

## OPSMILL MASTER SERVICES AGREEMENT

THIS OPSMILL MASTER SERVICES AGREEMENT ("AGREEMENT") CONTAINS THE TERMS FOR USE FOR THE SOFTWARE AND IS BETWEEN OPSMILL INC ("OPSMILL"), A DELAWARE CORPORATION, HAVING A PLACE OF BUSINESS AT 1 SANSOME STREET, SUITE 3500-10031, SAN FRANCISCO, CA 94104, USA, AND THE PARTY AGREEING TO THE TERMS OF THIS AGREEMENT ("CUSTOMER"). BY EXECUTING AN ORDER THAT REFERENCES THIS AGREEMENT, CLICKING AN "ACCEPT" OR SIMILAR BUTTON, OR OTHERWISE USING THE SOFTWARE, CUSTOMER AGREES TO BE BOUND BY THE TERMS OF THIS AGREEMENT. CUSTOMER MAY NOT USE THE SOFTWARE WITHOUT AGREEING TO THIS AGREEMENT FIRST.

### 1. DEFINITIONS.

**"Affiliate"** means, with respect to a party, any entity which directly or indirectly Controls, is Controlled by, or is under common Control with such party.

**"Confidential Information"** has the meaning set forth in Section 9.

**"Control"** means ownership or control, directly or indirectly, of more than 50% of the voting interests of the subject entity.

**"Customer Data"** means data, text, files, and the like that Customer inputs and/or loads into the Software.

**"Documentation"** means the description of the Software and Professional Services licensed or purchased by Customer as further described at [www.opsmill.com](http://www.opsmill.com).

**"Effective Date"** means the sooner of the date this Agreement is executed by Customer or Customer and OpsMill or Customer and Reseller execute and Order referencing this Agreement.

**"Order"** means an order for the Software and/or Professional Services signed by OpsMill or Reseller.

**"Software"** means any OpsMill software programs (in object code format) licensed by OpsMill to Customer, including any third-party products that OpsMill is sublicensing, together with all Updates, as further described in the Documentation and in an Order.

**"Professional Services"** means the installation, implementation, training, and/or other professional services listed in Section 4 and further identified in an Order.

**"Reseller"** means a OpsMill approved reseller or partner under which Customer orders the Software through.

**"Taxes"** means any direct or indirect local, state, federal or foreign taxes, levies, duties or similar governmental assessments of any nature, including value-added, sales, use or withholding taxes.

**"Term"** means the Term applicable to each OpsMill Product specified on an Order, or if no such term period is defined, twelve (12) months, commencing on the effective date of the Order.

**"Updates"** means all Software updates and enhancements that OpsMill generally makes available at no additional charge to its customers of the version of the Software purchased hereunder who are current in payment of applicable fees.

**"Users"** means Customer's and its Affiliates' employees, agents, contractors, and consultants who are authorized by Customer to use the Software.

**2. TERMS OF THE SOFTWARE.** Subject to the terms of the Agreement, OpsMill grants Customer and its Affiliates a non-exclusive, non-transferable (except to a successor in interest as permitted hereunder) license to access, use, and install the Software listed under an Order during the Term. Customer's right to use the Software is limited to the tier and other restrictions contained in in an Order and the Documentation.

### 3. CUSTOMER RESPONSIBILITIES RELATING TO USE OF THE SOFTWARE.

**3.1** As between the parties, Customer is responsible for, (i) all activities conducted under its User logins, (ii) obtaining and maintaining any Customer Equipment and any ancillary software and/or services needed to connect to, access, install, or otherwise use the Software and, (iii) ensuring that it has the proper third-party licenses to make use of the Software with.

**3.2** Customer shall use the Software solely for its internal business purposes, in compliance with applicable law, and shall not: (a) resell, sublicense, lease, time-share or otherwise make the Software available to any third party (including customers of Customer); (b) process, send, or store infringing or unlawful material using the Software; (c) attempt to gain unauthorized access to, or disrupt the integrity or performance of, the Software or the data contained therein; (d) modify, copy or create derivative works based on the Software; (e) reverse engineer the Software; (f) propagate any virus, worms, Trojan horses, or other programming routine intended to damage any system or data; (g) access or use the Software for the purpose of building a competitive product or service or copying its features or user interface; or (h) use the Software, or permit it to be used, for purposes of product evaluation, benchmarking or other comparative analysis intended for publication without OpsMill's prior written consent.

**3.3** Notwithstanding the grant in Sections 2 and 3.1 – 3.2, Customer and its Affiliates acknowledge that the Software includes or may include some software components that are licensed to Customer and its Affiliates under "free software" or "open source" licenses which, among other rights, permit the user to copy, modify and redistribute certain programs, or portions thereof, and/or have access to the source code for such components ("Free Software Licenses"). OpsMill shall provide a list of open source components for a particular version of the Software upon Customer's request. To the extent stated in any applicable Free Software License, the terms of such licenses will apply in lieu of the terms of Sections 2 and 3.1 - 3.2 of this Agreement. To the extent the terms of any Free Software License prohibit any of the restrictions in this Agreement with respect to such components, such restrictions will not apply to such components.

**3.4** From time-to-time, OpsMill may provide certain portions of the Software as new, beta-only features ("Beta Features"). Beta Features will be identified to Customer in an Order or Software log-in or landing page, or will otherwise be identified to Customer. Beta Features are provided without any warranties or SLAs and OpsMill has no liability to Customer for the Beta Features only.

**4. PROFESSIONAL SERVICES.** OpsMill will provide Professional Services if and to the extent stated in an Order or a mutually executed statement of work ("SOW") that specifically incorporates this Agreement by reference, which shall be subject to the SOW.

#### **5. OWNERSHIP.**

**5.1** Customer shall retain all ownership rights in and to all Customer data passing through or generated by the Software and Customer Confidential Information. OpsMill shall have and retain all ownership rights in the Software and all work developed or created by OpsMill during the course of providing Support or Professional Services to Customer (if any). OpsMill hereby grants Customer a royalty-free, fully paid-up, nonexclusive, license to use the foregoing on the same terms and conditions as the Software during the Term.

**5.2** OpsMill shall own any suggestions, enhancement requests, recommendations, or other feedback provided by Customer or its Users relating to the operation of the Software.

**5.3** No license, right or interest in any OpsMill or Customer trademark, copyright, trade name or service mark is granted hereunder.

#### **6. WARRANTIES.**

**6.1** Each party represents and warrants that (i) it has the legal power to enter into and perform under this Agreement; and (ii) it shall comply with all other applicable laws in its performance hereunder.

**6.2** OpsMill warrants (i) it will provide the Professional Services in a professional and workmanlike manner consistent with good industry standards and practices; and (ii) that for a period of thirty (30) days after completion, the Professional Services will conform to the representations in Section 4. As Customer's sole and exclusive remedy and OpsMill's entire liability for any breach of the foregoing warranty, OpsMill will re-perform the Professional Services, or, if OpsMill is unable to do so, return the fees paid for such deficient Professional Services.

**6.3** OpsMill warrants to Customer that for a period of three (3) months from delivery, the Software will substantially conform in all material respects to the Documentation ("Software Warranty"). The Software Warranty does not apply when: (a) the Software that has been modified by any party other than OpsMill; or (b) the Software that has been improperly used and/or installed in a manner other than as authorized under the Agreement to the extent such modification(s) or improper installation cause the Software to be nonconforming. As Customer's sole and exclusive remedy and OpsMill's entire liability for any breach of the foregoing warranty, OpsMill will repair or replace any nonconforming Software so that it operates as warranted or, if OpsMill is unable to do so, terminate the license for such Software and OpsMill or Reseller will return the license fees paid for the nonconforming Software, pro-rated from. Any claim submitted under this Section 6.3 must be submitted in writing to OpsMill or Reseller within the specified warranty period.

**6.4** EXCEPT AS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTIES OF ANY KIND, WHETHER IMPLIED, STATUTORY OR OTHERWISE, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. OPSMILL DOES NOT WARRANT THE OPERATION OF THE SOFTWARE AND RESULTS OF THE PROFESSIONAL SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE.

#### **7. PATENT AND COPYRIGHT INDEMNITY.**

**7.1** OpsMill shall defend, indemnify and hold Customer harmless against any loss, damage or costs (including reasonable attorneys' fees) incurred in connection with claims, demands, suits, or proceedings ("Claims") made or brought against Customer by a third party alleging that the use of the Software as contemplated hereunder infringes the French and European Union intellectual property rights of such third party, provided that Customer (a) promptly gives written notice of the Claim to OpsMill; (b) gives OpsMill sole control of the defense and settlement of the Claim (provided that OpsMill may not settle any Claim unless it unconditionally releases Customer of all liability); and (c) provides to OpsMill, at OpsMill's cost, all reasonable assistance.

**7.2** OpsMill may, at its sole option and expense: (i) procure for Customer the right to continue using the Software under the terms of this Agreement; (ii) replace or modify the Software to be non-infringing without material decrease in functionality; or (iii) if the foregoing options are not reasonably practicable, terminate the license for the Software and OpsMill or Reseller will refund Customer the prepaid fees for the remainder of the then-current Term after the date of termination.

**7.3** OpsMill shall have no liability for any Claim to the extent the Claim is based upon (i) the use of the Software in combination with any other product, service or device not furnished, recommended or approved by OpsMill, if such Claim would have been avoided by the use of the Software, without such product, service or device; or (ii) Customer's use of the Software other than in accordance with this Agreement.

**7.4** The provisions of this Section 9 set forth OpsMill's sole and exclusive obligations, and Customer's sole and exclusive remedies, with respect to infringement or misappropriation of third party intellectual property rights of any kind.

#### **8. CONFIDENTIALITY.**

**8.1** As used herein, "Confidential Information" means all confidential and proprietary information of a party ("Disclosing Party") disclosed to the other party ("Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure, including the terms and conditions of this Agreement (including pricing and other terms reflected under this Agreement), the Software, Documentation, business and marketing plans, technology and technical information, product designs, and business processes. Confidential Information shall not include any information that: (i) is or becomes generally known to the public without breach of any obligation owed to Disclosing Party; (ii) was known to Receiving Party prior to its disclosure by Disclosing Party without breach of any obligation owed to Disclosing Party; (iii) was independently developed by Receiving Party without breach of any obligation owed to Disclosing Party; or (iv) is received from a third party without breach of any obligation owed to Disclosing Party.

**8.2** Receiving Party shall not disclose any Confidential Information of Disclosing Party for any purpose outside the scope of this Agreement, except with Disclosing Party's prior written consent. Receiving Party shall protect the confidentiality of Disclosing Party's Confidential Information in the same manner that it protects the confidentiality of its own confidential information of like kind (but in no event using less than reasonable care). Notwithstanding the foregoing, OpsMill may use, for its business purposes, data generated by the use of the Software in anonymized and aggregated format, where such anonymized and aggregated information cannot be tied to Customer. Receiving Party shall promptly notify Disclosing Party if it becomes aware of any actual or reasonably suspected breach of confidentiality of Disclosing Party's Confidential Information.

**8.3** If Receiving Party is compelled by law to disclose Confidential Information of Disclosing Party, it shall provide Disclosing Party with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at Disclosing Party's cost, if Disclosing Party wishes to contest the disclosure.

**8.4** Upon any termination of this Agreement, the Receiving Party shall continue to maintain the confidentiality of the Disclosing Party's Confidential Information as long as it remains confidential and, upon request, return to the Disclosing Party or destroy (at the Disclosing Party's election) all materials containing such Confidential Information.

**8.5** OpsMill will process all personally identifiable information in accordance with and complies with the EU General Data Protection Regulation 2016/679, French law no. 78-17 of 6 January 1978 (referred to as "French Data Protection Act"), and other applicable data protection laws and regulations.

## **9. LIMITATION OF LIABILITY.**

**9.1** EXCEPT (i) FOR THE PARTIES' INDEMNIFICATION OBLIGATIONS; (ii) FOR CUSTOMER'S FAILURE TO PAY ANY FEES DUE UNDER THIS AGREEMENT; (iii) IN THE EVENT OF EITHER PARTY'S UNAUTHORIZED USE, DISTRIBUTION OR DISCLOSURE OF THE OTHER PARTY'S INTELLECTUAL PROPERTY; OR (iv) EITHER PARTY'S MATERIAL BREACH OF SECTION 10 (THE "EXCLUSIONS"), IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE SUBSCRIPTION FEES PAID TO OPSMILL DURING TWELVE MONTHS PRIOR TO WHEN THE CLAIM ACCRUED. EACH PARTY'S LIABILITY FOR THE EXCLUSIONS, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, SHALL NOT EXCEED FIVE (5) TIMES THE SUBSCRIPTION FEES PAID TO OPSMILL DURING TWELVE MONTHS PRIOR TO WHEN THE CLAIM ACCRUED. IN THE EVENT CUSTOMER HAS LICENSED SOFTWARE FOR EVALUATION PURPOSES WHERE NO FEES ARE DUE, THE LIMITATION OF LIABILITY IN THE PREVIOUS SENTENCE SHALL BE \$10,000.

**9.2** IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER FOR ANY LOST PROFITS OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES HOWEVER CAUSED AND, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

## **10. TERM AND TERMINATION.**

**10.1** This Agreement commences on the Effective Date and continues until all licenses granted in accordance with this Agreement have expired or have been terminated. The term of each Order shall be as set forth therein. Each Order Form shall automatically renew at OpsMill's then-current fees unless a party provides notice to the other party of its intent to not renew at least thirty (30) days prior to the date of the renewal.

**10.2** A party may terminate this Agreement for cause: (i) upon 30 days written notice to the other party of a material breach of this Agreement if such breach remains uncured at the expiration of such period; (ii) immediately upon written notice if the other party becomes the subject of a bankruptcy, insolvency, receivership, liquidation, assignment for the benefit of creditors or similar proceeding; and (iii) as otherwise provided herein.

**10.3** The parties' rights and obligations under Sections 5, 6, 8.4, 9, 10, 11, 12.3, 12.4, and 13 shall survive termination of this Agreement.

**10.4** Within thirty (30) days after termination of this Agreement, Customer shall certify in writing to OpsMill that all copies of the Software, Updates, and Documentation in any form, including partial copies within modified versions, have been destroyed or returned to OpsMill.

## **11. General**

**11.1** The parties are independent contractors, and no partnership, franchise, joint venture, agency, fiduciary or employment relationship between the parties is created hereby. There are no third-party beneficiaries to this Agreement.

**11.2** Notices shall be in writing, sent using a recognized private mail carrier and effective on proof of delivery.

**11.3** Each party may include the other's name and logos in its customer or vendor lists.

**11.4** No amendment or waiver of any provision of this Agreement shall be effective unless in writing and signed by Customer and OpsMill. To the extent of any conflict between this Agreement and any other schedule or attachment, this Agreement shall prevail unless expressly stated otherwise. Notwithstanding any language to the contrary therein, no terms stated in a purchase order or in any other order document (other than a SOW, or other mutually executed order document expressly incorporated herein) shall be incorporated into this Agreement, and all such terms shall be void. This Agreement, which includes all documents referenced herein, statements of work and attachments hereto, represents the entire agreement of the parties, and supersedes all prior or contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter.

**11.5** No failure or delay in exercising any right hereunder shall constitute a waiver of such right. Except as otherwise provided, remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, such provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions shall remain in effect.

**11.6** Neither party shall be liable to the other for any delay or failure to perform hereunder (excluding payment obligations) due to a natural disaster, actions or decrees of governmental bodies or communications line failure which (i) hinders, delays or prevents a party in performing any of its obligations, and (ii) is beyond the control of, and without the fault or negligence of, such party, and (iii) by the exercise of reasonable diligence such party is unable to prevent or provide against ("Force Majeure Event").

**11.7** Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this Agreement in its entirety, without consent of the other party, to its successor in interest in connection with a merger, reorganization, or sale of all or substantially all assets or equity not involving a direct competitor of the other party. Any attempted assignment in breach of this Section shall be void. This Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

**11.8** Each party shall comply with all applicable export trade control laws, rules, and regulations with respect to its use of the Software, and shall comply with all restrictions imposed pursuant thereto with respect to complying with prohibitions of trade or transactions with persons

or entities whom or which may be sanctioned or blocked by virtue of being subject of an order, directive, proclamation, regulation or otherwise listed as a blocked, barred, suspended, sanctioned or prohibited person identified by such agencies and departments.

**11.10** This Agreement shall be governed exclusively by the internal laws of the state of Delaware, without regard to its conflicts of laws rules. The parties hereby consent to the exclusive jurisdiction of the state and federal courts located in Delaware, for resolution of any disputes arising out of this Agreement.