REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY
AND RECORD OF ACTION

January 24, 2023

FROM
CHRIS WILHITE, Assessor-Recorder-County Clerk

SUBJECT
Non-Financial Terms of Use Agreement with Colony Labs, Inc. for Scribe Software Application Services

RECOMMENDATION(S)
1. Approve a non-financial Terms of Use **Agreement No. 23-47** with Colony Labs, Inc., including non-standard terms, to be accepted electronically, for future purchases of Scribe software application services, effective upon acceptance of the Terms of Use Agreement, automatically renewing until terminated by either party.
2. Authorize the Assessor-Recorder-County Clerk or Departmental Information Systems Administrator to electronically accept the Terms of Use Agreement in Recommendation No. 1 related to the use of Scribe software application services.
3. Direct the Assessor-Recorder-County Clerk or Departmental Information Systems Administrator to transmit copies of the electronically accepted Terms of Use Agreement in Recommendation No. 2 related to the use of Scribe software application services to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Chris Wilhite, Assessor-Recorder-County Clerk, 382-3208)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES
Improve County Government Operations.
Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT
Approval of this item will not result in the use of additional Discretionary General Funding (Net County Cost). The Terms of Use Agreement (Agreement) with Colony Labs, Inc. (Colony Labs) is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the Agreement, the Assessor-Recorder-County Clerk (ARC) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION
The ARC provides a number of services to the public including, but not limited to, locating, describing, and identifying ownership of all property within the County; establishing an assessed value for all properties subject to taxation; listing all assessed values on the assessment roll; applying all legal exemptions; recording documents; issuing and maintaining vital records; and managing the County's historically significant records. To efficiently and effectively provide these services to the public, it is critical that the ARC personnel document the business operations and procedures required to carry out these functions. Many of these functions are

provided through technological resources that require ARC employees to be familiar with specific procedures in various software applications.

The Scribe software application services (Scribe) is a tool that will enable ARC personnel to document these important business operations and procedures. Scribe runs in tandem with software applications (such as the Property Information Management System) that ARC staff uses regularly and will automatically generate step-by-step guides, including screen shots and instructions for each ARC business process that uses a software application. Scribe allows users to customize the screen shots and instructions by redacting any sensitive information, editing text, and adding annotations or custom branding. The step-by-step guides that are created for performing tasks in various software applications will be used by the ARC in training personnel to become and remain familiar with current business operations and procedures to properly maintain records/information and provide good customer service.

The Agreement is Colony Labs' standard commercial agreement, which includes terms that differ from the County's standard contract and omits certain County standard contract terms. Colony Labs is unwilling to negotiate these terms for any purchases less than $10,000. The non-standard and missing terms include the following:

1. All disputes arising under the Agreement, with the exception of those that qualify for small claims court, must be settled by binding arbitration. The County has the right to opt out of the Arbitration provisions of this Agreement by sending written notice of intent to opt out to Colony Labs within 30 days of first becoming subject to the Agreement.
    *   The County standard contract does not require arbitration.
    *   <u>Potential Impact</u>: The Agreement requires binding arbitration for all disputes between the parties, except for those that qualify for small claims court. Arbitration costs may exceed the costs of a court action. Arbitration decisions are not appealable. The County may opt out of the Arbitration provisions by sending written notice of its intent to opt out within 30 days of first becoming subject to the provisions of the Agreement.

2. Payment terms are as specified in each invoice with late payment interest of 1.5% per month on any outstanding balance, plus all expenses of collection.
    *   County standard payment terms are Net 60 days with no interest or late payment penalties.
    *   <u>Potential Impact</u>: County standard processing time is 60 days or more. Failing to pay by the due date stated in each invoice will result in a material breach of the contract, which would allow Colony Labs to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1.5% per month, which would exceed the Agreement amount.

3. The term of the Agreement is indefinite so long as there is an active purchase of Colony Labs application software services. The County can end the contract by not renewing the services at any subsequent renewal date as long as the intent not to renew is given by either party at least 30 days prior to expiration of the current term.
    *   County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.
    *   <u>Potential Impact</u>: There is no end term to the contract and the County is indefinitely bound to the terms and conditions of the Agreement.

4. County agrees to indemnify and hold Colony Labs, its parents, subsidiaries, affiliates, officers, employees, agents, partners and licensors harmless from any losses, costs, liabilities and expenses (including reasonable attorneys' fees) relating to or arising out of: its use of Colony Labs' software application services.
    - The County standard contract does not include any indemnification or defense by the County of a Contractor.
    - Potential Impact: By agreeing to indemnify Colony Labs, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against Colony Labs without such limitations and the County would be responsible to defend and reimburse Colony Labs for costs, expenses, and damages, which could exceed the total Agreement amount.

5. The Agreement does not require Colony Labs to indemnify the County, except for intellectual property infringement claims.
    - The County standard contract indemnity provision requires the Contractor to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person.
    - Potential Impact: Colony Labs is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Colony Lab's negligent or intentional acts. If the County is sued for any claim, based on its use of Colony Lab's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount.

6. Colony Labs provides the software "AS IS" and disclaims all warranties of any kind.
    - There is no warranty requirement in the County standard contract. The County expects its vendors and service providers to fully warrant the products and services they provide to the County.
    - Potential Impact: The County's use of the software is solely at its own risk.

7. Limitation of liability of Colony Labs to the County for all damages, losses, and causes of action, including negligence, to the amount actually paid for the services in the past twelve months, or $1,000, whichever is greater.
    - The County standard contract does not include a limitation of liability.
    - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess. In addition, the County's liability under the Agreement is not similarly limited.

8. The Agreement does not require Colony Labs to meet the County's insurance standards as required pursuant to County Policy 11-07.
    - The County Policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the County standard contract.
    - Potential Impact: The Agreement does not include County standard insurance requirements. This means that the County has no assurance that Colony Labs will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total Agreement amount.

9. Company Labs may change the terms of the Agreement without notice at any time.
    - The County standard contract requires that any changes to the contract be reduced to writing, executed and attached to the original contract and approved by the person(s) authorized to do so on behalf of Contractor and County.
    - <u>Potential Impact</u>: Company Labs may change the terms of the Agreement without notice at any time. The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board.

The recommended Agreement, including non-standard terms, will allow the ARC to operate in a fiscally-responsible and business-like manner, and improve County government operations by enabling the ARC to purchase subscriptions, to be approved in conformity with County purchasing policies, to utilize Colony Lab's Scribe upon acceptance of the Agreement, automatically renewing until terminated by either party. Approval of Recommendation No. 2 would authorize the Assessor-Recorder-County Clerk or Departmental Information Systems Administrator to electronically accept the Agreement. Approval of Recommendation No. 3 would direct the Assessor-Recorder-County Clerk or Departmental Information Systems Administrator to transmit a printed copy of the electronically accepted Agreement to the Clerk of the Board of Supervisors within 30 days of execution.

PROCUREMENT
The Agreement, including non-standard terms, will be used to accompany future purchases to be approved in accordance with County purchasing policies.

REVIEW BY OTHERS
This item has been reviewed by County Counsel (Kaleigh Ragon, Deputy County Counsel, 387-5455) on December 14, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2418) on December 15, 2022; Risk Management (Victor Tordesillas, Director, 386-8621) on December 21, 2022; Innovation and Technology Department (Jake Cordova, Assistant Chief Information Officer, 388-0503) on January 9, 2023; Finance (Penelope Chang, Finance Analyst, 387-4886) on December 21, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on January 6, 2023.
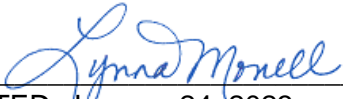
Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Curt Hagman   Seconded: Joe Baca, Jr.
Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY _Lynna Monell_
DATED: January 24, 2023

cc: ARC- Gaeta w/agree
        Contractor- C/O ARC w/agree
        File- w/agree

LA   01/30/2023