



Contract Number

23-04

SAP Number

Innovation and Technology Department

Department Contract Representative	Adrian Danczyk
Telephone Number	(909) 388-0534
Contractor	Quest Software Inc.
Contractor Representative	Hunter Debo
Telephone Number	(614) 726-4708
Contract Term	Upon download, installation, or use of software and continuing until termination by either party
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: Software Transaction Agreement, including non-standard terms, with Quest Software Inc., for platform management software and maintenance services for purchase amounts as authorized by County Policy for the period beginning upon download, installation, or use of the software and continuing until termination by either party.

FOR COUNTY USE ONLY

Approved as to Legal Form

► *Bonnie Uphold*
Bonnie Uphold, Supervising Dep. County Counsel

Date 12-16-2022

Reviewed for Contract Compliance

►

Date _____

Reviewed/Approved by Department

►

Date _____

Software Transaction Agreement

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE USING THIS PRODUCT. BY DOWNLOADING, INSTALLING OR USING THIS PRODUCT, YOU ACCEPT AND AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT. FOR ORDERS PLACED OUTSIDE THE UNITED STATES OF AMERICA, PLEASE GO TO <https://quest.com/legal/sta.aspx> TO VIEW THE APPLICABLE VERSION OF THIS AGREEMENT FOR YOUR COUNTRY OR REGION. IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT OR THE APPLICABLE VERSION OF THIS AGREEMENT FOR YOUR COUNTRY OR REGION, DO NOT DOWNLOAD, INSTALL OR USE THIS PRODUCT. IF YOU HAVE A SIGNED AGREEMENT WITH PROVIDER THAT IS SPECIFICALLY REFERENCED IN AN ORDER THAT IS EXECUTED BETWEEN YOU AND PROVIDER, THEN THAT SIGNED AGREEMENT WILL SUPERSEDE THIS AGREEMENT.

This Software Transaction Agreement (the "**Agreement**") is made between you, the Customer ("**Customer**" or "**You**") and the Provider, as defined below.

1. Definitions. Capitalized terms not defined in context shall have the meanings assigned to them below:

- (a) "**Affiliate**" means any legal entity controlling, controlled by, or under common control with a party to this Agreement, for so long as such control relationship exists.
- (b) "**Appliance**" means a computer hardware product upon which the Software is pre-installed and delivered.
- (c) "**Documentation**" means the then current user manuals and documentation that Provider makes available for the Software either through the electronic download of the Software or from the Support Site, and all copies of the foregoing.
- (d) "**eStore**" means Provider's online Software ordering system located at <https://quest.com/shop>.
- (e) "**License Type**" means the model by which the Software is licensed (e.g., by server, by mailbox, by managed user) as indicated in the applicable Order and defined in the Product Guide.
- (f) "**Maintenance Services**" means Provider's then current maintenance and support offering specified in the applicable Order and made available to Customer as stated in the *Maintenance Services* Section below.
- (g) An "**Order**" is either (i) an ordering document signed by Customer and Provider ("**Signed Order**"), (ii) a Provider quotation referenced on a PO that states that it is governed exclusively by such quotation ("**Governing Quotation**"), (iii) an order placed through the eStore, (iv) an order placed through a Partner, or (v) a Customer purchase order ("**PO**") submitted to Provider. Each Order shall be Customer's irrevocable commitment to purchase and pay for the Products and/or Maintenance Services stated in the Order and each Order placed with Provider shall be subject to approval by Provider in writing or by performance.
- (h) "**Partner**" means a reseller or distributor that is under contract with Provider or another authorized party and is authorized via such contract to resell the Products and/or Maintenance Services.
- (i) "**Product(s)**" means the Software and/or Appliance(s) provided to Customer by Provider.
- (j) "**Product Guide**" means the document located at https://Quest.com/docs/Product_Guide.pdf that contains the Product Terms.
- (k) "**Product Terms**" means the terms associated with each License Type and any other terms associated with an individual Product. The Product Terms for Products in a Signed Order or a Governing Quotation shall be as stated in the Signed Order or Governing Quotation. If no Product Terms are stated in the Signed Order or Governing Quotation, if the Order is placed with a PO only, if the Order is placed through the eStore, or if the Products are purchased from a Partner, then the Product Terms for such Products shall be as stated in the Product Guide as of the date of the Order or purchase.
- (l) "**Provider**" means Quest Software Inc., with its principal place of business located at 4 Polaris Way, Aliso Viejo, CA 92656. If an Order is placed through and approved by an Affiliate of Provider, then that Affiliate shall be the Provider under this Agreement.
- (m) "**Software**" means any and all software that is provided or made available to Customer under this Agreement as well as any new versions and releases of such software that are made available to Customer pursuant to this Agreement, and all copies of the foregoing. Software includes On-Premises Software and SaaS Software (as defined in the *Software License* Section), along with software that is delivered on an Appliance.
- (n) "**Use**" means Customer's installation, deployment, access of or provision of access to, or operation of a Product.

2. Software License.

- (a) **General.** Subject to Customer's compliance with the terms of this Agreement, Provider grants to Customer, and Customer accepts from Provider, a non-exclusive, non-transferable (except as otherwise set forth herein) and non-sublicensable license to Use the quantities of each item of Software purchased from Provider or a Partner within the parameters of the Product Terms associated with the applicable Software and License Type (the "**License**"). Except for MSP Licenses (as defined below), Customer shall only Use the Software to support the internal business operations of itself and its worldwide Affiliates.

(b) **On-Premises Software.** If Software is delivered to Customer for (i) Customer's installation and use on its own equipment or (ii) pre-installed by Provider on an Appliance ("**On-Premises Software**"), the License shall be perpetual (unless otherwise stated on the Order) and shall also include the right to (i) make a reasonable number of additional copies of the On-Premises Software to be used solely for non-productive archival or passive disaster recovery purposes, provided such copies are kept in a secure location and are not used for production purposes unless the associated primary copy of the On-Premises Software is no longer being used for production purposes, and (ii) make and use copies of the Documentation as reasonably necessary to support Customer's authorized users in their Use of the On-Premises Software. Each License for On-Premises Software shall only be installed by Customer in the country in which the On-Premises Software is initially delivered to Customer.

(c) **Software as a Service.** If an Order provides Customer with a right to access and use Software installed on equipment operated by Provider or its suppliers ("**SaaS Software**"), (i) the License for such SaaS Software shall be granted for the duration of the term stated in the Order (the "**SaaS Term**"), as such SaaS Term may be extended by automatic or agreed upon renewals, and (ii) the terms set forth in the Software as a Service Addendum available at <https://www.quest.com/legal/saas-addendum.aspx> (the "**SaaS Addendum**") which are incorporated herein and made part of this Agreement. If any item of Software to be installed on Customer's equipment is provided in connection with SaaS Software, the License duration for such Software shall be for the corresponding SaaS Term, and Customer shall promptly install any updates to such Software as may be provided by Provider.

(d) **MSP License.** If an Order indicates that Software is to be used by Customer as a managed service provider, Customer shall be granted a License to use such Software and the associated Documentation to provide Management Services (an "**MSP License**"). "**Management Services**" include, without limitation, application, operating system, and database implementation, performance tuning, and maintenance services provided by Customer to its customers (each, a "**Client**"). If an Order indicates that an MSP License will be used to support a specific Client, Customer may not Use the MSP License to support any Client other than the Client named on the Order.

Customer shall ensure that (i) each Client only uses the Software and Documentation as part of the Management Services provided to it by Customer, (ii) such use is subject to the restrictions and limitations contained in this Agreement, including, but not limited to those in the *Export* Section of this Agreement, and the applicable Order, and (iii) each Client cooperates with Provider during any compliance review that may be conducted by Provider or its designated agent. At the conclusion of any Management Services engagement with a Client, Customer shall promptly remove any Software installed on its Client's computer equipment or require the Client to do the same. Customer agrees that it shall be liable to Provider for the acts and omissions of its Clients in connection with their use of the Software and Documentation and shall, at its expense, indemnify and defend Provider against any action, suit, or claim brought against Provider by a Client in connection with or related to Customer's Management Services and pay any final judgments or settlements as well as Provider's expenses in connection with such action, suit, or claim.

For MSP Licenses, (i) Customer shall be solely responsible for supporting its Client, including but not limited to, conducting all activities required to install the Software and for providing any training to its Client and any system integrators regarding the installation, use and operation of the Software; (ii) Customer will provide Management Services to its Client in a manner that does not degrade the goodwill and reputation of Provider or the Software and will not undertake any action that would impair or disrupt Provider's relationship with its customers or potential customers; and (iii) Customer will make no representations or warranties related to the Software in excess of Provider's representations or warranties contained in this Agreement. In the event Customer acquires a perpetual MSP License, Customer may assign the Software to its Client for the Clients' internal use, provided that Customer obtains Provider's prior written consent for the assignment and the Client agrees to be bound by Provider's then current license agreement. Customer understands and agrees that Customer shall have no right to charge a fee to its Client for such an assignment and that following such an assignment, Customer shall have no further rights to use the assigned Software and the applicable License shall terminate in accordance with the terms of this Agreement. Any attempted transfer or assignment of the Software to a Client in violation of the foregoing shall be null and void.

(e) **Evaluation License.** If an Order indicates that Software is to be used by Customer for evaluation purposes, or if Software is otherwise obtained from Provider for evaluation purposes, Customer shall be granted a License to Use such Software and the associated Documentation solely for Customer's own non-production, internal evaluation purposes (an "**Evaluation License**"). Each Evaluation License shall be granted for an evaluation period of up to thirty (30) days from the date of delivery of the On-Premises Software or from the date that access is granted to the SaaS Software, plus any extensions granted by Provider in writing (the "**Evaluation Period**"). There is no fee for an Evaluation License during the Evaluation Period, however, Customer is responsible for any applicable shipping charges or taxes which may be incurred, and any fees which may be associated with Use beyond the scope permitted herein. Customer will only be granted one Evaluation License per release of any item of Software. Notwithstanding anything otherwise set forth in this Agreement, Customer understands and agrees that Evaluation Licenses are provided "AS IS" and that Provider does not provide warranties or Maintenance Services for Evaluation Licenses.

(f) **Freeware License.** If Customer downloads a freeware version of Software from a Provider website, the terms of Use of such Software shall be governed by the applicable Freeware definition set forth in the Product Guide (a "**Freeware License**"). Notwithstanding anything otherwise set forth in this Agreement, Customer understands and agrees that Freeware Licenses are (i) provided "AS IS", (ii) Provider does not provide warranties or Maintenance Services for Freeware Licenses, and (iii) Freeware Licenses are for internal use only and may not be distributed to any third party.

(g) **Use by Third Parties.** Customer may allow its services vendors, outsourcing providers, and contractors (each, a "**Third Party User**") to Use the Software and Documentation provided to Customer hereunder solely for purposes of providing services to Customer, provided that Customer ensures that (i) the Third Party User's access to or use of the Software and Documentation is subject to the restrictions and limitations contained in this Agreement, including, but not limited to those in the *Export* Section, and the applicable Order(s), (ii) the Third Party User cooperates with Provider during any compliance review that may be conducted by Provider or its designated agent, and (iii) the Third Party User promptly removes any Software installed on its computer equipment upon the completion of the Third Party's need to access or use the Software as permitted by this Section. Customer agrees that the acts and omissions of its Third Party Users related to this Agreement, the Software, and Orders shall be deemed the acts and omissions of Customer.

(h) **Third Party Licenses.** Some Products incorporate third party components which are subject to the terms of the third party licenses and whose licenses require Provider to publish copies of the licensing language and/or copyright notices. Copies of such third party licenses are available at <https://www.quest.com/legal/third-party-licenses.aspx>.

3. Restrictions. Customer may not, nor allow any third party to reverse engineer, decompile, disassemble, or attempt to discover or modify in any way the underlying source code of the Software, or any part thereof unless and to the extent (a) such restrictions are prohibited by applicable law and (b) Customer has requested interoperability information in writing from Provider and Provider has not provided such information in a timely manner. In addition, Customer may not, nor allow any third party to (i) modify, translate, localize, adapt, rent, lease, loan, create or prepare derivative works of, or create a patent based on the Products, Documentation or any part thereof, (ii) resell, sublicense or distribute the Products or Documentation, (iii) provide, make available to, or permit use of the Products, in whole or in part, (except as expressly set forth herein), (iv) use the Products or Documentation to create or enhance a competitive offering or for any other purpose which is competitive to Provider, (v) remove Software that was delivered on an Appliance from the Appliance on which it was delivered and load such Software onto a different appliance without Provider's prior written consent. Furthermore, Customer will not, nor allow any third party to distribute or publish the licensing files designed to enable an authorized user to run the Software provided by Provider or use any other means of circumventing copy protection, to install, operate, or access the Software. Customer understands and agrees that the Products may work in conjunction with third party products and Customer agrees to be responsible for ensuring that it is properly licensed to use such third-party products. Notwithstanding anything otherwise set forth in this Agreement, the terms and restrictions set forth herein shall not prevent or restrict Customer from exercising additional or different rights to any open source software that may be contained in or provided with the Products in accordance with the applicable open source software licenses which shall be either included with the Products or made available to Customer upon request.

4. Proprietary Rights. Customer understands and agrees that (i) the Products are protected by copyright and other intellectual property laws and treaties, (ii) Provider, its Affiliates and/or its licensors own the copyright, and other intellectual property rights in the Products, (iii) the Software is licensed, and not sold, (iv) this Agreement does not grant Customer any rights to use Provider's trademarks or service marks, and (v) Provider reserves any and all rights, implied or otherwise, which are not expressly granted to Customer in this Agreement.

5. Title, Risk of Loss and Delivery. Provider, its Affiliates and/or its licensors own the title to all Software. Title and risk of loss to an Appliance shall pass from Provider to Customer upon shipment (unless the Appliance is rented, leased or loaned to Customer). Delivery of Products shall be by electronic download or FOB Shipping Point.

6. Payment and Taxes. Customer agrees to pay to Provider (or, if applicable, the Partner) the fees specified in each Order, including any applicable shipping fees. Customer will be invoiced promptly following delivery of the Products or prior to the commencement of any Renewal Maintenance Period and Customer shall make all payments due to Provider in full within thirty (30) days from the date of each invoice or such other period (if any) stated in a Signed Order. Provider reserves the right to charge Customer a late penalty of 1.5% per month (or the maximum rate permitted by law, whichever is the lesser) for any amounts payable to Provider by Customer that are not subject to a good faith dispute and that remain unpaid after the due date until such amount is paid. The fees stated in an Order may not include taxes. If Provider is required to pay sales, use, property, value-added, other taxes based on the purchase or use of Products, or Maintenance Services provided under this Agreement, then such taxes shall be billed to and paid by Customer. This Section does not apply to taxes based on Provider's income.

7. Termination.

(a) **Termination.** This Agreement or the Licenses granted hereunder may be terminated (i) by mutual written agreement of Provider and Customer or (ii) by either party for a breach of this Agreement by the other party that the breaching party fails to cure to the non-breaching party's reasonable satisfaction within thirty (30) days following its receipt of notice of the breach.

(b) **End of Term Duties.** Upon termination of this Agreement or expiration or termination of a License for any reason, all rights granted to Customer for the applicable Software shall immediately cease and Customer shall immediately: (i) cease using the applicable Software and Documentation, (ii) remove all copies, installations, and instances of the applicable Software from all Customer computers and any other devices on which the Software was installed, and ensure that all applicable Third Party Users and Clients do the same, (iii) return the applicable Software to Provider together with all Documentation and other materials associated with the Software and all copies of any of the foregoing, or destroy such items, (iv) cease using the Maintenance Services associated with the applicable Software, (v) pay Provider or the applicable Partner all amounts due and payable up to the date of termination and shall not be entitled to any refund, and (vi) give Provider a written certification, within ten (10) days, that Customer, Third Party Users, and Clients, as applicable, have complied with all of the foregoing obligations.

(c) **Survival.** Any provision of this Agreement that requires or contemplates continued performance after (i) termination of this Agreement, (ii) a termination or expiration of a License, or (iii) the expiration of a SaaS Term, is enforceable against the other party and their respective successors and assignees notwithstanding such termination or expiration, including, without limitation, the *Restrictions, Export, Payment, Taxes, Termination, Warranty Disclaimer, Infringement Indemnity, Limitation of Liability, Confidential Information, Compliance Verification, and General Sections* of this Agreement. Termination of this Agreement or a License shall be without prejudice to any other remedies that the terminating party may have under law, subject to the limitations and exclusions set forth in this Agreement.

8. Export. Customer acknowledges that the Products and Maintenance Services are subject to the export control laws, rules, regulations, restrictions and national security controls of the United States, Europe, and other applicable countries and regions (the "**Export Controls**") and agrees to abide by the Export Controls. Customer hereby agrees to use the Products and Maintenance Services in accordance with the Export Controls, and shall not export, re-export, sell, lease or otherwise transfer the Products or any copy, portion or direct product of the foregoing in violation of the Export Controls. Customer is solely responsible for obtaining all necessary licenses or authorizations relating to the export, re-export, sale, lease or transfer of the Products and for ensuring compliance with the requirements of such licenses or authorizations.

9. Maintenance Services. If ordered, Maintenance Services are provided in accordance with Provider's then current Support Guide available on Provider's Support Site at <https://support.quest.com/essentials/support-guide> which describes the Maintenance Services, including support offering levels, severity levels, response times, and contact information. The time period during which Customer is entitled to receive Maintenance Services is the "**Maintenance Period**." The Support Guide is incorporated in this Agreement and subject to change at Provider's discretion; however, Provider will not materially reduce the level of technical support services provided during a paid support period. As part of the Maintenance Services Provider will (i) make available new releases and corrections of the Software when Provider makes them generally available to its supported customers at no additional license fee, and (ii) provide technical support for issues that are demonstrable in the currently supported release(s) of the Software.

Maintenance Services fees are due and payable annually in advance of a support period. Except for non-perpetual Licenses (for which the Maintenance Period is equal to the duration of the License) and unless otherwise stated in the Order, each License includes an initial Maintenance Period beginning on the date of the initial delivery of the Software following an Order and lasting for twelve (12) months thereafter. The Maintenance Period for perpetual Licenses will automatically renew for additional terms of 12 months, at the prices stated on a Maintenance Services renewal Quotation provided by Provider, unless the renewal has been cancelled by either party with at least sixty (60) days prior written notice (email is sufficient). Maintenance Services must be ordered for all copies of each licensed Product and may not be purchased for a subset of licenses of a Product only. The procedure and fees for reinstating Maintenance Services for Software after it has lapsed is posted on the Support Site.

10. Warranties and Remedies.

(a) **Software Warranty and Remedies.** Provider warrants that, during the applicable Warranty Period, the operation of the Software, as provided by Provider, will substantially conform to its Documentation (the "**Software Warranty**"). The "**Warranty Period**" for On-Premises Software shall be ninety (90) days following the initial delivery of the Software pursuant to an Order; and for SaaS Software shall be the duration of the SaaS Term. Provided Customer notifies Provider of any breach of the foregoing warranty within the Warranty Period, Provider shall at its option (i) correct or provide a workaround for reproducible errors in the Software that caused the breach within a reasonable time considering the severity of the error and its effect on Customer or (ii) refund the license fees paid for the applicable nonconforming On-Premises Software in exchange for a return of such nonconforming On-Premises Software or provide a credit of the fees allocable to the period during which the SaaS Software was not operating in substantial conformance with the applicable Documentation. These are Customer's sole and exclusive remedies and Provider's sole obligation for any such breach of the Software Warranty.

(b) **Appliance Warranties.** Appliances are warranted in accordance with the warranty document delivered with the Appliance and/or included on the hardware manufacturers' website.

(c) **Warranty Exclusions.** The warranties set forth in this Section shall not apply to any non-conformance (i) that Provider cannot recreate after exercising commercially reasonable efforts to attempt to do so; (ii) caused by misuse of the applicable Product or by using the Product in a manner that is inconsistent with this Agreement or the Documentation; or (iii) arising from the modification of the Product by anyone other than Provider.

(d) **Warranty Disclaimer.** THE EXPRESS WARRANTIES AND REMEDIES SET FORTH IN THIS SECTION OR IN A SIGNED ORDER OR GOVERNING QUOTATION ARE THE ONLY WARRANTIES AND REMEDIES PROVIDED BY PROVIDER HEREUNDER. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, ALL OTHER WARRANTIES OR REMEDIES ARE EXCLUDED, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, INTEROPERABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, NON-INFRINGEMENT, SATISFACTORY QUALITY, AND ANY WARRANTIES ARISING FROM USAGE OF TRADE OR COURSE OF DEALING OR PERFORMANCE. PROVIDER DOES NOT WARRANT UNINTERRUPTED OR ERROR-FREE OPERATION OF THE PRODUCTS.

(e) **High-Risk Disclaimer.** THE PRODUCTS ARE NOT FAULT-TOLERANT AND ARE NOT DESIGNED OR INTENDED FOR USE AND MAY NOT BE USED IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE PERFORMANCE, SUCH AS IN THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, WEAPONS SYSTEMS, LIFE-SUPPORT MACHINES, OR ANY OTHER POTENTIALLY LIFE CRITICAL USES (COLLECTIVELY, "**HIGH-RISK ACTIVITIES**"). PROVIDER SHALL NOT BE LIABLE FOR ANY CLAIMS BY CUSTOMER IN RESPECT OF OR WHICH RELATE DIRECTLY OR INDIRECTLY TO HIGH-RISK ACTIVITIES.

11. Infringement Indemnity.

(a) Provider shall indemnify Customer from and against any claim, suit, action, or proceeding brought against Customer by a third party to the extent it is based on an allegation that the Software directly infringes any patent, copyright, trademark, or other proprietary right enforceable in the country in which Provider has authorized Customer to use the Software, including the country to which the Software is delivered to Customer, or misappropriates a trade secret in such country (a "**Claim**"). Indemnification for a Claim shall exclusively consist of the following: Provider shall (1) defend or settle the Claim at its own expense, (2) pay any judgments finally awarded against Customer under a Claim or any amounts assessed against Customer in any settlements of a Claim, and (3) reimburse Customer for the reasonable administrative costs or expenses, including without limitation reasonable attorneys' fees, it necessarily incurs in responding to the Claim. Provider's obligations under this *Infringement Indemnity* Section are conditioned upon Customer (i) giving prompt written notice of the Claim to Provider, (ii) permitting Provider to retain sole control of the investigation, defense or settlement of the Claim as long as such settlement shall not include a financial obligation on or admission of liability by Customer, and (iii) providing Provider with cooperation and assistance as Provider may reasonably request in connection with the Claim.

(b) Provider shall have no obligation hereunder to indemnify Customer as described under section (a) above against any Claim resulting from (1) Use of the Software other than as authorized by this Agreement, a Signed Order, or a Governing Quotation, (2) a modification of the Software other than by Provider, (3) Customer's Use of any release of the Software after Provider has provided a non-infringing update at no charge, or (4) Use of the Software in conjunction with other products, services, or data not supplied by Provider if the infringement would not have occurred but for such use.

(c) If, as a result of a Claim or an injunction, Customer must stop using any Software ("**Infringing Software**"), Provider shall at its expense and option either (1) obtain for Customer the right to continue using the Infringing Software, (2) replace the Infringing Software with a functionally equivalent non-infringing product, (3) modify the Infringing Software so that it is non-infringing, or (4) terminate the License for the Infringing Software and (A) for On-Premises Software, accept the return of the Infringing Software and refund the license fee paid for the Infringing Software, pro-rated over a sixty (60) month period from the date of initial delivery of such Software following an Order, or (B) for SaaS Software, discontinue Customer's right to access and use the Infringing Software and refund the unused pro-rated portion of any license fees pre-paid by Customer for such Software. This Section states Provider's entire liability and its sole and exclusive indemnification obligations with respect to a Claim and Infringing Software.

12. Limitation of Liability.

(a) EXCEPT AS OTHERWISE STATED IN SUBSECTION (C) BELOW IN NO EVENT SHALL CUSTOMER OR ITS AFFILIATES OR PROVIDER, ITS AFFILIATES OR SUPPLIERS BE LIABLE FOR (X) ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE OF ANY KIND OR (Y) LOSS OF REVENUE, LOSS OF ACTUAL OR ANTICIPATED PROFITS, LOSS OF BUSINESS, LOSS OF CONTRACTS, LOSS OF GOODWILL OR REPUTATION, LOSS OF ANTICIPATED SAVINGS, LOSS OF, DAMAGE TO OR CORRUPTION OF DATA, HOWSOEVER ARISING, WHETHER SUCH LOSS OR DAMAGE WAS FORESEEABLE OR IN THE CONTEMPLATION OF THE PARTIES AND WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE.

(b) EXCEPT AS OTHERWISE STATED IN SUBSECTION (C) BELOW, THE MAXIMUM AGGREGATE AND CUMULATIVE LIABILITY OF CUSTOMER AND ITS AFFILIATES AND PROVIDER, ITS AFFILIATES AND SUPPLIERS, FOR DAMAGES UNDER THIS AGREEMENT, WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE, SHALL BE THE FEES PAID AND/OR OWED (AS APPLICABLE) BY CUSTOMER OR ITS AFFILIATES FOR THE PRODUCTS THAT ARE THE SUBJECT OF THE BREACH, EXCEPT FOR MAINTENANCE SERVICES OR A PRODUCT SUBJECT TO RECURRING FEES, FOR WHICH THE MAXIMUM AGGREGATE AND CUMULATIVE LIABILITY SHALL BE THE AMOUNT PAID AND/OR OWED (AS APPLICABLE) FOR SUCH MAINTENANCE SERVICE OR PRODUCT DURING THE TWELVE (12) MONTHS PRECEDING THE BREACH. THE PARTIES AGREE THAT THESE LIMITATIONS OF LIABILITY ARE AGREED ALLOCATIONS OF RISK CONSTITUTING IN PART THE CONSIDERATION FOR PROVIDER PROVIDING PRODUCTS AND SERVICES TO CUSTOMER, AND SUCH LIMITATIONS WILL APPLY NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY AND EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LIABILITIES OR FAILURES.

(c) NOTHING IN THIS AGREEMENT SHALL EXCLUDE OR LIMIT A PARTY'S LIABILITY FOR (A) ANY BREACH OF THE *SOFTWARE LICENSE, RESTRICTIONS, OR EXPORT* SECTIONS OF THIS AGREEMENT, (B) PROVIDER'S OBLIGATIONS UNDER THE INFRINGEMENT INDEMNITY SECTION OF THIS AGREEMENT AND CUSTOMER'S OBLIGATIONS UNDER THE *CONDUCT* SECTION OF THE *SAAS ADDENDUM* (IF APPLICABLE) AND *MSP LICENSE* SECTIONS OF THIS AGREEMENT, (C) A PREVAILING PARTY'S LEGAL FEES PURSUANT TO THE LEGAL FEES SECTION OF THIS AGREEMENT; OR (D) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF APPLICABLE LAW.

13. Confidential Information.

(a) **Definition.** "**Confidential Information**" means information or materials disclosed by one party (the "**Disclosing Party**") to the other party (the "**Receiving Party**") that are not generally available to the public and which, due to their character and nature, a reasonable person under like circumstances would treat as confidential, including, without limitation, financial, marketing, and pricing information, trade secrets, know-how, proprietary tools, knowledge and methodologies, the Software (in source code and/or object code form), information or benchmark test results regarding the functionality and performance of the Software, any Software license keys provided to Customer, and the terms and conditions of this Agreement.

Confidential Information shall not include information or materials that (i) are generally known to the public, other than as a result of an unpermitted disclosure by the Receiving Party after the date that Customer accepts the Agreement (the "**Effective Date**"); (ii) were known to the Receiving Party without an obligation of confidentiality prior to receipt from the Disclosing Party; (iii) the Receiving Party lawfully received from a third party without that third party's breach of agreement or obligation of trust; or (iv) are or were independently developed by the Receiving Party without access to or use of the Disclosing Party's Confidential Information,

(b) **Obligations.** The Receiving Party shall (i) not disclose the Disclosing Party's Confidential Information to any third party, except as permitted in subsection (c) below and (ii) protect the Disclosing Party's Confidential Information from unauthorized use or disclosure by exercising at least the same degree of care it uses to protect its own similar information, but in no event less than a reasonable degree of care. The Receiving Party shall promptly notify the Disclosing Party of any known unauthorized use or disclosure of the Disclosing Party's Confidential Information and will cooperate with the Disclosing Party in any litigation brought by the Disclosing Party against third parties to protect its proprietary rights. For the avoidance of doubt, this Section shall apply to all disclosures of the parties' Confidential Information as of the Effective Date, whether or not specifically arising from a party's performance under this Agreement.

(c) **Permitted Disclosures.** Notwithstanding the foregoing, the Receiving Party may disclose the Disclosing Party's Confidential Information without the Disclosing Party's prior written consent to any of its Affiliates, directors, officers, employees, consultants, contractors or representatives (collectively, the "**Representatives**"), but only to those Representatives that (i) have a "need to know" in order to carry out the purposes of this Agreement or to provide professional advice in connection with this Agreement, (ii) are legally bound to the Receiving Party to protect information such as the Confidential Information under terms at least as restrictive as those provided herein, and (iii) have been informed by the Receiving Party of the confidential nature of the Confidential Information and the requirements regarding restrictions on disclosure and use as set forth in this Section. The Receiving Party shall be liable to the Disclosing Party for the acts or omissions of any Representatives to which it discloses Confidential Information which, if done by the Receiving Party, would be a breach of this Agreement.

Additionally, it shall not be a breach of this Section for the Receiving Party to disclose the Disclosing Party's Confidential Information as may be required by operation of law or legal process, provided that the Receiving Party provides prior notice of such disclosure to the Disclosing Party unless expressly prohibited from doing so by a court, arbitration panel or other legal authority of competent jurisdiction.

14. Data Protection. Each party shall comply with all laws and regulations applicable to the processing of personal data in connection with any transactions related to this Agreement, such as the General Data Protection Regulation (EU) 2016/679 (the "**GDPR**"), including any implementation act(s) related thereto, or any other applicable laws regulations and other legal requirements related to (a) privacy and data security, and (b) the use, collection, retention, storage, security, disclosure, transfer, disposal and other processing of personal data ("**Privacy Laws**"). Each party is responsible for obtaining any necessary authorizations and consents prior to disclosing personal data to the other party or to any third party. The terms "controller", "personal data" and "processing" used in this Section shall have the meaning set out in the applicable Privacy Laws. Either party

may use personal data consisting of ordinary business contact data (e.g., name, phone number, email address, etc.) in its capacity as a controller strictly in accordance with applicable Privacy Laws in the normal course of business but only for the purpose of administration of the party's business relationship and performance of their obligations under this Agreement. Where Customer has purchased SaaS Software and to the extent that Provider processes any personal data on behalf of the Customer through the Customer's use of the SaaS Software, the SaaS Addendum shall apply.

15. Compliance Verification.

(a) **Tracking.** Customer shall maintain and use systems and procedures that allow Customer to accurately and completely track, document, and report Customer's installations, deployment, access of or provision of access to, or operation of each Product in the quantities and versions used and allow Provider to audit the same (the "**Audit**"). Audits may be performed by Provider or its designated agents. Provider shall provide at least ten (10) days prior written notice to Customer before the start of an Audit and will conduct the Audit during normal business hours at Customer's facilities. Customer shall provide, and will require its Clients and Third Party Users to provide, their full cooperation and assistance with such audit and provide access to the applicable records and computers.

(b) **Confidentiality.** Provider agrees that any Customer information gathered during the performance of an audit shall be Customer's Confidential Information under this Agreement. Customer agrees that it will not require any further confidentiality or nondisclosure agreements to be executed by Provider or its designated agents in connection with the Audit. Prior to the Audit, Provider shall ensure that its agents are subject to confidentiality obligations at least as protective as those set forth herein.

(c) **Excess Use.** If an Audit indicates that Customer's installations, deployment, access of or provision of access to, or operation of each Product exceeds the quantity of licenses owned or is otherwise not in compliance with the scope of the license granted ("**Overuse**") then Customer shall pay for all Overuse quantities at Provider's then current list price plus any interest on past due amounts and prior Maintenance Service fees. If the Overuse is more than five percent (5%) of Customer's license entitlements, then Customer shall reimburse Provider for Provider's reasonable cost of performing the Audit. Strict performance by Customer in accordance with this provision is an express condition to all or any licenses granted in this Agreement.

16. General.

(a) **Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of California, without giving effect to any conflict of laws principles that would require the application of laws of a different state. Any action seeking enforcement of this Agreement or any provision hereof shall be brought exclusively in the state or federal courts located in Orange County, California. Each party hereby agrees to submit to the jurisdiction of such courts. The parties agree that neither the United Nations Convention on Contracts for the International Sale of Goods, nor the Uniform Computer Information Transaction Act (UCITA) shall apply to this Agreement, regardless of the states in which the parties do business or are incorporated.

(b) **Assignment.** Except as otherwise set forth herein, Customer shall not, in whole or part, assign or transfer any part of this Agreement, the Licenses granted under this Agreement or any other rights, interest or obligations hereunder, whether voluntarily, by contract, by operation of law or by merger (whether that party is the surviving or disappearing entity), stock or asset sale, consolidation, dissolution, through government action or order, or otherwise without the prior written consent of Provider. Any attempted transfer or assignment by Customer that is not permitted by this Agreement shall be null and void.

(c) **Severability.** If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, such provision will be enforced to the maximum extent permissible by law to affect the intent of the parties and the remaining provisions of this Agreement will remain in full force and effect. Notwithstanding the foregoing, the terms of this Agreement that limit, disclaim, or exclude warranties, remedies or damages are intended by the parties to be independent and remain in effect despite any failure or unenforceability thereof. The parties have relied on the limitations and exclusions set forth in this Agreement in determining whether to enter into it.

(d) **Use by U.S. Government.** The Software is a "commercial item" under FAR 12.201. Consistent with FAR section 12.212 and DFARS section 227.7202, any use, modification, reproduction, release, performance, display, disclosure or distribution of the Software or Documentation by the U.S. government is prohibited except as expressly permitted by the terms of this Agreement. In addition, when Customer is a U.S. government entity, the language in Subsection (a)(ii) of the *Infringement Indemnity* Section of this Agreement and the *Injunctive Relief* Section of this Agreement shall not be applicable.

(e) **Notices.** All notices provided hereunder shall be in writing and addressed to the legal department of the respective party or to such other address as may be specified in an Order or in writing by either of the parties to the other in accordance with this Section. Except as may be expressly permitted herein, notices may be delivered personally, sent to an email address specified by the receiving party, sent via a nationally recognized courier or overnight delivery service, or mailed by first class mail, postage prepaid. All notices, requests, demands or communications shall be deemed effective upon personal delivery or, if sent by mail, four (4) days following deposit in the mail in accordance with this paragraph.

(f) **Disclosure of Customer Status.** Provider may include Customer in its listing of customers and, upon written consent by Customer, announce Customer's selection of Provider in its marketing communications.

(g) **Waiver.** Performance of any obligation required by a party hereunder may be waived only by a written waiver signed by an authorized representative of the other party, which waiver shall be effective only with respect to the specific obligation described therein. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

(h) **Injunctive Relief.** Each party acknowledges and agrees that in the event of a material breach of this Agreement, including a breach of the *Software License*, *Restrictions* or *Confidential Information* Sections of this Agreement, the non-breaching party shall be entitled to seek immediate injunctive relief, without limiting its other rights and remedies.

(i) **Force Majeure.** Each party will be excused from performance for any period during which, and to the extent that, it is prevented from performing any obligation or service as a result of causes beyond its reasonable control, and without its fault or negligence, including without limitation, acts of God, strikes, lockouts, riots, acts of war, epidemics, pandemics, communication line failures, and power failures. For added certainty, this Section shall not operate to change, delete, or modify any of the parties' obligations under this Agreement (e.g., payment), but rather only to excuse a delay in the performance of such obligations.

(j) **Equal Opportunity.** Provider is a federal contractor and Affirmative Action employer (M/F/D/V) as required by the Equal Opportunity clause C.F.R. § 60-741.5(a).

(k) **Headings.** Headings in this Agreement are for convenience only and do not affect the meaning or interpretation of this Agreement. This Agreement will not be construed either in favor of or against one party or the other, but rather in accordance with its fair meaning. When the term "including" is used in this Agreement it will be construed in each case to mean "including, but not limited to."

(l) **Legal Fees.** If any legal action is brought to enforce any rights or obligations under this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, full costs and other collection expenses, in addition to any other relief it may be awarded.

(m) **Entire Agreement.** This Agreement contains the total agreement between the two parties regarding the subject matter covered herein and supersedes any other agreements, written, oral, expressed, or implied, including any confidentiality agreement between the parties. Unless there is a prevailing signed Agreement between the Parties, all Orders are governed solely and exclusively by this Agreement and any additional or varying terms stated on a Signed Order or a Governing Quotation. In the event of a conflict between the terms of this Agreement and the terms contained in an Order, the terms of a Signed Order or Governing Quotation shall control. For all other Orders, in the event of a conflict between the terms of this Agreement and the terms contained in an Order, the terms of this Agreement shall control. Neither this Agreement, nor an Order, may be modified or amended except by a writing executed by a duly authorized representative of each party. No other act, document, usage or custom shall be deemed to amend or modify this Agreement or an Order and Customer agrees that all additional or inconsistent terms that may be contained in any purchase order or other documentation submitted by Customer in connection with an Order are not applicable. Customer agrees that all of Customer's licenses for such Product, regardless of license date, will be governed by the version of the Software Transaction Agreement and applicable Product Terms in effect on the date of the most recent license purchase.