  
Clerk of the Board of Supervisors  
of San Bernardino County

By  Deputy



KLDiscovery Ontrack, LLC

(Print or type name of corporation, company, contractor, etc.)

By

►   
(Authorized signature - sign in blue ink)

Name

Shannon Gaughan

(Print or type name of person signing contract)

Title

Commercial Counsel

(Print or Type)

Dated:

3/28/2022

Address

9023 Columbine Road, Eden Prair

**FOR COUNTY USE ONLY**

Approved as to Legal Form

► \_\_\_\_\_  
County Counsel  
Date \_\_\_\_\_

Reviewed for Contract Compliance

Date

►

Reviewed/Approved by Department

Date

►