

**SEISMIC SOFTWARE, INC.
TERMS OF SERVICE**

These Terms of Service (the **"Agreement"**) are between Seismic Software, Inc. and its Affiliates (collectively **"Seismic"**), and the customer (**"Customer"**) identified on a Seismic Service Order Form (**"Service Order Form"**). This Agreement shall govern Customer's access to, use of, and receipt of the Services (as defined below). By executing a Service Order Form, registering for, and/or using the Services, Customer agrees to be bound these Agreement. Customer and Seismic may each be referred to herein individually as a **"Party"** and collectively as the **"Parties"**. This Agreement incorporate any and all executed Service Order Form(s).

1. DEFINITIONS

- 1.1.** **"Account"** means the customer portal through which Customer will have access to the Subscription Services through the internet.
- 1.2.** **"Affiliate"** means, with respect to each Party, any entity that is controlled by, controls, or is under common control of such Party, where **"control"** means the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
- 1.3.** **"Annual Recurring Subscription Services Fees"** has the meaning set forth on the Order Form.
- 1.4.** **"API"** means Seismic's application programming interface and related documentation, end points and embeddable applications made available by Seismic to Customer.
- 1.5.** **"API Special Terms"** means the terms applicable to APIs located at [API Special Terms](#).
- 1.6.** **"Claim"** means any and all claims, actions, demands, lawsuits, or proceedings of any kind brought by an unaffiliated third party.
- 1.7.** **"Customer Content"** means all text, multimedia, graphics, audio, video, data, quizzes, practice scenarios and other information and content provided by Customer to Seismic for use with and display through the Subscription Services.
- 1.8.** **"Documentation"** means printed or electronic technical documentation about the Services that is published or provided to Customer by Seismic, including user manuals, training videos, and FAQs, but excluding marketing materials.
- 1.9.** **"Fees"** means the then-applicable charges for the Subscription Services and other Services as set forth in an Order Form or SOW.
- 1.10.** **"Instance"** means a single platform environment provisioned for Customer allowing access and use of the Subscription Services by Customer. Each Instance requested by Customer or its Affiliates is subject to mutual agreement and execution of a separate Order Form and payment of any applicable additional fees specified on such Order Form.
- 1.11.** **"IP Rights"** means any and all current and future intellectual property and related rights including, but not limited to, all patent rights, trademark rights, copyrights, moral rights, and rights in inventions, service marks, trade secrets, designs, logos, domain names and mask works.
- 1.12.** **"Losses"** means all damages, liabilities, settlements, expenses and costs (including reasonable attorneys' fees) payable as a result of a Claim.
- 1.13.** **"Non-Seismic Materials"** means mobile, cloud-based and on premises software applications, connectors and application programming interfaces, data, SDKs, or other materials owned by Customer or a third party which interoperate with the Subscription Services.
- 1.14.** **"Order Form"** means a written order form that specifies the Subscription Services provided under this Agreement and describes the User quantities, the Service Term, the Fees, the Services (if any) and other information relevant to a specific transaction between Seismic and the Customer. Each Order Form shall be issued pursuant to the terms and conditions of this Agreement, shall require Customer to be bound to the terms of this Agreement, and, other than with respect to **"overage"** Order Forms issued pursuant to Section 2.4 below, must be executed by both Seismic and Customer in order to be effective.
- 1.15.** **"Personal Data"** shall mean personally identifiable information as further defined under applicable privacy law(s).
- 1.16.** **"Product Support Services"** means support services for the Subscription Services provided by Seismic under the Agreement, as further described in and in accordance with Seismic's then-current [Product Support Policy](#). Product Support Services vary depending on the type of Subscription Services listed on the Order Form.

- 1.17. **“Professional Services”** means professional services such as implementation services, consulting services, and training, in each case, as expressly set forth in a SOW executed by both Parties.
- 1.18. **“Service Level Agreement”** means, with respect to each Subscription Service specified on an Order Form, the applicable terms of Seismic’s [Standard Service Level Agreement](#), or if indicated on the applicable Order Form, Seismic’s [Platinum Service Level Agreement](#).
- 1.19. **“Services”** means the Product Support Services and Professional Services, if any.
- 1.20. **“Statement of Work”** or **“SOW”** means any written document executed by both Parties that outlines the Professional Services to be provided by Seismic to Customer pursuant to the terms and conditions of this Agreement, and the applicable fees for such Professional Services.
- 1.21. **“Subscription Services”** means Seismic’s proprietary, web-based software as a service described on the Order Form. Subscription Services may include, as and to the extent described on an Order Form, Seismic, LiveSocial, Percolate and/or Lessonly.
- 1.22. **“Term”** means the term of this Agreement, commencing on the Effective Date and continuing as long as an Order Form or a SOW is in effect, unless terminated pursuant to Section 9 of this Agreement. The term of each Order Form (such Order Form’s **“Service Term”**) shall be specified in each Order Form.
- 1.23. **“User”** means an employee or contractor of Customer or its Affiliates that is authorized by Customer to access and use the Subscription Services through Customer’s Account, in accordance with the user parameters established by Seismic and described at [User Description](#). User parameters vary depending on the type of Subscription Services listed on the Order Form.

2. SUBSCRIPTION SERVICES

- 2.1 **Subscription Services.** Upon mutual execution of the Order Form, subject to the maximum number of Users listed on the Order Form and any other applicable capacity limitations, Seismic grants Customer a worldwide, limited-term, non-exclusive, non-transferable, non-sublicensable, right during the Service Term to, and to permit Customer’s Affiliates to, internally: (a) access, display and use the Subscription Services through the internet; and (b) access, display, reproduce, and use the Documentation; in each case, subject to Section 5 below and solely for the internal business purposes of Customer and its Affiliates. Each Order Form is enforceable according to the terms and conditions contained in such Order Form and, if a conflict occurs between this Agreement and any Order Form, the applicable provisions of such Order Form shall prevail. In connection with the Subscription Services, Seismic may provide Customer access to its API. Subject to the terms of this Agreement, including the API Special Terms, Seismic grants Customer a non-exclusive, non-transferable, non-sublicensable, revocable, limited right and license during the Service Term to make calls to the API to the extent necessary to use the Subscription Services. Seismic reserves all rights not expressly granted herein.
- 2.2 **Service Operation.** Seismic shall use commercially reasonable efforts to make the Subscription Services available during the Service Term in accordance with the applicable Service Level Agreement and in substantial compliance with the Documentation.
- 2.3 **Users.** Customer shall ensure that its Users’ use of the Subscription Services comply with the user parameters described in Section 1.23 above. Customer shall assign each User account to a designated individual and shall not allow more than one individual to use a single User account at a time; however, Customer may exchange individuals who are designated as Users during the Service Term in Customer’s reasonable discretion, provided that such exchange will not decrease the Annual Recurring Subscription Services Fees indicated on the Order Form.
- 2.4 **Overages.** Seismic uses internal tools to monitor the quantity of Users, number of supported Instances, and other capacity metrics (such as number of API calls) to ensure that authorized maximums are not exceeded. If Seismic determines that Customer has exceeded any authorized capacity limitation at any time in a calendar quarter, then Seismic will notify Customer in writing promptly following the end of that calendar quarter, describing the overage. Customer will have fifteen (15) business days from the date of notice to object to this notice or to decrease its usage to the permitted capacity. If Customer objects to this notice, then Seismic will review the basis for the objection in good faith. If the Customer does not limit its usage to the permitted capacity within this period, then Seismic will issue an “overage” Order Form for the additional capacity at Seismic’s then-current rates, which will co-terminate with the

original Order Form and which will contain payment terms identical to the payment terms in that Order Form. Customer agrees to pay the Fees listed in the “overage” Order Form, if any, in accordance with the payment terms specified therein.

3. OTHER SERVICES

- 3.1. **Product Support Services.** Seismic will provide the applicable Product Support Services specified in the Order Form to Customer, at no additional charge, during the Service Term. For the avoidance of doubt, Customer is not authorized to (and agrees that it will not) use any Instance, or receive support for any Instance, other than the Instance(s) authorized on the applicable Order Form.
- 3.2. **Professional Services.** If Customer purchases Professional Services, then the Parties will execute a separate Statement of Work describing the Professional Services and related Fees. Each such SOW shall include the scope of Professional Services, the anticipated schedule, the fee structure, and the deliverables (if any) to be provided as part of the Professional Services. All SOWs must be signed by authorized representatives of both Parties in order to be effective, shall be deemed incorporated herein and shall be subject to the terms and conditions of this Agreement. Any material change to the SOW (including, without limitation, any changes to the scope of any deliverable, milestone or payment obligation) shall be subject to a change order made only in writing and signed by authorized representatives of both Parties. Customer shall cooperate in good faith with Seismic, as reasonably requested by Seismic, to facilitate Seismic’s provision of the Professional Services.

4. SECURITY

- 4.1. **Customer Content.** Seismic will maintain practices that are generally accepted in the industry for administrative, physical and technical safeguards designed to protect the security, confidentiality and integrity of Customer Content. These safeguards will include, but will not be limited to, measures designed to (a) ensure the security and confidentiality of the Customer Content, (b) protect against reasonably anticipated threats or hazards to the security or integrity of the Customer Content, and (c) protect against unauthorized access to or use of Customer Content by Seismic and by third parties.
- 4.2. **Subscription Services.** Seismic will maintain practices that are generally accepted in the industry designed to ensure that the Subscription Services do not contain any programs, subroutines, code, instructions, data or functions (including but not limited to viruses, worms, date bombs, time bombs, and shut-down devices), intended to damage, maliciously interfere with, or hinder Customer’s normal and authorized operation of the Subscription Services.

5. RESTRICTIONS

- 5.1. Customer will not, nor allow any other person to: (a) make the Subscription Services available to, or use the Subscription Services for the benefit of, anyone other than Customer, its Affiliates and Users; (b) reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas or algorithms of the Subscription Services (provided that reverse engineering is prohibited only to the extent such prohibition is not contrary to applicable statutory law); (c) frame or mirror any part of the Subscription Service other than for Customer’s own internal business purposes, or copy the Subscription Services or any part, feature, function or user interface of the Subscription Services; (d) access the Subscription Services in order to build a competing product or service; (e) use the Subscription Services or APIs other than in accordance with this Agreement and in compliance with all applicable laws and regulations; or (f) use the Subscription Services to store, transmit or display financial data of individuals, health data of individuals, or other sensitive data as described in Article 9, Paragraph 1 of the General Data Privacy Regulation (GDPR) or otherwise defined under applicable law.
- 5.2. Customer will not provide content to Seismic or use the Subscription Services in connection with content (including Customer Content) that (as determined by Seismic, in its sole discretion): (a) is infringing, illegal, libelous, defamatory, obscene, pornographic or profane, or likely to cause harm to any individuals; (b) contains a bug, virus or other similar attribute or code that may infect, disable or otherwise impair the systems, software, and services operated by Seismic

or (c) may otherwise infringe or violate rights of a third party (collectively, “**Affected Content**”). Seismic reserves the right to remove Affected Content from the Subscription Services or, where deemed necessary by Seismic in its reasonable discretion, suspend access to the Subscription Services; provided that Seismic shall use commercially reasonable efforts to provide notification to Customer prior to removing the Affected Content (including by sending Customer a message through Customer’s Account), if prior notice is reasonable, taking into account the nature of the Affected Content. Customer shall reasonably cooperate with Seismic to minimize any adverse impact of the Affected Content on either Party and any third party.

6. CUSTOMER OBLIGATIONS

- 6.1. Customer will cooperate with Seismic in connection with the performance of this Agreement and will make available such personnel, Customer Content and other information as may be reasonably required for Seismic to perform the Services and meet its obligations under this Agreement. Seismic will not be liable for any failure to provide access to the Subscription Services or perform the Services when such failure is caused by Customer’s delay or failure in providing such cooperation and/or Customer Content.
- 6.2. Customer shall be responsible for maintaining the security of its own network connections and files. Customer will establish user login credentials such as usernames, passwords and PINs (“**Account Credentials**”) for Customer’s Users to access the Subscription Services. Customer is solely responsible for protecting the confidentiality of Customer’s Account Credentials. Customer is solely responsible for, and Seismic will have no liability for, any actions taken by Customer’s personnel who access Customer’s account within the Subscription Services by using Customer’s Account Credentials.
- 6.3. Customer agrees that it will be responsible for the accuracy, quality and legality of Customer Content and the means by which Customer acquires Customer Content.

7. CONFIDENTIALITY

- 7.1. “**Confidential Information**” shall mean any data or information disclosed by the Disclosing Party in writing or orally and not generally known to the public, including but not limited to finances, concepts, marketing proposals, branding strategies, creative designs, technical data, web designs, trade secrets and know-how, research, product plans, products, product pricing and discounts, customer technical requirements, software, programming techniques, algorithms, services, suppliers, supplier lists, customers, employee lists, customer lists, markets developments, inventions, processes, technology, designs, drawings, engineering, apparatus, techniques, hardware configuration information, documentation, marketing, forecasts, business strategy, or other business information that would be reasonably understood to be confidential. Customer’s Confidential Information includes Customer Content. In the event that the Parties have executed a separate Data Processing Addendum relating to Personal Data (a “**DPA**”), then Personal Data will be deemed not to be included in the definition of Confidential Information for purposes of this Agreement and shall be governed solely by, and subject to, the terms of the DPA.
- 7.2. For the purposes of this Section the “**Disclosing Party**” shall mean the Party or Party’s employees, subcontractors, officers, directors, representatives, agents and Affiliates that has given control or possession of Confidential Information to the Receiving Party, and the “**Receiving Party**” shall mean the Party or the Party’s employees, subcontractors, officers, directors, representatives, agents and Affiliates that has received Confidential Information from the Disclosing Party.
- 7.3. The Receiving Party understands that the Disclosing Party has disclosed or may disclose Confidential Information relating to the Disclosing Party’s business. The Receiving Party agrees: (i) to take reasonable precautions designed to protect such Confidential Information, (ii) not to divulge to any third person any such Confidential Information; and (iii) advise each person who receives or accesses Confidential Information under the terms of this Agreement that it is to be kept strictly confidential; the Receiving Party shall be fully responsible for any noncompliance by such persons.
- 7.4. **Exclusions.** The Disclosing Party agrees that the foregoing shall not apply with respect to any Confidential Information after three (3) years following the disclosure thereof or any Confidential Information that the Receiving Party can document: (i) is or becomes a part of the public domain through no act or omission of the non-disclosing Party; (ii) was lawfully in its possession or known by it prior to receipt from the Disclosing Party with no obligations of confidentiality; (iii) was rightfully disclosed to it by a third-party without continuing restrictions on its use or disclosure; or (iv) was independently developed by the Receiving Party without the use of any Confidential Information of the Disclosing Party; or (v) is required to be disclosed by court order or government requirement (but only to the extent so required), provided

that the Disclosing Party is given prompt written notice of such court order or government requirement and an opportunity to obtain a protective order to prohibit or restrict such disclosure. Notwithstanding the foregoing, the Receiving Party's obligations hereunder shall survive and continue in effect thereafter with respect to any Confidential Information that is a trade secret under applicable law.

- 7.5.** Both Parties will have the right to disclose the existence but not the terms and conditions of this Agreement, unless such disclosure is approved in writing by both Parties prior to such disclosure, or is included in a filing required to be made by a Party with a governmental authority (provided such Party will use reasonable efforts to obtain confidential treatment or a protective order or to redact any competitively sensitive information, such as pricing) or is made on a confidential basis as reasonably necessary to potential investors or acquirers.
- 7.6.** The Receiving Party shall return or dispose of all Confidential Information of the Disclosing Party upon termination of this Agreement or at any time upon written request (provided that certain Services may not operate correctly if such request is made prior to termination). Obligations under this Section shall expire on the earlier of: (i) the date upon which the Disclosing Party consents in writing to disclosure of its Confidential Information by the Receiving Party; (ii) the date upon which the Disclosing Party formally announces, releases, or otherwise discloses its Confidential Information to the public; or (iii) the date upon which the Receiving Party returns or disposes of all of the Disclosing Party's Confidential Information pursuant to the foregoing.

8 PAYMENT OF FEES

- 8.1** Seismic will invoice Customer annually in advance and Customer will pay to Seismic all Subscription Services Fees within thirty (30) days after receipt of the invoice. If the applicable Service Term is longer than one year, Customer will pay the applicable Subscription Services Fees for the first year of such Service Term in advance and pay the applicable Subscription Services Fees for each subsequent year of the Service Term on each anniversary thereafter. Customer agrees that, to the extent Customer requires annual purchase orders, it will issue a purchase order to Seismic for each subsequent year's Subscription Services Fees no later than thirty (30) days prior to the end of the then-current contract year. There shall be no force or effect to any different terms of any related purchase order or similar form even if signed by the Parties after the date hereof.
- 8.2** Unless otherwise specified in advance, Seismic will bill all other Fees (for example, Professional Services Fees) through an invoice and Customer will pay to Seismic all undisputed, invoiced amounts no later than thirty (30) days after Customer's receipt of the invoice.
- 8.3** Fees are exclusive of all applicable taxes and Customer is responsible for the payment of all taxes that may now or in the future be associated with this Agreement or Customer's use of the Subscription Services (other than U.S. taxes based on Seismic's net income); Customer may not withhold from or otherwise reduce the amounts paid to Seismic hereunder on account of any such taxes. Unpaid Fees are subject to a finance charge of 1.0% per month on any outstanding balance, or the maximum permitted by law, whichever is lower, plus all expenses of collection. Subscription Services are non-cancellable and, subject to Section 9 (Termination), all Fees are non-refundable.
- 8.4** If Customer has a good faith dispute in an invoice, Customer must contact Seismic no later than thirty (30) days after Customer's receipt of the disputed invoice. Once Seismic receives notification of the disputed invoice, Seismic will review the disputed invoice and if Seismic determines, at its sole discretion, that an error was made, Customer will receive an adjustment or credit. Disputes or inquiries must be directed to Seismic's customer support department.

9 TERMINATION

- 9.1** **Termination for Breach.** In addition to any other remedies it may have, either Party may terminate this Agreement, in whole or in part, effective upon thirty (30) days' written notice to the other Party, in the event the other Party commits a material breach of this Agreement, which breach is not cured within such thirty (30) day period (or ten (10) days in the case of nonpayment). Seismic reserves the right to suspend Customer's access to any Subscription Services, or suspend Seismic's performance of this Agreement, if any amount owed is not paid when due or in the event of a material breach of this Agreement by Customer that Seismic reasonably believes could result in harm to Seismic or others. Customer shall promptly reimburse Seismic for all costs of collection (including, without limitation, reasonable attorney's fees) incurred in connection with pursuing payments due to Seismic under this Agreement. In the event this Agreement is terminated

by Customer due to Seismic's material breach, then Seismic shall refund to Customer a pro-rata portion of the prepaid but unused Fees applicable to the portion of the Service Term remaining after the termination date.

- 9.2 Termination for Bankruptcy.** Either Party may terminate this Agreement, without notice, (i) upon the institution by or against the other Party of insolvency, receivership or bankruptcy proceedings which are not dismissed within ninety (90) days, (ii) upon the other Party's making an assignment for the benefit of creditors, or (iii) upon the other Party's dissolution or ceasing to do business without a successor.
- 9.3 Effect of Termination.** Except in the case of Seismic's material breach as described in Section 9.1, upon termination of this Agreement, any and all unpaid Fees under all applicable Order Forms and SOWs will become immediately due and payable. All provisions of this Agreement which by their nature should survive termination will survive termination, including, without limitation, all warranty disclaimers and limitations on liability.

10 WARRANTY AND DISCLAIMER

- 10.1** Seismic represents and warrants that: (a) it has the corporate power and right to enter into this Agreement; (b) it shall perform the Services in a professional and workmanlike manner consistent with generally accepted industry standards.
- 10.2** Customer represents and warrants that: (a) it has the corporate power and right to enter into this Agreement; (b) it owns the Customer Content and Non-Seismic Materials or otherwise has the right to use and permit Seismic to use the Customer Content and Non-Seismic Materials as contemplated in this Agreement; (c) the publication or use of Customer Content does not violate the privacy rights, publicity rights, contract rights, intellectual property rights, or any other rights of any third party; and (d) its use of the Subscription Services, including any results or information derived by Customer therefrom, will comply with all applicable laws.
- 10.3 Disclaimer of Warranty.** EXCEPT AS EXPRESSLY SET FORTH IN SECTION 10.1 ABOVE, THE SUBSCRIPTION SERVICES, APIS AND OTHER SERVICES ARE PROVIDED "AS IS" AND SEISMIC DISCLAIMS ALL OTHER WARRANTIES, CONDITIONS, REPRESENTATIONS, INDEMNITIES AND GUARANTEES WITH RESPECT TO THE SUBSCRIPTION SERVICES AND OTHER SERVICES, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NONINFRINGEMENT. SEISMIC DOES NOT WARRANT THAT THE SUBSCRIPTION SERVICES WILL BE UNINTERRUPTED OR ERROR FREE, NOR DOES IT MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. SEISMIC DOES NOT WARRANT OR SUPPORT NON-SEISMIC MATERIALS OR OTHER NON-SEISMIC PRODUCTS OR SERVICES, WHETHER OR NOT THEY ARE DESIGNATED BY SEISMIC AS "CERTIFIED" OR OTHERWISE. SEISMIC DOES NOT GUARANTEE THAT THE SUBSCRIPTION SERVICES WILL FUNCTION OR INTEGRATE WITH NON-SEISMIC MATERIALS.
- 10.4 Customer Responsibility for Use.** CUSTOMER IS SOLELY RESPONSIBLE FOR, AND AGREES THAT SEISMIC SHALL HAVE NO LIABILITY FOR, ANY DECISIONS OR ACTIONS TAKEN (OR NOT TAKEN) BY CUSTOMER AS A RESULT OF CUSTOMER'S ACCESS TO OR USE OF THE SUBSCRIPTION SERVICES AND OTHER SERVICES, RESULTS PROVIDED TO CUSTOMER IN CONNECTION THEREWITH, OR CUSTOMER'S INTERPRETATION OF SUCH RESULTS. IN PARTICULAR, BUT WITHOUT LIMITATION, CUSTOMER ACKNOWLEDGES AND AGREES THAT NONE OF THE RESULTS OR INFORMATION PROVIDED THROUGH THE SUBSCRIPTION SERVICES CONSTITUTES ANY FORM OF ADVICE (LEGAL OR OTHERWISE), RECOMMENDATION, REPRESENTATION, OR ENDORSEMENT, AND NONE OF THE SAME SHOULD BE RELIED UPON BY ANY PERSON FOR ANY REASON, INCLUDING, WITHOUT LIMITATION, IN CONNECTION WITH ANY PERSONNEL DECISION.

11 INDEMNIFICATION

- 11.1 Seismic Indemnity.** Subject to Section 11.4 below, Seismic will defend Customer from, or settle, any Claim made or brought against Customer by a third party alleging that the Subscription Services infringe the copyright, trade secret or U.S. patent of such third party and will indemnify Customer from all: (a) Losses finally awarded against Customer by a court in such Claim, (b) Losses that Seismic agrees to pay to any third party to settle such Claim and (c) out of pocket costs (including reasonable attorneys' fees) reasonably incurred by Customer in connection with the defense of such Claim (other than attorneys' fees and costs incurred without Seismic's consent after Seismic has accepted defense of the Claim).

- 11.2 Exclusions.** Seismic's obligations under this Section 11 do not apply to the extent a Claim arises from or relates to: (a) Customer Content; (b) use of the Subscription Services with Non-Seismic Materials or any other third party product or service not embedded into the Subscription Services; (c) modification or alteration of the Subscription Services by anyone other than a Seismic employee or representative; (d) Customer's continued use of the Subscription Services after notification by Seismic that the Subscription Services or such use may be infringing; (e) Customer's use of the Subscription Services in breach of this Agreement; or (f) Customer's failure to timely implement any updates, modifications, corrections, bug-fixes, or enhancements to the Subscription Services made available by Seismic.
- 11.3 Customer Indemnity.** Subject to Section 11.4 below, Customer will defend Seismic from, or settle, any Claim caused by or arising out of: (a) Customer Content or (b) Customer's use of the Subscription Services in violation of this Agreement and will indemnify Seismic from all: (i) Losses finally awarded against Seismic by a court in such Claim (ii) Losses that Customer agrees to pay to any third party to settle such Claim and (iii) out of pocket costs (including reasonable attorneys' fees) reasonably incurred by Seismic in connection with the defense of such Claim (other than attorneys' fees and costs incurred without Customer's consent after Customer has accepted defense of the Claim).
- 11.4 Conditions.** The indemnity obligations hereunder are conditioned upon the Party seeking indemnification giving the indemnifying Party: (a) prompt written notification of any potential Claim; (b) sole control of the defense and settlement of any Claim; and (c) reasonable assistance, at the indemnifying Party's request and expense, in the defense and settlement of any Claim. The indemnifying Party will not be responsible for any settlement agreed to by the indemnified Party that is not pre-approved in writing by the indemnifying Party.
- 11.5 Infringement Remedies of Customer.** If Seismic believes that Customer's use of the Subscription Services may be enjoined as a result of a Claim of infringement then Seismic shall, at its sole option and expense, either (a) procure for Customer the right to continue using the allegedly infringing component of the Subscription Services; or (b) replace or modify such allegedly infringing component so that it becomes non-infringing, so long as functionality of the Subscription Services will not be materially adversely affected. If neither alternative is reasonably practicable, the Order Form affected by the allegedly infringing component of the Subscription Services will be terminated and Seismic shall provide Customer with a pro rata refund based upon the unused portion of any prepaid Fees for such allegedly infringing component. The indemnity provided in Section 11.1 and the foregoing remedies constitute Seismic's sole liability and Customer's exclusive remedy in the event of any infringement by the Subscription Services.

12. LIMITATION OF LIABILITY

- 12.1 Disclaimer of Certain Damages.** SUBJECT TO SECTION 12.4 BELOW, IN NO EVENT WILL EITHER PARTY HAVE ANY LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT FOR: (A) ANY INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE, (B) THE DELAY OR INABILITY TO USE THE SUBSCRIPTION SERVICES, APIS OR ANYTHING PROVIDED IN CONNECTION WITH THIS AGREEMENT, (C) COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES, OR TECHNOLOGY, OR (D) LOSS OF REVENUE OR ANTICIPATED PROFITS, LOST BUSINESS OR LOST SALES, OR LOST DATA; IN EACH CASE, WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
- 12.2 Cap on Liability.** SUBJECT TO SECTION 12.4 BELOW, THE TOTAL LIABILITY OF EACH PARTY, WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, WILL NOT EXCEED THE FEES PAID OR PAYABLE TO SEISMIC HEREUNDER IN THE TWELVE (12) MONTH PERIOD PRECEDING THE DATE THE CAUSE OF ACTION GIVING RISE TO SUCH DAMAGES FIRST AROSE.
- 12.3 Cause of Action.** Neither Party may institute an action in any form arising out of or in connection with this Agreement more than one (1) year after the cause of action has arisen.
- 12.4 Exceptions.** The limitations set forth in this Section 12 shall not apply to limit: (a) Customer's liability for its breach of Section 5 (Restrictions), (b) either Party's liability for its breach of Section 7 (Confidentiality) or (c) either Party's liability for its gross negligence, willful misconduct, or fraud.

13 INTELLECTUAL PROPERTY

- 13.1 Ownership and Reservation of Rights.** Subject to the limited rights expressly granted under the Agreement, Seismic reserves and retains all right, title and interest in and to the Subscription Services, Documentation, APIs and other Services, including all related IP Rights, all improvements thereto and derivative works therefrom. Any custom development or works-for-hire requested by Customer must be mutually agreed upon and expressly set forth in a separate Statement of Work.
- 13.2 Non-Seismic Materials.** If Customer installs or enables any Non-Seismic Materials for use with the Subscription Services, Customer grants Seismic permission to allow the provider of such Non-Seismic Materials to access Customer's Instance(s), including any Customer Content, as required for the interoperation of such Non-Seismic Materials with the Subscription Services. Seismic is not responsible for any disclosure, modification, transmission or deletion of Customer Content resulting from access by any Non-Seismic Materials. If the provider of any Non-Seismic Materials ceases to make such Non-Seismic Materials available for interoperation with the corresponding Subscription Services features on reasonable terms, Seismic may cease providing those Subscription Services features without entitling Customer to any refund, credit, or other compensation.
- 13.3 Statistical Usage Data.** Seismic owns the statistical and other usage data and output derived from the operation of the Subscription Services and operation of data applications utilized in connection with the Subscription Services, configurations, log data, and the performance results for the Subscription Services ("**Usage Data**"). Seismic may use Customer Content to (a) provide the Subscription Services and other Services to Customer and perform this Agreement, and (b) to generate Usage Data and improve Seismic's products and services, solely in aggregated and anonymized form and in a manner that does not disclose Customer Content or Confidential Information of Customer. Nothing herein shall be construed as prohibiting Seismic from utilizing the Usage Data for purposes of operating Seismic's business; provided that the Usage Data shall be de-identified, anonymized and aggregated such that it would not be possible to identify any particular data element or identify Customer as the source of such data.
- 13.4 Changes to Functionality.** Seismic continually strives to improve its products and services and reserves the right to improve or modify the Subscription Services and its features in any manner at any time during the Term at its sole discretion; provided however that such modifications will not materially reduce the functionality of the Subscription Services for Customer.
- 13.5 Feedback.** Customer grants to Seismic a worldwide, perpetual, irrevocable, royalty-free license to use and incorporate into the Subscription Services any suggestion, enhancement, request, recommendation or other feedback provided by Customer or its Users, except to the extent such feedback embodies Customer Content or Customer Confidential Information.

14 MISCELLANEOUS

- 14.1 Software Special Terms.** For certain Seismic offerings, additional terms apply. See the [Software Special Terms](#) for more information. If the Order Form includes a Seismic offering identified in the Software Special Terms then the applicable Software Special Terms are hereby incorporated by reference into the Agreement. In the event of a conflict between the Software Special Terms and this Agreement, the Software Special Terms shall govern.
- 14.2 Severability.** If any provision of this Agreement is found to be unenforceable or invalid by a court of competent jurisdiction, in whole or in part, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable.
- 14.3 Assignment.** This Agreement is not assignable, transferable or sublicensable by either Party without the prior written consent of the other, which shall not be unreasonably withheld, provided that such consent is not required in case of assignment to a successor by way of an asset sale, merger, change of control or operation of law where the acquiring entity assumes all liabilities, responsibilities, and obligations of the assigning entity hereunder. Any other attempted assignment, transfer, or sublicense shall be void. This Agreement is binding upon and inures to the benefit of the Parties and their respective successors and permitted assigns. In the event of a permitted assignment by Customer and notwithstanding any unlimited rights (such as unlimited User amounts) set forth on an Order Form, the assignee shall not be entitled to increase Customer's then-current usage capacity by more than five percent (5%) and shall be invoiced in accordance with Section 2.4 for any overages.

- 14.4 Future Functionality.** Customer acknowledges that any purchase hereunder is not contingent on the delivery of any future functionality or features, or dependent on any oral or written public comments made by Seismic regarding functionality or features.
- 14.5 Waiver; Amendment.** All waivers, amendments, and modifications must be reduced to writing and signed by both Parties, except as otherwise expressly provided herein.
- 14.6 Relationship.** No agency, partnership, joint venture, or employment, whether express or implied, is created as a result of this Agreement and neither Party has any authority of any kind to bind the other Party in any respect whatsoever. Neither Party is authorized as an agent or legal representative of the other Party.
- 14.7 Publicity.** Customer agrees to participate in press announcements, case studies, trade shows, or other mutually agreed-upon marketing activities as reasonably requested by Seismic. Seismic is permitted to disclose that Customer is one of its customers to any third-party at its sole discretion.
- 14.8 Costs.** In any action or proceeding to enforce rights under this Agreement, the prevailing Party will be entitled to recover costs and reasonable attorneys' fees.
- 14.9 Notices.** All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by e-mail; the day after it is sent, if sent for next day delivery by recognized overnight delivery service; and upon receipt, if sent by certified or registered mail, return receipt requested. Notice to Seismic must be sent to Seismic, "Attention Legal Department", 12390 El Camino Real, San Diego, California 92130 or to legal@seismic.com. Notice to Customer must be sent to the contact mailing address listed on the most recent Order Form, "Attention Legal Department" or to the contact email address listed on the most recent Order Form.
- 14.10 Force Majeure.** Neither party shall be liable to the other by reason of any failure or delay in performance of this Agreement if the failure or delay arises out of the unavailability of communications facilities or energy sources, Internet service provider failure or delay, Non-Seismic Materials, denial of service attacks, acts of God, acts of the other party, acts of governmental authority, fires, strikes, delays in transportation, riots, terrorism, war, or any causes beyond the reasonable control of that party, except for payment obligations.
- 14.11 Governing Law.** This Agreement and any dispute arising out of or in connection with this Agreement shall be governed by the laws of the State of California without regard to its conflicts of law provisions. For all purposes of this Agreement, the Parties consent to exclusive jurisdiction and venue in the Supreme Court of the State of California, San Diego County, and/or if applicable the United States District Court located in the Southern District of California.
- 14.12 Entire Agreement.** This Agreement constitutes the complete and exclusive statement of the mutual understanding of the Parties with respect to the subject matter hereof, and supersedes and cancels all prior or contemporaneous written and oral agreements, communications and other understandings relating to the subject matter hereof.
- 14.13 Counterparts.** This Agreement may be executed in counterparts, each of which will be deemed to be an original, but all of which when taken together will constitute one and the same agreement.