

Smarsh Service Agreement

Version Date: March 31, 2017

BY CLICKING A BOX INDICATING ACCEPTANCE OF THIS AGREEMENT OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU (“**CLIENT**”) AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ACCEPT THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY TO THIS AGREEMENT.

IF CLIENT EXECUTED A SUBSCRIPTION FORM OR AN ORDER FORM (OR ENTERED INTO ANY OTHER ORDERING DOCUMENT IN ELECTRONIC OR HARD COPY FORM) FOR SMARSH SERVICES, CLIENT AGREES THAT BY ACCEPTING THE TERMS OF THIS AGREEMENT (WHETHER BY CLICK THROUGH OR BY ORDER FORM REFERENCING THIS AGREEMENT), THIS AGREEMENT AMENDS AND REPLACES ANY AND ALL PRIOR TERMS AND CONDITIONS ASSOCIATED WITH SUCH ORDER FORM(S) (AND THIS AGREEMENT SHALL CONSTITUTE A WRITTEN AMENDMENT THERETO) AND SUCH TERMS AND CONDITIONS ARE OF NO FORCE OR EFFECT; *PROVIDED THAT* THE “**EFFECTIVE DATE**” OF CLIENT’S AGREEMENT WITH SMARSH IS THE DATE ON WHICH CLIENT FIRST EXECUTED ANY ORDER FORM FOR SERVICES, AND THE TERM OF CLIENT’S AGREEMENT FOR ALL SERVICES WILL SYNC TO AND CONTINUE TO RENEW ON THE ANNIVERSARY OF THE EFFECTIVE DATE ACCORDING TO THE RENEWAL TERMS OF THIS AGREEMENT.

This Smarsh Service Agreement (the “**Agreement**”) constitutes a binding agreement between Smarsh Inc. (“**Smarsh**”) and the Client identified in an order document (an order document includes electronic ordering mechanisms) referencing this Agreement (“**Order Form**”) or the Client who accepts the terms of this Agreement via click-through acceptance (“**Client**”). Client agrees that the terms of this Agreement will govern Client’s use of the Services (as defined in Section 1). If any term in an Order Form conflicts with the terms of this Agreement, the Order Form will supersede this Agreement solely with respect to the conflicting term.

1. **Services.** The Services may consist of software as a service offerings, including configurations thereof and feature add-ons (“**SaaS Services**”), email hosting services (“**Email Hosting Services**”), on premise software (“**On-Premise Service**”), professional services related to any of the foregoing services (“**Professional Services**”), or Services resold or licensed through third party terms and conditions, each as specified in an Order Form executed or accepted by Client and as further described at www.smarsh.com/legal under Service Descriptions (“**Service Descriptions**”). All services listed in the Order Form are the “**Services**.” Certain Professional Services will only be provided pursuant to a statement of work executed by Client. Following execution of the Order Form, Smarsh will activate or otherwise make available the applicable Service by providing Client with access to an account within such Service (“**Activation Date**”). As used in this Agreement, the term “**Client Data**” means (a) the data that the SaaS Service receives from Client’s third-party communication providers or other third party content providers; or (b) the data that is generated, transmitted, and stored by the Email Hosting Services (“**Client Data**”). Client hereby grants Smarsh the limited, non-exclusive right to access, copy, transmit, download, display, and reproduce Client Data as necessary to provide, support, and improve the Services, as directed by Client, or as otherwise authorized hereunder. Data generated by the SaaS Services regarding Client’s use of the SaaS Services is not Client Data.

1.1. **SaaS Services.** The SaaS Services may include the following, as specified on Client’s Order Form:

- 1.1.1. **The Archiving Platform.** The Smarsh Archiving Platform is a SaaS Service that receives Client Data. To enable the Smarsh Archiving Platform to receive Client Data, Client must purchase Units for each [Content Type](#) (as defined in the Service Descriptions) to be received and stored by the Smarsh Archiving Platform. A “**Unit**” with respect to the Smarsh Archiving Platform means one of the following, as applicable to the specific Content Type: (a) a user account such as an email mailbox; (b) an instant message account or screen name; (c) a social media page or profile; (d) a mobile device phone number; or (e) any other usage metric specified in an Order Form.
- 1.1.2. **MobileGuard Archiving.** The MobileGuard platform is a SaaS Service that receives Client Data. To enable the MobileGuard platform to receive Client Data, Client must purchase Units for each device to be archived. A “**Unit**” with respect to the MobileGuard Service means a mobile device phone number.
- 1.1.3. **Website Archiving.** Smarsh Website Archiving is a SaaS Service that crawls and captures Client-designated websites. To enable Website Archiving, Client must purchase Units and pay a domain fee. A “**Unit**” with respect to the Website Archiving SaaS Service means a (a) webpage; or (b) a video.
- 1.1.4. **Third Party Providers.** The SaaS Services receive Client Data from third-party sources, and as such are dependent on third party services, software, applications, platforms (such as third party social media, business networking platforms systems, telecommunications carriers, or other messaging or communication services or API’s) (“**Third Party Services**”). Third Party Services are not offered, controlled or provided by Smarsh. The Third-Party Service may make changes to its service, or components thereof, or discontinue a service without notice to Smarsh. In addition, the availability of the Third-Party Service may depend on Client’s compliance with the Third-Party Service terms. The Third-Party Service will have access to Client’s data and will provide Client Data to Smarsh. Smarsh does not control and is not responsible or liable for how the Third-Party Service transmits, accesses, processes, stores, uses or provides data to Smarsh. Smarsh expressly disclaims all liability related to or arising from Third-Party Services, including Client’s use thereof, any updates, modifications, outages, delivery failures, corruption of data, loss of data, discontinuance of services or termination of Client’s account by the Third-Party Service. Client is solely responsible for ensuring Client complies with any Third-Party Services terms and conditions. To integrate the SaaS Services with certain Third Party Services, Client may be required to provide Client’s or Client’s end user access credentials for the Third-Party Service. In such cases, to provide the Service, Smarsh’s access must be approved (a) by Client for all end users or content; or (b) by each individual end user. With respect to third party text message providers, additional carrier specific terms and conditions may apply. The Additional Text Service Terms are available at www.smarsh.com/legal. Such additional terms are subject to modification by the applicable third party or carrier and such modifications shall be incorporated into this Agreement upon notice to Client.

- 1.2. **CellTrust SL2.** The CellTrust SL2 product (“**SL2**”) is resold by Smarsh and licensed by CellTrust Corporation to Client pursuant to the applicable CellTrust license agreement, available here: SL2 App Agreement, the SL2 Server Agreement and the SL2 App for Apple Agreement each available at www.smarsh.com/legal (“**SL2 Terms**”). To use SL2, Client and end users must download SL2 and accept the applicable SL2 Terms. Smarsh will provide Client with a license key to enable such download. A “Unit” with respect to SL2 means a license key. The provision of the license key is Smarsh’s sole obligation with respect to the SL2 product. The SL2 product is delivered by CellTrust and all data or information generated by the SL2 product is received, processed and stored by CellTrust and transmitted by CellTrust to the SaaS Service (if Client purchases the Archiving Platform SaaS Service). The SL2 Terms and privacy policies apply to data generated, hosted, processed and stored by the SL2 product and this Agreement does not apply to such data. In the event of CellTrust’s breach of the SL2 Terms, Client’s remedies are those remedies set forth in the SL2 Terms and are as between Client and CellTrust. Technical support for SL2 is provided by CellTrust. The CellTrust service level agreement located at www.smarsh.com/legal and applies to SL2; provided that, Client must request credits for any unavailability of SL2 directly from Smarsh.
- 1.3. **Email Encryption.** Email Encryption is a Service that encrypts a Client designated email mailbox’s outgoing email. A “Unit” with respect to Email Encryption is an email mailbox.
- 1.4. **Email Hosting Services.** The Email Hosting Service is provided through a Smarsh third party provider. In addition to the terms of this Agreement, the Microsoft Email Hosting Services are subject to Microsoft Software Use Terms located at www.smarsh.com/legal. A “Unit” with respect to Email Hosting Service is an email mailbox.
- 1.5. **On-Premise Service.** The On-Premise Service is downloadable software; Client must install Software on Client servers to archive Client Data. Section 1.8 does not apply to On-Premise Services. A “Unit” with respect to the On-Premise Services is a mobile device phone number.
- 1.6. **Software Terms.** Certain SaaS Services, the Email Hosting Services or the On-Premise Service may require Client to install software. Such software may be sublicensed to Client by Smarsh (“**Software**”) or Client may be required to license the software directly from a third party. Smarsh (including its licensors) retains all rights in and to the Software not expressly granted to Client in this Section. If Software is provided to Client by Smarsh, upon delivery of the Software Smarsh grants Client the limited, non-exclusive, non-sublicensable right to download, execute and install the applicable Software onto Client’s end user’s computer, laptop or mobile device (as applicable), for which Client has purchased a Unit, or on Client owned or controlled servers, plus one copy for backup or archival purposes. Client will not alter, disable or work around any usage control mechanism within the Software or rent, lease, sell, sublicense, distribute, reproduce, create derivatives of, edit, disassemble or reverse engineer the Software, or remove any proprietary notice from the Software. Client will not use the Software to provide services to third parties. Client is responsible for the supervision, management and control of the use of the Software, and for the provision and proper maintenance of the hardware and any supporting software (such as operating-system updates and virus-protection software). The Software may contain automated tracking features. Client will not hinder, impede, alter or prevent the automated tracking features. Smarsh will deliver the Software to Client in a good and workmanlike manner and per generally accepted industry standards (“**Software Performance Warranty**”). The foregoing warranty will expire 30 days following Smarsh’s delivery of the Software. In the event of a breach of the Software Performance Warranty, Smarsh will repair the Software such that it meets the foregoing Software Performance Warranty or provide Client with a replacement. The foregoing represents Client’s sole and exclusive remedy for any damage, loss or claim arising out of the Software. Smarsh makes no other representation or warranty with respect to the Software. The Software is provided “AS IS.” Smarsh expressly disclaims liability for (a) changes or modifications made to the Software by anyone other than Smarsh; or (b) any changes, modifications, combinations with other software applications or equipment, conditions or issues on or arising from Client’s systems, servers, networks, or the Internet which affects the use or operation of the Software. The warranty contained in this Section, and the obligation to provide support, do not apply to any software which is not provided by Smarsh or which is licensed to Client directly from the applicable software provider. Where Client licenses software directly from the licensor of such software, Client must contact the licensor support for any issues related to the software. Additional Software terms and conditions (“**Software Terms**”) may apply to the Software purchased by Client, which are available under the Software Terms located at <http://www.smarsh.com/legal/>.
- 1.7. **Support and Service Level Agreements.** Smarsh will provide the level of support applicable to the Services package purchased by Client. Service Level Agreements for each Service are available at www.smarsh.com/legal and are subject to modification by Smarsh. Client may find support FAQ’s and other support resources, or initiate support requests by submitting support tickets here: <http://www.smarsh.com/support/>. Changes in Smarsh’s support policies will be made available in the applicable Support and Service Level Agreement policies at www.smarsh.com/legal and will be effective on the date the policy is posted.
- 1.8. **Data Retention.** With respect to the SaaS Services, Smarsh will retain Client Data for the Term of the Agreement, unless Client requests or implements specific retention policies within the SaaS Services. Retention policies are based on variables assigned to Client Data as directed by Client or implemented by Client. Client is solely responsible for compliance with all applicable legal, regulatory or internal requirements with respect to such retention policies. Following termination or expiration of this Agreement, Smarsh will retain Client Data associated with the SaaS Services for a minimum of six (6) months. Thereafter, Smarsh reserves the right, in its sole discretion, to delete Client Data. With respect to the Email Hosting Services, the retention of Email Hosting Service Client Data during the Term is subject to space limitations applicable to the Email Hosting Service plan purchased by Client. Email Hosting Service Client Data will be retained for a period of 30 days following the termination or expiration of the earlier of the Email Hosting Service termination or the termination or expiration of the Agreement. With respect to SL2, the SL2 Terms apply to data retained by CellTrust Corporation.
- 1.9. **Trial Services.** If a trial period is indicated on the Order Form, Smarsh will provide Client with a temporary account to one or more of the Services free of charge (a “**Trial Account**”). The Trial Account will be accessible for the trial period set forth in the Order Form, or if no trial period is stated, the trial period will be thirty (30) days from the Activation Date. During the trial period, the Trial Account and associated Services are provided “AS IS” and without representation or warranty of any kind. Smarsh is under no obligation to store or retain Client Data during the trial period and may delete such data

unless Client purchases the same Services as the Trial Account services. Smarsh will not be responsible for any direct, indirect, consequential or any other damages, loss or claims resulting from Client's access to, or use of the Trial Account or the Trial Account Services during the trial period.

2. Client Obligations and Responsibilities.

- 2.1. **Account.** Client is responsible for (a) ensuring that Client's account registration information is complete and accurate; and (b) the security and confidentiality of Client's account credentials. Client will notify Smarsh immediately of any unauthorized use of any password or account or any other known or suspected breach of security. Client will not permit Smarsh competitors to access the Services for any reason. Client is solely responsible for all activity which occurs within Client's account and for the actions of its employees, contractors or agents, whether such person is or was acting within the scope of their employment, engagement or agency relationship. Client is responsible for configuring applicable third-party platforms or systems to transmit Client Data to the SaaS Services; and (c) installing and configuring any Software or On Premise Service (if applicable) to Client servers, equipment, laptops or handheld devices. Client is responsible for providing Smarsh with any historical data to be archived by the SaaS Services in a format acceptable to Smarsh.
- 2.2. **Representatives.** Client may provide Representatives with access to the Services, may purchase Services on behalf of Representatives, or where Client is required to review Representative communications, Client may use the Services to meet such requirement. A "**Representative**" means any entity which (a) Client controls or which is under common control with Client; or (b) Client has a regulatory requirement to archive or review communications data on behalf of. Subject to the terms of this Agreement, Client may provide access to, or use of, the Services to Representatives; provided that, Client is responsible and liable for the acts or omissions of Representative acts. Representatives use of the Services is subject to the terms of this Agreement.
- 2.3. **Users.** Client may designate different user roles with different support or Service access. An "**Authorized User**" is the administrative user(s) with the highest level of access and is responsible for managing the Services for Client. Only Authorized Users may appoint other Authorized Users, request or agree to changes to the Services, add or remove users, make billing inquiries, contact support or take other, similar actions. A "**Reviewer**" role is a user for which Client has purchased access rights to the supervision feature of the SaaS Service which enable the Reviewer to perform supervision tasks related to Client Data. A "**User**" is any individual who accesses the SaaS Services or the Email Hosting Services in any capacity. Reviewers and Authorized Users are also "Users." Users may not share account log in credentials.
- 2.4. **Acceptable Use of Services.** Client will comply with Smarsh's Acceptable Use Policy available at www.smarsh.com/legal. The Acceptable Use Policy may be updated from time to time by Smarsh. Client is prohibited from, and will not copy, modify, adapt, transmit, sell, distribute or otherwise use the Services, in whole or in part, except as expressly permitted in this Agreement. Client is solely responsible for Client Data and represents and warrants that Client Data will not (a) infringe any third party right, including, without limitation, third party rights in patent, trademark, copyright, or trade secret; or (b) constitute a breach of any other right of a third party, including without limitation, any right under contract or tort theories. Client will abide by all applicable local, state, national or foreign laws, rules, regulations or treaties in connection with Client's use of the Services including, without limitation, those related to data privacy, communications, SPAM, or the transmission or storage of technical or personal data. It is Client's responsibility to post all legally required privacy policies, or notices and to obtain all legally required or necessary consents with respect to the transmission, collection or storage of Client Data. Client represents that, with respect to any account, website or webpage Client directs Smarsh to archive, Client has all necessary rights or licenses to archive such account, website or webpage and that the archiving of the same does not place Client or Smarsh in violation of any website terms and conditions included on the website.
- 2.5. **Text Message Carrier Requirements.** If Client purchases text message archiving as a SaaS Service, this Section applies. Client is only permitted to archive text messages for Client's current employees. Client is not permitted to actively archive text messages for any individual who is not a Client employee. Client agrees to (a) notify Smarsh immediately when any employee's employment is terminated; and (b) provide each employee with clear and conspicuous notice of policies regarding the receipt, transmission, storage and use of employee text messages. Client is responsible for ensuring that each employee has agreed to such policies and that each employee has been made aware that such employee has no reasonable expectation of privacy in such employee's text messages. Each telecommunications carrier may have a different implementation process. The implementation process is dependent on actions to be completed by Client and the applicable telecommunications carrier. Smarsh is not responsible for delays in implementation caused by a telecommunication carrier, Client or Client employees. To archive text messages generated by a Verizon mobile account, each employee will be required to accept a request to archive sent by Verizon directly to the employee device. If the employee device does not accept or respond to such request, Verizon will not release the employee text messages to Smarsh.
- 2.6. **Client Data Transmission.** It is Client's sole responsibility to monitor Client Data to be transmitted to the SaaS Service to ensure that Client Data is properly transmitted. Client will notify Smarsh of any delivery failures or outages of its systems which may affect the transmission of Client Data. It is Client's responsibility to encrypt data sent to Smarsh and Smarsh is not responsible or liable for any data which Client transmits to Smarsh in an unencrypted format. Smarsh is not responsible or liable for any update, upgrade, patch, maintenance or other change which affects the transmission of Client Data to the SaaS Service. It is Client's responsibility to ensure that Smarsh is notified of all Users to be archived.
- 2.7. **Client Indemnification.** Client will indemnify, defend and hold harmless Smarsh, its officers, directors, employees and agents, from and against all claims, losses, damages, liabilities and expenses (including reasonable attorneys' fees), arising from Client's breach of any of Client's obligations under this Section 2. Client's obligation for indemnification will be predicated upon (a) Smarsh providing Client with prompt written notice upon becoming aware of any such claim, provided that Client will not be relieved of its obligation for indemnification as the result of Smarsh's failure to provide such notice unless Client is actually prejudiced in defending such a claim as a result of Smarsh's failure to provide notice; (b) if requested by Client, and at Client's expense, Smarsh reasonably cooperating with the defense of such claim; and (c) Smarsh allowing Client sole and exclusive control over the defense and settlement of any such claim.

3. Fees.

- 3.1. **Payment of Fees.** Client will pay Smarsh the fees set forth in the Order Form ("**Fees**"). One-Time Fees are the setup or data import fees, or other one-time fees that do not recur over ongoing and regular intervals during the Term ("**One-Time Fees**"). Platform Fees are the Fees charged for access to the Smarsh Archiving Platform ("**Platform Fees**"). Content Usage Fees are the Fees that are charged on a per-Unit basis ("**Content Usage Fees**"). Added Functionality Fees are those Fees charged for feature add-ons ("**Added Functionality Fees**"). Professional Services Fees are the fees for hourly, monthly or flat rate professional services ("**Professional Service Fees**"). The Platform Fees, the Content Usage Fees and the Added Functionality Fees are "**Recurring Fees**" and are invoiced on a monthly or annual basis, as specified in the Order Form. Beginning on the Activation Date, Smarsh will invoice Client for the Recurring Fees per the invoice schedule in the Order Form. One-Time Fees are invoiced upon execution of the Order Form. Professional Services will be invoiced per the terms of the Order Form or the applicable statement of work. Fees are due and payable within thirty (30) days from the date of invoice. If Client disputes any Fees, Client must notify Smarsh within 120 days of the date of invoice. Invoices not disputed within 120 days from the date of invoice will be deemed accepted by Client. Smarsh may charge a late fee of 1.5% per month on any Fees not paid when due. Smarsh reserves the right to increase Fees at any time following the Initial Term. Smarsh reserves the right to suspend Client's access to the Services in the event Client fails to pay the Fees when due.
- 3.2. **Minimum Commitment.** Client agrees that the Recurring Fees are Client's minimum purchase commitment during the Initial Term and each Renewal Term. The minimum commitment is the total sum of the Recurring Fees during the Term, as specified on the Order Form. If the number of Units used by Client during a month exceeds the minimum Units specified in the Order Form, Smarsh will invoice, and Client will pay the additional Fees due for such usage at the per-Unit rate specified in the Order Form. If the number of Units used by Client during a month is less than Client's minimum purchase commitment, Smarsh will invoice Client for the minimum purchase commitment.
- 3.3. **Taxes.** All Fees payable by Client under this Agreement are exclusive of taxes and similar assessments. Client is responsible for all sales, service, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state or local governmental or regulatory authority on any amounts payable hereunder, other than any taxes imposed on Smarsh's income.
- 3.4. With respect to Email Hosting Services, if Microsoft Corporation ("**Microsoft**") increases the price that Microsoft charges for the underlying licenses or services Microsoft provides that are applicable to the Email Hosting Services, Smarsh may increase the price for the Email Hosting Services by the full amount of the price increase, regardless of whether the price increase occurs during the Initial Term.

4. Confidentiality.

- 4.1. **Definition of Confidential Information.** "**Confidential Information**" means (a) the non-public information of either party, including but not limited to information relating to either party's product plans, customers, designs, costs, prices, finances, marketing plans, business opportunities, personnel, research, development or know-how; (b) any information designated by either party as "confidential" or "proprietary" or which, under the circumstances taken as a whole, would reasonably be deemed to be confidential; (c) the terms of this Agreement; (d) Client Data; or (e) information related to, and including, the Software or On Premise Software. "Confidential Information" will not include information that: (i) is in, or enters, the public domain without breach of this Agreement; (ii) the receiving party lawfully receives from a third party without restriction on disclosure and without breach of a nondisclosure obligation; (iii) the receiving party knew prior to receiving such information from the disclosing party; or (iv) the receiving party develops independently without reference to the Confidential Information.
 - 4.2. **Obligations with Respect to Confidential Information.** Each party agrees: (a) that it will not disclose to any third party, or use for its own benefit or the benefit of any third party, any Confidential Information disclosed to it by the other party except as expressly permitted in this Agreement; and (b) that it will use reasonable measures to maintain the confidentiality of Confidential Information of the other party in its possession or control. Either party may disclose Confidential Information of the other party: (i) pursuant to the order or requirement of a court, administrative or regulatory agency, or other governmental body, provided that the receiving party, if feasible and/or legally permitted to do so, gives reasonable notice to the disclosing party to contest such order or requirement; or (ii) to the parties agents, representatives, subcontractors or service providers who have a need to know such information provided that such party maintain the Confidential Information on a confidential basis.
 - 4.3. **Remedies.** Each party acknowledges and agrees that a breach of the obligations of this Section 4 by the other party may result in irreparable injury to the disclosing party for which there will be no adequate remedy at law, and the disclosing party will be entitled to seek equitable relief, including injunction and specific performance, in the event of any breach or threatened breach or intended breach by the recipient of Confidential Information.
5. **Intellectual Property.** As between Smarsh and Client, all server hardware, technology, software (including the Software and On Premise Services) and applications required to operate the Services, other associated technology or documentation or data regarding the use of the Services, are the sole and exclusive property of Smarsh. Except as expressly stated herein, nothing in this Agreement will serve to transfer to Client any intellectual property right in or to the Services, Software, Smarsh trademarks or other intellectual property. Smarsh retains all right, title and interest in and to the Services, Software and the associated technology and documentation. As between Smarsh and Client, Client Data is the sole and exclusive property of Client and, other than the limited license to Client Data granted hereunder, nothing in this Agreement will serve to transfer to Smarsh any intellectual property rights in the Client Data.

6. Term.

- 6.1. **Term.** The Agreement will commence on the Effective Date and will remain in effect for the period specified in the Order Form or, if no period is specified, twelve (12) months ("**Initial Term**"). The Initial Term will renew automatically for additional, successive twelve-month terms (each a "**Renewal Term**"), unless Smarsh or Client provides the other party with written termination notice at least ninety (90) prior to the end of the Initial Term or the applicable

Renewal Term. The Initial Term plus any Renewal Term are, collectively, the “**Term**.” Any Order Form or other purchase of Services effected after the Effective Date will sync to and co-terminate with Client’s then-current Service Term.

- 6.2. **Termination for Breach.** Either party may terminate this Agreement if the other party materially breaches its obligations under this Agreement and such breach remains uncured for a period of thirty (30) days following the non-breaching party’s written notice thereof to the breaching party. Smarsh reserves the right to suspend Client’s access to the Services in the event of any breach of this Agreement and will not be liable for any damages resulting from such suspension.
- 6.3. **Termination for Bankruptcy.** This Agreement will terminate immediately, upon written notice, where (a) either party is declared insolvent or adjudged bankrupt by a court of competent jurisdiction; or (b) a petition for bankruptcy or reorganization or an arrangement with creditors is filed by or against that party and is not dismissed within sixty (60) days.
- 6.4. **Effect of Termination.** Upon any termination or expiration of the Agreement: (a) all rights and licenses to the Services granted to Client by Smarsh will immediately terminate; (b) Client will pay any Fees due and payable up to the date of termination, except in the case of Smarsh’s termination for Client’s breach, and in such case, Client will pay the Fees owing for the remainder of the then-current Term; and (c) upon request, each party will return to the other or delete the Confidential Information of the other party; provided, however, if Client requests Smarsh to return Client Data, Client agrees to pay Smarsh’s then-current data extraction and exportation fees plus any hardware costs.

7. **Warranties; Disclaimers of Warranties.**

- 7.1. **Performance Warranty.** Smarsh represents and warrants that it will provide the Services in accordance with generally accepted industry standards.
- 7.2. **Proper Authority.** Smarsh represents that it has the right and authority to enter into this Agreement and that the performance of its obligations under this Agreement will not breach or be in conflict with any other agreement to which Smarsh is a party.
- 7.3. **Compliance with Laws.** Smarsh warrants that it will comply with the laws and regulations applicable to Smarsh’s business.
- 7.4. **Disclaimer of Warranty.** EXCEPT AS SET FORTH IN SECTIONS 7.1 — 7.3 ABOVE, SMARSH MAKES NO REPRESENTATION OR WARRANTY OF ANY KIND IN CONNECTION WITH THE SERVICES, PROFESSIONAL SERVICES OR SOFTWARE, INCLUDING, WITHOUT LIMITATION, ANY OTHER INFORMATION OR MATERIALS PROVIDED, OR MADE AVAILABLE, BY SMARSH. SMARSH HEREBY DISCLAIMS ANY AND ALL REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. SMARSH DOES NOT REPRESENT OR WARRANT THAT THE SERVICES OR SOFTWARE WILL BE AVAILABLE OR ERROR-FREE. SMARSH WILL NOT BE LIABLE FOR DELAYS, INTERRUPTIONS, SERVICE FAILURES OR OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET, ELECTRONIC COMMUNICATIONS, OR OTHER SYSTEMS OUTSIDE THE REASONABLE CONTROL OF SMARSH. SMARSH MAKES NO REPRESENTATION OR WARRANTY THAT USE OF THE SERVICES OR THE ADVICE, CONSULTING OR PROFESSIONAL SERVICE PROVIDED TO CLIENT GUARANTEES LEGAL COMPLIANCE UNDER ANY FEDERAL, STATE OR INTERNATIONAL STATUTE, LAW, RULE, REGULATION, OR DIRECTIVE AND SMARSH EXPRESSLY DISCLAIMS ALL LIABILITY ARISING OR RELATED TO CLIENT’S COMPLIANCE WITH ANY FEDERAL, STATE OR INTERNATIONAL STATUTE, LAW, RULE, REGULATION, OR DIRECTIVE. THE SOFTWARE IS NOT DESIGNED OR INTENDED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE PERFORMANCE, INCLUDING BUT NOT LIMITED TO ANY APPLICATION IN WHICH THE FAILURE OF THE SOFTWARE COULD LEAD DIRECTLY TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR PROPERTY DAMAGE.

8. **Remedies; Limitations of Remedies.**

- 8.1. **Remedies.** In the event of a breach of any warranty under Section 7, Smarsh will use commercially reasonable efforts to provide Client with an error correction or work-around that corrects the reported non-conformity. In the event of a breach of the applicable Service Level Agreement located at <http://www.smarsh.com/legal/>, Smarsh will provide Client with the credit stated in the Service Level Agreement. The foregoing remedies represent Client’s sole and exclusive remedy for a breach of Section 7.
- 8.2. **Limitation of Liability.** IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER, OR TO ANY THIRD PARTY, FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS), ARISING OUT OF OR IN CONNECTION WITH THE SERVICES OR SOFTWARE, WHETHER BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE OR WHETHER THE PARTY HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. SMARSH’S AGGREGATE LIABILITY HEREUNDER FOR ALL DAMAGES ARISING UNDER OR RELATING TO THIS AGREEMENT, NOTWITHSTANDING THE FORM IN WHICH ANY ACTION IS BROUGHT (E.G., CONTRACT, TORT, OR OTHERWISE), WILL BE LIMITED TO THE TOTAL FEES ACTUALLY RECEIVED BY SMARSH FROM CLIENT FOR THE APPLICABLE SERVICES IN THE TWELVE (12) MONTH PERIOD PRECEDING THE MONTH IN WHICH THE INCIDENT CAUSING THE DAMAGES AROSE. THE LIMITATION ON LIABILITY SET FORTH ABOVE IS CUMULATIVE; ALL PAYMENTS MADE FOR ALL CLAIMS AND DAMAGES WILL BE AGGREGATED TO DETERMINE IF THE LIMIT HAS BEEN REACHED.
- 8.3. THE ABOVE LIMITATIONS OF LIABILITY REFLECT AN ALLOCATION OF RISK BETWEEN THE PARTIES IN VIEW OF THE FAVORABLE FEES CHARGED BY SMARSH RELATIVE TO THE SERVICES DESCRIBED HEREIN, AND ARE MATERIAL TERMS HEREOF.

9. **Indemnification.**

- 9.1. Smarsh will defend, indemnify and hold Client harmless from third-party claims arising out of a claim that the Services infringe any United States patent, trademark or copyright; provided that, (a) Client provides Smarsh with prompt written notice upon becoming aware of any such claim; (b) Client reasonably cooperates with Smarsh in the defense of such claim; and (c) Smarsh has sole and exclusive control over the defense and settlement of any such claim. Notwithstanding the foregoing, Smarsh will have no liability of any kind to the extent any claim relates to or arises from: (i) custom functionality provided to Client based on Client's specific requirements; (ii) any modification of the Services by Client or any third party; (iii) the combination of Services with any technology or other services, software or technology not provided by Smarsh; or (iv) the failure of Client to use updated or modified versions of the Services made available by Smarsh. If the Services are subject to a claim of infringement of the intellectual property rights of a third party, Smarsh may, in its sole discretion, either (a) procure for Client the right to continue to use the Services; (b) modify the Services such that they are non-infringing; or (c) if in the reasonable opinion of Smarsh, neither (a) nor (b) are commercially feasible, then Smarsh may upon thirty (30) days prior written notice to Client, terminate the applicable Service.
- 9.2. The indemnification obligation contained in this Section 9 will be Client's sole remedy, and Smarsh's sole obligation, with respect to claims of infringement.

10. General Provisions.

- 10.1. **Export Restrictions.** The Services and Software, including any software, documentation and any related technical data included with, or contained in the Services, may be subject to United States export control laws and regulations. Smarsh Public IM policy manager is classified under Export Control Classification Number (ECCN) 5D002.c.1, and has been qualified for export under authority of license exception ENC, in accordance with sections 740.17(d) and 740.17(b)(3) of the U.S. Export Administration Regulations (EAR), 15 C.F.R. Part 730 et seq. (the "EAR"). It may not be downloaded or otherwise exported or re-exported into (or to a national or resident of) Afghanistan, Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria or any other country to which the United States has embargoed goods; or any organization or company on the United States Commerce Department's "Denied Parties List." Client will comply with the export laws and regulations of the United States and other applicable jurisdictions in providing or using the Services. Client will not transfer the Software, or any other software or documentation provided by Smarsh (a) to any person on a government-promulgated export restriction list; or (b) to any U.S.-embargoed countries. Without limiting the foregoing: (a) Client represents that it and its Authorized Users and other users are not named on any United States government list of persons or entities prohibited from receiving exports; (b) Client represents that Client will not use the Software or Services in a manner which is prohibited under United States Government export regulations; (c) Client will comply with all United States anti-boycott laws and regulations; (d) Client will not provide the Software or Service to any third party, or permit any user to access or use the Software or Service, in violation of any United States export embargo, prohibition or restriction; and (e) Client will not, and will not permit any user or third party to, directly or indirectly, export, re-export or release the Software or Services to any jurisdiction or country to which, or any party to whom, the export, re-export or release is prohibited by applicable law, regulation or rule.
- 10.2. **Assignment.** Neither party may assign this Agreement, in whole or in part, without the other party's prior written consent, except that either party may assign this Agreement without the other's consent in the case of a merger, reorganization, acquisition, consolidation, or sale of all, or substantially all, of its assets. Any attempt to assign this Agreement other than as permitted herein will be null and void. Without limiting the foregoing, this Agreement will inure to the benefit of and bind the parties' respective successors and permitted assigns.
- 10.3. **Force Majeure.** No failure or omission by the parties hereto in the performance of any obligation of this Agreement will be deemed a breach of this Agreement, nor will it create any liability, provided the party uses reasonable efforts to resume performance hereunder, if the same will arise from any cause or causes beyond the reasonable control of the parties, including, but not limited to the following, which, for the purpose of this Agreement, will be regarded as beyond the control of the parties in question: (a) acts of God; (b) acts or omissions of any governmental entity; (c) any rules, regulations or orders issued by any governmental authority or any officer, department, agency or instrumentality thereof; (d) fire, storm, flood, earthquake, accident, war, rebellion, insurrection, riot, strikes and lockouts; or (e) utility or telecommunication failures.
- 10.4. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the State of Delaware, without regard to conflict/choice of law principles. Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in Multnomah County, in the State of Oregon, and the parties hereby irrevocably consent to the personal jurisdiction and venue therein.
- 10.5. **Notices.** Any legal notice under this Agreement will be in writing and delivered by personal delivery, express courier, or certified or registered mail, postage prepaid and return receipt requested. Notices will be deemed to be effective upon personal delivery, one (1) day after deposit with express courier, five (5) days after deposit in the mail. Notices will be sent to Client at the address set forth on the Order Form or such other address as Client may specify. Notices will be sent to Smarsh at the following address: Smarsh, Inc., Attention: Legal, 851 SW 6th Ave, Suite 800, Portland, OR 97204.
- 10.6. **No Agency.** The parties are independent contractors and will have no power or authority to assume or create any obligation or responsibility on behalf of each other. This Agreement will not be construed to create or imply any partnership, agency, or joint venture.
- 10.7. **Entire Agreement.** This Agreement is the complete and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes any prior or contemporaneous agreements, negotiations and communications (both written and oral) regarding such subject matter.
- 10.8. **Marketing.** Client grants Smarsh the limited right to disclose that Client is a customer of the Smarsh. Smarsh agrees to obtain the prior written approval for any use of Client's name in any print marketing materials, press release, blog posts, case studies or white papers.

- 10.9. **Severability.** If for any reason a court of competent jurisdiction finds any provision or portion of this Agreement to be unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.
- 10.10. **Waiver.** Failure of either party to insist on strict performance of any provision herein will not be deemed a waiver of any rights or remedies that either party will have and will not be deemed a waiver of any subsequent default of the terms and conditions thereof.
- 10.11. **Electronic Signatures and Communications.** The parties agree that electronic signatures, whether digital or encrypted, or click-through acceptance, by an Authorized User or a party's authorized signatory are intended to authenticate such signatures and give rise to a valid, enforceable, and fully effective agreement. The parties expressly agree that any terms in Client's purchase order forms, or electronic communications form no part of this Agreement.
- 10.12. **Modifications.** Smarsh may make modifications to this Agreement by posting a revised version to www.smarsh.com/legal or via weblink at the Service login page. Client unequivocally indicates acceptance of any such modifications by (a) accepting the version of the Agreement with the modified terms at the product log in page; (b) executing an Order Form including the modified terms; or (c) continued use of the Services for 30 days following the earliest notice provided to an Authorized User of the modification.

11. **WHERE CLIENT IS LOCATED IN EUROPE THE FOLLOWING MODIFICATIONS TO THE ABOVE TERMS APPLY:**

- 11.1. Section 8.2 and 8.3 of this Agreement are replaced with the following Sections 8.2, 8.3 and the addition of 8.4:

8.2 Limitation of Consequential Damages. Subject to 8.4, in no event shall either party be liable under or in relation to this Agreement or its subject matter (whether such liability arises due to negligence, breach of contract, misrepresentation or for any other reason) for any: (a) loss of profits; (b) loss of sales; (c) loss of turnover; (d) loss of, or loss of use of, any (i) software or (ii) data; (e) loss of use of any computer or other equipment or plant; (f) wasted management or other staff time; (g) losses or liabilities under or in relation to any other contract; or (h) indirect, special or consequential loss or damage.

8.3 Limitation on Direct Damages. Subject to Sections 8.2 and 8.4, Smarsh's aggregate liability arising from or in connection with this Agreement (and whether the liability arises because of breach of contract, negligence, misrepresentation or for any other reason) shall not exceed 1.25 times the amounts paid or payable (having been invoiced but not yet paid) by you for the license to use the Service.

8.4 Notwithstanding anything to the contrary in this Agreement, neither party excludes or limits its liability in respect of death or personal injury caused by the negligence of that party, its servants or agents, breach of any condition as to title or quiet enjoyment implied by Section 12 Sale of Goods Act 1979 or Section 2 Supply of Goods and Services Act 1982, or liability for fraudulent misrepresentation or such other liability which cannot under applicable law be excluded or limited by Agreement."

- 11.2 Section 10.4 is replaced with the following:

10.4 Governing Law and Jurisdiction. This Agreement and all matters arising out of or relating to this Agreement shall be governed by the laws of England and Wales and the parties agree to submit to the exclusive jurisdiction of the English courts. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement. Notwithstanding anything in this Agreement to the contrary, nothing in this Agreement prevents either party from seeking injunctive relief in the appropriate or applicable forum."