SAN BERNARDINO COUNTY

Contract Number
26-28

SAP Number
N/A

Assessor-Recorder-County Clerk

Department Contract Representative	Yvonne Robbins, Departmental Information System Administrator
Telephone Number	(909) 382-3254
Contractor	SmartBear Software, Inc.
Contractor Representative	Liam Flood
Telephone Number	(617) 934-8157
Contract Term	Effective 1/13/26 and continuing until terminated by either party
Original Contract Amount	Non-financial in nature
Amendment Amount	Non-financial in nature
Total Contract Amount	Non-financial in nature
Cost Center	N/A
Grant Number (if applicable)	N/A

Briefly describe the general nature of the contract: *Terms of Use Agreement with SmartBear Software, Inc., including non-standard terms, for software services, effective January 13, 2026, and continuing until terminated by either party. This Agreement is non-financial in nature and does not commit the County to make any purchases.*

FOR COUNTY USE ONLY

Approved as to Legal Form	Reviewed for Contract Compliance	Reviewed/Approved by Department
► *Bonnie Uphold*	►	► *[signature]*
Bonnie Uphold, Supervising Deputy County Counsel		Josie Gonzales, Assessor-Recorder-County Clerk
Date 1/6/2026	Date	Date 1/6/2026

Non-Standard Contract Coversheet

Revised 7/1/24

SmartBear Terms of Use

Effective starting February 13, 2025

For prior version, please click here.

BY ACCESSING OR USING THE SMARTBEAR SOLUTIONS, CUSTOMER AGREES TO THE TERMS AND CONDITIONS OF THIS SMARTBEAR SOLUTIONS AGREEMENT. THE TERM "CUSTOMER" SHALL MEAN THE ORGANIZATION FOR WHOM AN INDIVIDUAL ACCESSES OR USES THE SMARTBEAR SOLUTION(S) AND FOR WHOM SUCH INDIVIDUAL IS EMPLOYED OR OTHERWISE RETAINED.

THE **"EFFECTIVE DATE"** OF THIS AGREEMENT IS THE EARLIER OF (A) CUSTOMER'S INITIAL ACCESS TO ANY SOLUTION THROUGH ANY ONLINE PROVISIONING, REGISTRATION OR ORDER PROCESS, OR (B) THE DATE CUSTOMER ORDERS SOLUTIONS FROM SMARTBEAR. THIS AGREEMENT WILL GOVERN CUSTOMER'S INITIAL PURCHASE ON THE EFFECTIVE DATE AS WELL AS ANY FUTURE PURCHASES MADE BY CUSTOMER.

BY ACCESSING OR USING THE SOLUTION CUSTOMER (A) ACKNOWLEDGES THAT CUSTOMER HAS READ AND UNDERSTANDS THIS AGREEMENT; (B) REPRESENTS AND WARRANTS THAT CUSTOMER HAS THE RIGHT, POWER, AND AUTHORITY TO ENTER INTO THIS AGREEMENT AND, IF ENTERING INTO THIS AGREEMENT FOR AN ORGANIZATION, THAT THE INDIVIDUAL ACCESSING OR USING THE SERVICE HAS THE LEGAL AUTHORITY ON BEHALF OF CUSTOMER TO BIND THAT ORGANIZATION; AND (C) ACCEPTS THIS AGREEMENT AND AGREES THAT CUSTOMER IS LEGALLY BOUND BY ITS TERMS.

IF CUSTOMER DOES NOT ACCEPT THESE TERMS, CUSTOMER MAY NOT ACCESS OR USE THE SERVICES.

This SmartBear Solutions Agreement (the **"Agreement"**) is entered into by and between SmartBear Software Inc., a Delaware corporation (if Customer is located in the U.S. or Canada) or SmartBear (Ireland) Limited, a private company limited by shares, Ireland registration number 541086 (if Customer is located outside of the United States or Canada) (**"SmartBear"**) and the person or entity accessing or purchasing the Solution(s) ("Customer").

In consideration of the terms and conditions set forth below, the parties agree as follows:

1. **SmartBear Solutions.** The SmartBear Solutions provides various tools to Customer for application performance monitoring, software development, software testing, API testing and API management, all on a SaaS and/or on-premise basis as further described herein.

    a. **SaaS Services.** As specified in an Order, certain Solutions are made available to Customer on a SaaS basis in accordance with the following subscription license. Subject to Customer's payment of all Fees and compliance with the terms and conditions of this Agreement, SmartBear hereby grants Customer a revocable, non-exclusive, non-transferable, non-sublicensable, limited right to access and use the SaaS Services during the subscription term in Customer's Order solely for Customer's internal

business operations by Users. SmartBear shall provide to Customer the necessary passwords and access credentials to allow Customer to access the Solution. The SaaS Services are subject to certain product specific restrictions described in the Software License and Services Types. If Customer purchases a subscription to a SaaS Solution, standard support is provided without additional charge as further described in the Support Manual ("**Support**"). Enhanced support options may be available for an additional charge.

b. **Licensed Software**. As specified in an Order, certain Solutions may be licensed as end use licenses of software and applications that are downloaded and installed on the Customer's premises and managed by Customer for use in its internal business operations for a specified term (collectively, the "**Licensed Software**").

  i. **License Grant for Licensed Software**. Subject to payment of all Fees and compliance with the terms and conditions of this Agreement, SmartBear hereby grants to Customer a non-exclusive, non-transferable, non-sublicensable, revocable license to use the Licensed Software for the applicable term in the Order, in machine-readable object code form only and solely for use in its internal business operations to install and deploy the Licensed Software, in the number of systems or based on usage as specified in the Order, in accordance with this Agreement, the applicable Documentation, and the product specific restrictions set forth at smartbear.com/legal/software-license-and-services-types. The Licensed Software is licensed, not sold, and Customer receives no title to or ownership of the Licensed Software. Furthermore, Customer receives no rights to the Licensed Software other than those specifically granted in this paragraph.

  ii. **Delivert**. SmartBear shall deliver the Licensed Software to Customer by email or other electronic means. Delivery is deemed to have occurred when the Licensed Software has been made available to Customer for download.

  iii. **Permitted Copies and License Usage.** Customer may make copies of the Licensed Software and Documentation only as reasonably necessary to use the Licensed Software as licensed and for back-up and archival purposes; provided that, each copy of the Licensed Software and Documentation contains all titles, trademarks, and copyright and restricted rights notices as in the original, and Customer does not exceed the license quantities or other entitlements in the applicable Order.

  iv. **Maintenance and Support for Licensed Software**. Customer may elect to purchase maintenance and support services for the Licensed

Software as further described in the Support Manual (**"Support"**) for the Licensed Software as indicated in the Order. SmartBear has no obligation to provide Support for any version of the Licensed Software other than the most current and previous minor release and shall have no liability for damages resulting from or in connection with Customer's failure to install and/or use a current version.

v. **End of Life.** In its sole and exclusive discretion, SmartBear may discontinue Support for, discontinue sales of and/or retire a non-current version of the Licensed Software (**"End of Life"**). SmartBear shall publicly post (on its website or other designated location) a notice of End of Life, including, where relevant, the last date of general commercial availability of the affected version of the SmartBear Solution and the timeline for discontinuing Support.

vi. **Emergency Update.** Due to operation of law, regulation, or to comply with reasonable security standards (e.g., patching a known vulnerability) SmartBear may, on rare occasions, require Customer to update to the most current version of the affected SmartBear Solution (**"Emergency Update"**). SmartBear will clearly communicate the need for such Emergency Update. SmartBear shall have no liability for damages resulting from or in connection with Customer's failure to implement an Emergency Update.

c. **Third Party Products.** Any Third-Party Products are subject to Section 4(e).

d. **AI Enabled Features.** The Solutions may contain certain AI features as further described in Exhibit A.

2. **Responsibilities of Customer**

a. **Customer Account.** Customer may need to register for an Account in order to place Orders or access or receive the Solutions. Customer agrees to keep its Account information current, accurate, and complete so that SmartBear may send notices, statements, and other information to Customer via email or through its Account, which notifications will be subject to this Agreement and the Privacy Notice. Customer will be responsible for maintaining the confidentiality of User login information and credentials for accessing the Solutions and will notify SmartBear promptly of any loss, misuse, or unauthorized disclosure of such login information and/or credentials of which Customer becomes aware. SmartBear and its Affiliates will not be liable for any damage or loss that may result from Customer's breach of the foregoing obligations. SmartBear may deliver license keys and access codes via any commercially reasonable method of delivery and may change that delivery method from time to time.

b. **Acceptable Use.** Customer may only use the Solutions in accordance with the Documentation, subject to the use limitations indicated in any Order

pursuant to which Customer subscribes to or licenses the Solutions, and the terms of this Agreement. Customer agrees to comply with SmartBear's Acceptable Use Policy which is hereby incorporated into this Agreement.

c. **Use Restrictions.** Customer will not directly or indirectly, nor authorize any of its representatives or any third party, to do any of the following: (i) use the SmartBear Technology to process data on behalf of any third party other than Customer's Users; (ii) violate applicable law; (iii) use the SmartBear Technology to store or transmit any content that infringes upon any third party's intellectual property rights; (iv) use the SmartBear Technology for competitive intelligence or performance benchmarking purposes; (v) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share or otherwise commercially exploit or make the SmartBear Technology available to any third party other than Users, and then only in furtherance of its permitted business purposes as expressly permitted by this Agreement; (vi) to falsely imply any sponsorship or association with SmartBear; or (vii) decompile, reverse engineer, disassemble, reproduce, or copy, modify, create derivative works or otherwise access or discover the source code or underlying program of any portion of SmartBear Technology (viii) remove any proprietary notices from the SmartBear Technology or any other materials made available by Company; (ix) use or access the SmartBear Technology in order to build a competitive product or service; (x) interfere with or disrupt the integrity or performance of the SmartBear Technology or any data contained therein; (xi) attempt to gain unauthorized access to the SmartBear Technology or its related data, systems or networks; (xii) publish or disclose to third parties any evaluation of the SmartBear Technology, or data or information on Customer's results from using the SmartBear Technology, without Company's prior written consent; or (xiii) perform vulnerability, load or any other testing of the SmartBear Technology without Company's prior written consent. Customer is responsible for each User's use of the SmartBear Technology and their compliance with the terms of this Agreement.

3. **Customer Data**

   a. **Use of Customer Data.** Subject to the terms of this Agreement, Customer hereby grants to SmartBear and its Affiliates a revocable, non-exclusive, worldwide, royalty-free right to process, reproduce, distribute, display and use the Customer Data and perform all acts with respect to the Customer Data as may be necessary to provide the Solution to Customer as well as maintain and improve the SmartBear Technology and perform all related obligations owed to Customer under this Agreement, or as may be required by law. Customer is solely responsible for the accuracy, content, and legality of all Customer Data. Customer warrants that Customer has and will have sufficient rights in the Customer Data to grant the rights to SmartBear under this Agreement.

b. **Data Security.** SmartBear has implemented and will maintain an information security program that uses appropriate physical, technical and organizational measures designed to protect Customer Data from unauthorized access, destruction, use, modification, or disclosure. Further information about SmartBear's security program is available on the SmartBear Trust Center as updated from time to time. SmartBear will treat Customer Data as confidential by only disclosing to its employees, contractors, and suppliers to the extent necessary to perform its obligations under this Agreement.

c. **Restricted Data.** Customer represents and warrants that Customer shall not upload or transmit to the Service any data (a) to be used in military or nuclear applications, (b) regulated pursuant to the Health Insurance Portability and Accountability Act of 1996, the Payment Card Industry Data Security standards, or the Gramm-Leach-Bliley Act, or (c) that would constitute special category or sensitive personal data under applicable privacy laws.

d. **Privacy Policy.** In providing the Solution, SmartBear complies with its privacy notice (**"Privacy Notice"**). The Privacy Notice is subject to change as described therein. By accessing, using, and providing information to or through the Solutions, Customer acknowledges that Customer has reviewed and accepted the Privacy Notice, and Customer consents to all actions taken by SmartBear with respect to Customer's information in compliance with the then-current version of the Privacy Notice.

e. **Personal Information Processing.** When acting as a Processor under the GDPR (or other applicable privacy laws), any personal information that SmartBear processes as part of this Agreement shall be governed by the SmartBear Data Processing Addendum.

4. **Intellectual Property**

a. **Customer Ownership Rights.** Customer and its licensors retain all right, title, and interest in and to the Customer Data and all of Customer's Confidential Information provided under this Agreement, and SmartBear obtains no rights in the foregoing except for the express rights granted in this Agreement and the Privacy Notice.

b. **SmartBear Ownership Rights.** SmartBear and its licensors retain all right, title, and interest including all intellectual property rights in and to SmartBear Technology and Solution Data. Customer acknowledges that the SaaS Services are offered as online, hosted solutions, and that Customer has no right to obtain a copy of the underlying computer code for any SaaS Services. Customer may suggest or recommend changes to the Solution, including without limitation, new features or functionality relating thereto, or any comments, questions, suggestions, or the like (**"Feedback"**). The Feedback shall be considered SmartBear Confidential Information and SmartBear shall

own all right, title and interest in the Feedback. Feedback does not include any suggestion or idea to the extent that it solely addresses Customer's products or services.

c. **Solution Data.** Without limiting the confidentiality rights and protections set forth in this Agreement, SmartBear owns the anonymized, aggregated, and statistical data derived from the operation of the Solution (**"Solution Data"**). Nothing herein shall be construed as prohibiting SmartBear from owning and utilizing the Solution Data. The Solution Data shall not include any Customer Confidential Information or Customer Data or any information that personally identifies a specific individual.

d. **Changes.** SmartBear may modify the Solutions from time to time, including by adding or removing features, functions, and entitlements. Such modifications to any Solutions are subject to this Agreement. Customer agrees that its purchase of the Solutions is neither contingent upon the delivery of any future functionality or features, nor dependent upon any oral or written comments made by SmartBear with respect to future functionality or features. SmartBear may phase-out a generally available Solution upon reasonable notice to Customer.

e. **Third-Party Services.** SmartBear or other third parties may make available third-party products or services (**"Third-Party Services"**). These Third-Party Services may integrate with the Solutions and are not licensed by SmartBear pursuant to this Agreement but are governed by the third-party provider's terms and conditions and privacy policies that accompany them, which Customer must accept separately. SmartBear does not warrant or support Third-Party Services, unless expressly provided otherwise in an Order. SmartBear is not responsible for any disclosure, modification, or deletion of Customer Data resulting from access by such third party.

f. **Promotional Materials.** Customer agrees that its name, logo, and/or use case may be used by SmartBear in marketing materials (**"Promotional Materials"**) provided that SmartBear observes all guidelines and other instructions or requirements regarding such usage provided by Customer. Promotional Materials may be for both internal and/or external purposes of SmartBear and such rights granted herein shall be worldwide, perpetual, and in any media. Customer may request that SmartBear stop the use of Promotional Materials by submitting an email to marketing@smartbear.com at any time.

5. **Fees and Payment**

a. **Fees and Payment.** All charges associated with Customer's Account (**"Fees"**) are set forth in the applicable Order. For credit card payments, the payment is due immediately upon receipt of invoice. For payments through other accepted methods, Fees are due and payable in full within thirty (30)

days from the invoice date or as stated in the applicable Order. Payment obligations are non-cancellable, regardless of utilization by Customer and, except as expressly permitted in this Agreement, Fees paid are non-refundable. Customer will pay the Fees through an accepted payment method as specified in the applicable Order or website, without offset or deduction. Unless otherwise set forth in the Order, Customer's subscription to the Solutions will renew automatically for an Order Term in accordance with the renewal terms and conditions set forth in Section 6(b) below.

b. **Late Payments.** If undisputed Fees are more than thirty (30) days overdue, then, following written notification (email notification acceptable) from SmartBear, SmartBear may suspend Customer's access to the SmartBear Technology, including, without limitation, Customer's Account, until such unpaid Fees are paid in full. If Customer fails to make any payment when due (without limiting SmartBear's other rights and remedies), SmartBear may charge interest on the past due amount at the rate of 1.5% per month calculated daily or, if lower, the highest rate permitted under applicable law.

c. **Payment Disputes.** SmartBear will not exercise its rights under Section 5(b) (Late Payments), Section 6(c)(i) (Suspension of Service), or Section 6(d) (Termination for Cause) with respect to non-payment by Customer if Customer is disputing the applicable charges reasonably and in good faith and is cooperating diligently to resolve the dispute. However, if the parties are unable to resolve such a dispute within thirty (30) days, SmartBear will have the right to seek any remedies it may have under this Agreement, at law or in equity, irrespective of any terms that would limit remedies on account of a dispute. For clarity, any undisputed amounts must be paid in full. Customer's withholding payment of Fees due to an internal procurement requirement that SmartBear use Customer's vendor management system or any web-based interface for invoice submission will not constitute a good faith dispute.

d. **Applicable Taxes.** The Fees do not include any taxes, levies, duties, or similar governmental assessments, including value-added, sales, use, or withholding taxes assessable by any local, state, provincial or foreign jurisdiction (collectively **"Taxes"**). Customer agrees to pay applicable direct or indirect Taxes associated with its purchases hereunder, which, to the extent SmartBear is legally required to collect the same, will be separately stated on the SmartBear invoice or invoiced to Customer as soon as SmartBear is made aware of the tax liability. If Customer has an obligation to withhold any amounts under any law or tax regime (other than U.S. income tax law), Customer will notify SmartBear before payment and the parties will cooperate to determine the proper withholding. If SmartBear has the legal obligation to pay or collect Taxes for which Customer is responsible under this Section, the appropriate amount will be invoiced and paid by Customer,

unless, prior to the invoice date, Customer provides SmartBear with a valid tax exemption certificate authorized by the appropriate taxing authority.

e. **Purchases from Channel Partners.** Customer may procure use of any Solutions from a third-party authorized reseller or distributor of SmartBear (including third party marketplaces) (**"Channel Partner"**) pursuant to a separate agreement with the Channel Partner. Customer's use of any Solutions procured through a Channel Partner will be subject to the terms of this Agreement, and all fees payable (including all applicable Taxes) for such use will be payable to the Channel Partner pursuant to the terms agreed to between Customer and Channel Partner. Customer understands and agrees that, if Customer purchased the Solutions via a Channel Partner, service credits and refunds payable under this Agreement may be payable or applied by Channel Partner acting on behalf of SmartBear in proportion to the fees paid by Customer to the Channel Partner, and the discharge by the Channel Partner of such obligations will relieve SmartBear of the same under this Agreement.

6. **Term, Termination and Suspension**

   a. **Term.** This Agreement is effective as of the Effective Date (which for online orders is the date of order via the website) and continues through the Order Term set forth in the initial Order ("Initial Term").

   b. **Renewal.** Unless a party gives written notice of non-renewal at least sixty (60) days' prior to the expiration of the relevant Order Term, this Agreement and each Order will automatically renew at SmartBear's then-current prices for the same number of Users and entitlements (including any add-ons) for a period equal to the previous Order Term ("Renewal Term"). Notwithstanding anything to the contrary, in the event of non-renewal by a party, this Agreement shall continue to apply to any outstanding Orders until the Order is fully satisfied by both parties.

   c. **Suspension.** SmartBear may suspend Customer's access to the Solutions and/or Customer's Account, on the following grounds: (i) late payment/non-payment of undisputed Fees, per the process noted in Section 5(b) above; (ii) non-renewal of the Solutions by Customer; (iii) Customer's or its Users' breach of Section 2 (Use Restrictions); or (iv) in the event suspension is deemed necessary by SmartBear to prevent or address the introduction of malicious software, a security incident, or other harm to Customer, SmartBear, or SmartBear's other customers. SmartBear will use reasonable efforts to notify Customer of any such suspension. SmartBear will use diligent efforts to attempt to limit, where commercially feasible, the suspension to affected Users or SmartBear Technology, and will immediately restore the availability of the same as soon as the issues leading to the suspension are resolved. Such suspension will in no way affect Customer's other obligations under this Agreement.

d. **Termination for Cause.** Either party may terminate this Agreement by written notice to the other party in the event that (i) such other party materially breaches this Agreement and does not cure such breach within thirty (30) days of such notice, or (ii) immediately in the event the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

7. **Confidentiality.** Each party will protect the other's Confidential Information from unauthorized use, access, or disclosure in the same manner as it protects its own Confidential Information of similar nature or importance, and in any event, using no less than reasonable care. Except as otherwise expressly permitted pursuant to this Agreement, the receiving party may use the disclosing party's Confidential Information solely to exercise its respective rights and perform its respective obligations under this Agreement, and will disclose such Confidential Information solely (i) to those of its respective employees, representatives, and agents who have a need to know such Confidential Information for such purposes and who are bound by obligations to maintain the confidentiality of, and not misuse, such Confidential Information; (ii) as necessary to comply with an order or subpoena of any administrative agency or court of competent jurisdiction; or (iii) as reasonably necessary to comply with any applicable law or regulation. The provisions of this Section will supersede any non-disclosure agreement by and between the parties entered into prior to this Agreement that would purport to address the confidentiality of any information shared by the parties, including Customer Data, and such agreement will have no further force or effect with respect to the foregoing. The receiving party acknowledges that disclosure of Confidential Information may cause substantial harm for which damages alone would not be a sufficient remedy, and therefore that upon any such disclosure by the receiving party, the disclosing party will be entitled to seek appropriate equitable relief in addition to whatever other remedies it might have at law.

8. **Warranties/Disclaimer of Warranties**

   a. **SmartBear Solutions Warranty.**

      i. SmartBear warrants to Customer that the Licensed Software will perform substantially in accordance with the applicable Documentation for a period of 90 days after delivery.

      ii. SmartBear warrants to Customer that the SaaS Services will perform substantially in accordance with the applicable Documentation for the subscription term in the Order.

      iii. If the Licensed Software or the SaaS Services do not conform to this SmartBear Solution Warranty in any material respect, then as Customer's exclusive remedy and SmartBear's sole liability and

obligation, SmartBear will use commercially reasonable efforts to correct the non-conforming Licensed Software or SaaS Services.

iv. THE FOREGOING WARRANTY DOES NOT APPLY, AND SMARTBEAR STRICTLY DISCLAIMS ALL WARRANTIES, WITH RESPECT TO ANY THIRD-PARTY PRODUCTS.

b. **Warranty Disclaimer. EXCEPT FOR THE LIMITED WARRANTY SET FORTH IN SECTION 8(a), THE SOLUTION IS PROVIDED "AS IS" AND SMARTBEAR SPECIFICALLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. SMARTBEAR SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE. SMARTBEAR MAKES NO WARRANTY OF ANY KIND THAT THE SOLUTION, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET CUSTOMER'S OR ANY OTHER PERSON'S OR ENTITY'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY OF CUSTOMER'S OR ANY THIRD PARTY'S SOFTWARE, SYSTEM, OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR-FREE, OR THAT ANY ERRORS OR DEFECTS CAN OR WILL BE CORRECTED.**

9. **Indemnification**

a. **Indemnification by SmartBear.** SmartBear will defend Customer, and its officers, directors, and employees from any unaffiliated third party claim alleging that Customer's use of a Solution in accordance with this Agreement infringes such third party's U.S. patent, copyright and/or trademark intellectual property rights (an **"IP Claim"**), and will indemnify Customer from and against any damages and costs finally awarded against Customer, or agreed in settlement by SmartBear (including reasonable attorneys' fees) resulting from such IP Claim. SmartBear will have no liability or obligation with respect to any IP Claim if such claim is caused in whole or in part by (i) unauthorized use of the Solution by Customer, its Affiliates or Users; (ii) modification of the Solution by anyone other than SmartBear or its representatives; or (iii) the combination, operation, or use of the Solution with other data, hardware, or software not provided by SmartBear unless the Documentation refers to a combination with such hardware or software (without directing the user not to perform such a combination). If Customer's use of the Solution results (or in SmartBear' opinion is likely to result) in an IP Claim, SmartBear may at its own option and expense (a) procure for Customer the right to continue using the Solution; (b) repair, replace or modify the SmartBear Technology to make it non-infringing; or (c) if options (a) or (b) are not commercially reasonable as determined by SmartBear, then

SmartBear may terminate Customer's subscription or license to the Solution whereupon SmartBear will refund Customer, on a pro-rated basis, any Fees Customer has previously paid SmartBear for the remainder of the Order Term.

b. **Indemnification by Customer.** Customer will defend SmartBear and its Affiliates from any third party claim ("**Claim**"), and will indemnify SmartBear and its Affiliates from and against any damages and costs finally awarded against SmartBear and its Affiliates, or agreed in settlement by Customer (including reasonable attorneys' fees) resulting from such Claim, to the extent caused by: (i) Customer's or its Affiliate's unauthorized supply, disclosure, or processing of Customer Data (including Personal Data) or Customer Data's infringement of third part intellectual property rights, (ii) Customer's or its Affiliate's violation of laws applicable to Customer's or its Affiliate's business.

c. **Indemnification Procedures.** In the event of a potential indemnity obligation under this Section **9**, the indemnified party will: (i) promptly notify the indemnifying party in writing of the claim, (ii) allow the indemnifying party the right to control the investigation, defense and settlement (if applicable) of such claim at the indemnifying party's sole cost and expense, and (iii) upon request of the indemnifying party, provide all necessary cooperation at the indemnifying party's expense. Failure by the indemnified party to notify the indemnifying party of a claim under this section will not relieve the indemnifying party of its obligations under this Section, however, the indemnifying party will not be liable for any litigation expenses that the indemnified party incurred prior to the time when notice is given or for any damages and/or costs resulting from any material prejudice caused by the delay or failure to provide notice to the indemnifying party in accordance with this section. The indemnifying party may not settle any claim that would bind the indemnified party to any obligation (other than payment covered by the indemnifying party or ceasing to use infringing materials) or require any admission of fault by the indemnified party, without the indemnified party's prior written consent, such consent not to be unreasonably withheld, conditioned, or delayed. Any indemnification obligation under this Section **9** will not apply if the indemnified party settles or makes any admission with respect to a claim without the indemnifying party's prior written consent.

d. **Sole Remedy.** THIS SECTION CONTAINS CUSTOMER'S EXCLUSIVE REMEDIES AND SMARTBEAR'S SOLE LIABILITY FOR THE INFRINGEMENT CLAIMS IDENTIFIED IN THIS SECTION.

10. **Limitation of Liability**

a. SUBJECT TO APPLICABLE LAW AND NOTWITHSTANDING ANYTHING ELSE IN THIS AGREEMENT, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR

SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION DOWNTIME COSTS, LOSS OF DATA, RESTORATION COSTS, LOST PROFITS, OR COST OF COVER) REGARDLESS OF WHETHER SUCH CLAIMS ARE BASED ON CONTRACT, TORT, WARRANTY OR ANY OTHER LEGAL THEORY.

b. SUBJECT TO APPLICABLE LAW, EACH PARTY'S TOTAL AGGREGATE LIABILITY AND THAT OF ITS AFFILIATES, OFFICERS, EMPLOYEES, AGENTS, SUPPLIERS, AND LICENSORS, UNDER THIS AGREEMENT WILL NOT EXCEED THE FEES RECEIVED BY OR PAYABLE TO SMARTBEAR UNDER THIS AGREEMENT IN THE TWELVE (12) MONTHS PRECEDING THE CLAIM.

c. THE PARTIES AGREE THAT THIS SECTION 10 (LIMITATION OF LIABILITY) WILL APPLY REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE AND WILL APPLY EVEN IF ANY LIMITED REMEDY SPECIFIED IN THIS AGREEMENT IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. THE APPLICABLE MONETARY CAP SET FORTH IN THIS SECTION WILL APPLY ACROSS THIS AGREEMENT AND ANY AND ALL SEPARATE AGREEMENT(S) ON AN AGGREGATED BASIS, WITHOUT REGARD TO WHETHER ANY INDIVIDUAL CUSTOMER AFFILIATES HAVE ENTERED INTO A SEPARATE ORDER FORM.

d. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, THE LIMITATIONS OF LIABILITY IN THIS SECTION 10 (LIMITATION OF LIABILITY) SHALL NOT APPLY TO (a) CUSTOMER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT, OR (ii) A VIOLATION OF SMARTBEAR'S INTELLECTUAL PROPERTY RIGHTS.

11. **Modifications to this Agreement:** Customer acknowledges and agrees that SmartBear has the right, in SmartBear's sole discretion, to modify this Agreement from time to time, and that modified terms become effective for Customer upon renewal of the then-current Order Term or entry into a new Order Term after the updated version of this Agreement goes into effect. SmartBear will use reasonable efforts to notify Customer of modifications through communications via Customer's Account, email, or other means. Customer is responsible for reviewing and becoming familiar with any such modifications. Customer's continued use of the Solution after the effective date of the modifications will be deemed acceptance of the modified terms. Notwithstanding the foregoing, the parties may modify particular provisions of this Agreement as to that Customer only by setting forth the modified provisions, with a reference to the particular provision of the Agreement being modified in an Order executed by both parties.

12. **Miscellaneous.**

   a. **Use of Third Parties for Payment Processing.** SmartBear may use third-party service providers to manage payment processing provided that such service provider is not permitted to store, retain, or use Customer's payment

account information except to process Customer's payment information for SmartBear. Customer must notify SmartBear of any change in Customer's payment account information.

b. **Assignment.** Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the other party's prior written consent (not to be unreasonably withheld); provided, however, SmartBear may assign this Agreement in its entirety (including all Orders), without Customer's consent, to an Affiliate or in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets. Any attempted assignment in violation of this section will be null and void.

c. **Entire Agreement.** This Agreement, together with any Order, constitutes the entire agreement and supersedes any and all prior or contemporaneous agreements or communications between Customer and SmartBear, including but not limited to Customer registration forms, requests for proposal or quote, customer or third-party procurement portals or applications, and purchase orders, regarding the subject matter. If any provision in this Agreement is held by a court of competent jurisdiction to be unenforceable, such provision will be modified by the court and interpreted so as to best accomplish the original provision, and the remaining provisions of this Agreement will remain in effect. SmartBear will only (i) accept Customer purchase orders or (ii) complete Customer vendor registration forms or procurement portal enrollments as an accommodation to Customer, and SmartBear hereby expressly disclaims the application of any Customer purchase order terms or procurement terms, standards, or requirements (whether accepted via click-through or otherwise) that purport to cover the subject matter of this Agreement.

d. **Relationship of the Parties.** The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship among the parties.

e. **Survival.** Any right, obligation, or required performance of the parties in this Agreement which, by its express terms or nature is intended to survive termination of this Agreement, will survive any such termination. Termination of this Agreement will not limit either party's liability for obligations accrued as of or prior to such termination or for any breach of this Agreement.

f. **Notices.** All notices to be provided by one party to the other under this Agreement may be delivered in writing by (i) nationally recognized overnight delivery service or US mail to the mailing address provided on the Order; or (ii) electronic mail to the e-mail address provided for Customer's Account administrator. The address for a notice to SmartBear is: SmartBear Software Inc., 450 Artisan Way, Somerville, MA 02145 with a copy to legal@smartbear.com by electronic mail. All notices will be deemed to

have been given immediately upon delivery by electronic mail, or if otherwise delivered upon receipt.

g. **Anti-Corruption.** Neither party has received or been offered any illegal or improper bribe, kickback, payment, gift, or thing of value from an employee or agent of the other party in connection with this Agreement. Reasonable gifts and entertainment provided in the ordinary course of business do not violate the above restriction. If Customer learns of any violation of the above restriction, Customer will use reasonable efforts to promptly notify SmartBear at legal@smartbear.com. In keeping with SmartBear's compliance program, SmartBear complies with policies covering ethics and business conduct, conflict of interest, anti-bribery and corruption, environmental protection, and whistleblower protection.

h. **Force Majeure.** Neither party will be liable to the other for any delay or failure to perform any obligation under this Agreement (except for a failure to pay Fees) if the delay or failure results from any cause beyond such party's reasonable control, including but not limited , acts of God, acts of government, epidemic, pandemic, acts of terror or civil unrest, Internet failures, or acts undertaken by third parties not under the performing party's control, including, without limitation, denial of service attacks (**"Force Majeure Event"**). In the event that a Force Majeure Event continues for a period of thirty (30) consecutive days, the other party may terminate this Agreement and all Orders on written notice to the non-performing party.

i. **Governing Law.** This Agreement will be deemed to have been made in, and will be construed pursuant to: (i) if Customer is located in the U.S. or Canada, the laws of the state of New York without regard to conflicts of law provisions and without regard to the United Nations Convention on the International Sale of Goods or the Uniform Computer Information Transactions Act; (ii) if Customer is located outside of the U.S. or Canada, the laws of Ireland without regard to the United Nations Convention on the International Sale of Goods or the Uniform Computer Information Transactions Act. The parties hereby consent to the jurisdiction of the applicable courts as set forth above.

j. **Dispute Resolution.** In the event of a dispute, prior to initiating any action, Customer shall submit a description of the dispute to the appropriate SmartBear representative (**"Dispute Notice"**). If the parties are unable to resolve the dispute within ten (10) business days after the Dispute Notice, either party may call for escalation by written notice to the other (**"Escalation Notice"**). In that case each party shall select an executive with the authority to make commitments that would resolve the dispute, and the two executives shall meet within ten (10) business days after the Escalation Notice and shall negotiate in good faith to resolve the dispute.

k. **Export Compliance and Use Restrictions.** The Solutions or components of the Solutions which SmartBear may provide or make available to Customer or Users may be subject to U.S. (or other territories) export control and economic sanctions laws, rules and regulations, including without limitation the regulations promulgated by the U.S. Department of Commerce's Bureau of Industry and Security (**"BIS"**) and the U.S. Department of the Treasury's Office of Foreign Assets Control (**"OFAC"**) (collectively, **"Export Control Laws"**). Customer agrees to comply with all the Export Control Laws as they relate to access to and use of the Solutions and such other components by Customer and Users. Customer shall not access or use the Solutions if Customer is located in any jurisdiction in which the provision of the Solutions or other components is prohibited under U.S. or other applicable laws or regulations, including, without limitation, a country or territory that is subject to comprehensive U.S. trade sanctions (including, without limitation Cuba, Iran, North Korea, Syria or the Crimea or so-called Donetsk People's Republic (DNR) or Luhansk People's Republic regions of Ukraine) (a **"Prohibited Jurisdiction"**) and Customer shall not provide access to the Solutions to any government, entity or individual located in any Prohibited Jurisdiction. Customer acknowledges that the Solutions may not be available in all jurisdictions and that Customer is solely responsible for complying with the Export Control Laws.

l. **Federal Government End Use Restrictions.** If Customer is a U.S. federal government department or agency or contracting on behalf of such department or agency, the Solutions were developed at private expense are "Commercial Items" as that term is defined at 48 C.F.R. §2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation", as those terms are used in 48 C.F.R. §12.212 or 48 C.F.R. §227.7202. Consistent with 48 C.F.R. §12.212 or 48 C.F.R. §227.7202-1 through 227.7202-4, as applicable, the Service is made available to Customer with only those rights as provided under the terms and conditions of this Agreement. Any provisions of this Agreement that are inconsistent with federal procurement regulations or other federal law are not enforceable against the U.S. federal government.

13. Definitions.

a. **"Account"** means any accounts or instances created by or on behalf of Customer for access to and use of any of the Solutions.

b. **"Affiliate"** means with respect to a party to this Agreement, any entity that directly or indirectly controls, is controlled by, or is under common control with such party, where "control" means the possession, directly or indirectly, of the power to direct, or cause the direction of the management and policies of such entity, whether through the ownership of voting securities, by contract, or otherwise.

c. **"Acceptable Use Policy"** means the SmartBear Acceptable Use Policy, which is located currently at https://smartbear.com/legal/acceptable-use-policy/, as updated from time to time.

d. **"Confidential Information"** means all information disclosed by one party to the other party, orally, in writing or electronically, that is designated as "confidential" (or with a similar legend), or which a reasonable person should understand to be confidential given the nature of the information and circumstances of disclosure. Confidential Information does not include any information that: (it) was publicly known and made generally available in the public domain prior to the time of disclosure by the disclosing party; (ii) becomes publicly known and made generally available through no action or inaction of the receiving party; (iii) is already in the possession of the receiving party at the time of disclosure by the disclosing party; (iv) is obtained by the receiving party from a third party without any restrictions or obligations of confidentiality; or (v) is independently developed by the receiving party without use of or reference to the disclosing party's Confidential Information.

e. **"Customer Data"** means all electronic data, text, messages, or other materials submitted to the Solutions by Customer or its Users through the Services or Customer's Account in connection with Customer' use of the Solutions.

f. **"Data Processing Addendum"** or **"DPA"** means SmartBear' Data Processing Addendum at https://smartbear.com/legal/data-processing-addendum/ as updated from time to time.

g. **"Documentation"** means, the then-current, generally available user documentation provided by SmartBear detailing the functionalities of the Software and the Solutions available at https://support.smartbear.com/documentation/ and updated from time to time.

h. **"SmartBear Technology"** means (i) the Solutions, Documentation, SmartBear APIs, SmartBear's website(s), and any content published on the SmartBear websites, (ii) SmartBear's underlying technology platform, (iii) any training materials, Support materials, templates, tools, methodologies or know-how, (iv) SmartBear Confidential Information and intellectual property, and (v) any modifications or derivative works of the foregoing.

i. **"Order"** means (i) any order form, quotation, or other document issued by SmartBear and executed or accepted by Customer; (ii) any document referencing this Agreement and executed by Customer and SmartBear; or (iii) any online ordering document or process completed by Customer, including any online registration through a website, each of which may detail, (a) the Solutions ordered, (b) the access rights or license metrics (e.g. the number of

authorized Users), (c) Fees payable to SmartBear, (d) the applicable Order Term, and (e) any relevant additional terms and conditions. This may also include any change order forms.

j. **"Solution"** means the SmartBear (i) SaaS based offerings (**"SaaS Services"**) and/or (ii) on-premise Licensed Software, as identified on Customer's Order, including any Updates or Documentation made available by SmartBear with such offering, but excluding any third-party products, services, applications, or APIs.

k. **"Order Term"** means, the period stated on an Order during which Customer subscribes to the Solutions.

l. **"Update"** means, the generally available updates, hot fixes, patches and workarounds to the Solutions provided by SmartBear to all subscribing customers but excludes separately priced new products or modules.

m. **"User"** means, any individual who is authorized by Customer to use the Solutions, including an Account administrator, employees, consultants, contractors, and agents of Customer or its Affiliates, and third parties with which Customer or its Affiliates transact business.

n. **"Third-Party Products"** means any products, content, services, information, websites, or other materials that are owned by third parties and are incorporated into or accessible through the Solution.

Exhibit A: AI Enabled Features

The Solution may leverage third party artificial intelligence platforms ("AI Enabled Features"). Customer understands and acknowledges that AI Enabled Features are not mandatory or integrated by default and the Solutions may be used without enabling the AI Enabled Features.

1. **Customer Data.** If Customer chooses to use an AI Enabled Feature included in the Solution, Customer acknowledges and agrees that SmartBear may share certain Customer Data ("Input Data") with the third-party artificial intelligence platforms as may be required for the AI Enabled Feature to operate (e.g., the html of Customer's website that Customer chooses to analyze with an AI Enabled Feature). Customer represents and warrants that (i) Customer will use the AI Enabled Feature in accordance with Section 3 of this Agreement and (ii) it has obtained all necessary rights, approvals, and consents to provide Input Data.

2. **AI Provider.** Customer acknowledges and understands that certain AI Enabled Features utilize third-party AI providers ("AI Provider"). Current AI Providers include, OpenAI LLC ("OpenAI"). In addition to this Agreement, the OpenAI Terms of Service govern Customer's use of the AI Enabled Features and are available here: https://openai.com/policies/business-terms. The AI Enabled Features may only be used in the following jurisdictions: https://platform.openai.com/docs/supported-countries. In the event

that a different AI Provider is utilized in the future, such AI Provider's terms of use shall govern. SmartBear does not permit AI Providers to use Input Data to train or improve their foundational or large language models. SmartBear reserves the right to utilize a different AI Provider at any time upon providing prior notice. If Customer does not agree to the new AI Provider, Customer's remedy is to cease its use of the AI Enabled Features.

3. **Fees.** SmartBear reserves the right to charge Fees for the use of the AI Enabled Features, at any time, upon providing prior notice. If Customer does not agree to such Fees, or any of these AI Terms, Customer's sole remedy is to cease its use of the AI Enabled Features.

4. **AI Content.** The output insights generated and returned by the AI Enabled Features ("AI Output") are based on the Customer Data processed on and through the Solution. Customer is solely responsible for the AI Output. AI Output shall be deemed Customer Data subject to the AI provider's terms and conditions. Due to the nature of machine learning, AI Output may not be unique, and the AI Features may generate the same or similar output for other users.

5. **Accuracy.** SmartBear does not guarantee accuracy of any AI Output generated by the AI Enabled Features. Given the probabilistic nature of machine learning and AI, use of the AI Enabled Features may result in incorrect or inaccurate AI Output. Customer shall have full responsibility for and control of any AI Output being applied or used, and shall evaluate the accuracy of any AI Output prior to acceptance or use of the AI Output.

6. **AI Enabled Features Disclaimer.** IN ADDITION TO ANY DISCLAIMERS SET FORTH IN THE AGREEMENT, THE AI ENABLED FEATURES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. SMARTBEAR AND THE APPLICABLE THIRD-PARTY AI PROVIDER MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THE AI ENABLED FEATURE, OR THE INFORMATION, TEXT, AND CONTENT INCLUDED IN THE AI OUTPUT, OR INPUT OF THE CUSTOMER DATA, INCLUDING WITHOUT LIMITATION, ACCURACY OF THE RESULTS, AVAILABILITY, SUITABILITY, RELIABILITY, OR ANY INFORMATION PROVIDED THROUGH THE AI ENABLED FEATURES. CUSTOMER UNDERSTANDS THAT AI OUTPUT MAY BE SUSCEPTIBLE TO RISKS COMMONLY ASSOCIATED WITH INFORMATION STORED ON THE CLOUD. SMARTBEAR WILL HAVE NO LIABILITY OR RESPONSIBILITY ARISING IN ANY WAY FROM THE USE OF THE AI ENABLED FEATURES OR ANY ERRORS OR OMISSIONS CONTAINED IN THE AI OUTPUT.