

Smarsh Subscription Service

Terms of Service

Version Date: July 6, 2015

BY CLICKING A BOX INDICATING ACCEPTANCE OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO 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, ORDER FORM (OR ANY OTHER ORDERING DOCUMENT) FOR SMARSH SERVICES PRIOR TO JULY 6, 2015, CLIENT AGREES THAT 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 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 RENEW ON THE ANNIVERSARY OF SUCH DATE ACCORDING TO THE RENEWAL TERMS OF THIS AGREEMENT.

This Smarsh Services Agreement (the “**Agreement**”) constitutes a legal, binding agreement between Smarsh Inc. (“**Smarsh**”) and the client identified in an Order Form (defined in Section 1.1) referencing this Agreement 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 Smarsh products and services. In the event 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.

1.1. *License to Services.* Subject to Client’s compliance with this Agreement, upon Client’s execution or electronic acceptance of an order form (including electronic order forms) (“**Order Form**”) for Smarsh products or services (“**Service**” or “**Services**”), Smarsh grants Client the limited, non-exclusive, non-sublicensable right to access and use the Platform (defined in 1.1.1). Smarsh will provide the professional services or premium support services specified on the Order Form or in a statement of work executed or accepted by Client (“**Professional Services**”). Professional Service descriptions are available at www.smarsh.com/wp-content/uploads/2015/06/professional-services-descriptions.pdf and Service descriptions are available at: <http://www.smarsh.com/services> (“**Service Descriptions**”) and incorporated by reference herein. Smarsh may modify the Services or the Service Descriptions from time to time, as long as the modifications do not materially, adversely affect the Services. Components of the Services include:

1.1.1. *The Archiving Platform.* Client may access the Services via the Smarsh Archiving Platform (“**Platform**”). The Platform is designed to receive data from certain third party platforms or systems. Smarsh will enable the features of the Platform which are associated with the package Client purchases. Features are set forth in the Service Descriptions.

1.1.2. *Content.* In order to enable the Platform to receive data, Client must purchase content type usage for each content type to be archived on a per-User (defined in Section 1.3) basis. A “**Content Type**” is a category of content to be archived via the Service, such as email or LinkedIn content, and the “**Content Usage**” is the total Users purchased by Client under an Order Form, per each Content Type.

1.1.3. *Functionality/Feature Add-Ons.* Client may purchase certain enhanced functionality packages. Enhanced functionality descriptions are set forth in the Service Description.

1.2. *Client Data Definition and License.* “**Client Data**” means the data which is transmitted to the Platform by or on behalf of Client. Client represents and warrants that Client has all necessary rights in and to the Client Data to

grant the foregoing license to Smarsh. 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, or as otherwise authorized hereunder. Client acknowledges and agrees that Platform usage data is not considered Client Data.

- 1.3. *User Definitions.* Client may designate different types of users with different access privileges. “**Authorized User**” is the administrative user(s) who have the highest level of access and are responsible for managing the Service 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, agree to modifications to this Agreement or take other, similar actions. “**Supervision User**” is an individual who uses the Service to review Client Data. “**User**” a user is the individual account within each platform or system for which Client Data is received by the Platform. A User is one of the following (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 or phone number; (e) in the case of Software, a single device, server or other equipment; or (g) any other usage metric described in an Order Form. Users may be designated as either a “**Historical User**” or an “**Active User.**” A “**Historical User**” is a User for which the Platform is not actively receiving Client Data, as determined by Smarsh’s automatic user monitoring processes. An “**Active User**” is a User for which the Platform is actively receiving Client Data, as determined by Smarsh’s automatic user monitoring processes. An Authorized User may remove any Active User or Historical User at the Authorized User’s discretion; provided that, removing a Historical User requires the deletion of all data associated with the User account. Client is solely responsible for ensuring that deletion of any User complies with all applicable legal, regulatory or internal requirements.
- 1.4. *Professional Services.* Smarsh will provide Client with the professional services or premium support services specified on the Order Form or statement of work, according to any additional terms agreed to by the parties in the Order Form or statement of work and the terms of the Smarsh Professional Services Agreement located here: <http://www.smarsh.com/professional-services-agreement>.
- 1.5. *Support.* Smarsh will provide the level of support applicable to the Services package purchased by Client or the applicable support policy. Client may find support FAQ’s, or initiate support requests by submitting support tickets here: <http://www.smarsh.com/support/>. Support will be provided according to the Support documentation and Service Level Agreement applicable to the Service, located at <http://www.smarsh.com/legal/>. Premium support services may be purchased by Client as a Professional Service. Smarsh reserves the right to limit the number of Authorized Users who may contact 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.
- 1.6. *Service Activation.* Following execution of the Order Form, Smarsh will activate the Service by providing Client with access to an account within the applicable Service (“**Activation Date**”). Client is responsible for (a) providing Smarsh with any historical data to be archived in a format acceptable to Smarsh; (b) configuring applicable third party platforms or systems to transmit Client Data to the Platform; and (c) installing and configuring any Software (if applicable, and as defined in Section 6.2) to Client servers, equipment, laptops or handheld devices.
- 1.7. *Data Retention.* Smarsh will retain all Client Data for the Term of the Agreement, unless Client requests or implements specific retention policies within the 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. Following termination or expiration of this Agreement, Smarsh will retain Client Data for a minimum of six (6) months. Thereafter, Smarsh reserves the right, in its sole discretion, to delete Client Data.
- 1.8. *Representatives.* Client may provide Representatives with access to the Services, may purchase Services on behalf of Representatives, or Client may be required to review Representative communications and may use the

Services to meet such requirement. A “**Representative**” means any entity which Client purchases Services on behalf of, or an entity for which Client archives data via the Services. Subject to the terms of this Agreement, Client may provide access to, or use of, the Services to Representatives. Representatives use of the Services is subject to the terms of this Agreement.

- 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. Fees & Payment Terms.

- 2.1. *Types of Fees.* Client will pay Smarsh the fees set forth in the Order Form (“**Fees**”). Fees may include Platform Fees, Content Usage Fees, One-Time Fees, Added Functionality Fees or Professional Service Fees. One-Time Fees are one time set up or data import fees (“**One-Time Fees**”). Platform Fees are the Fees charged for access to the Platform. (“**Platform Fees**”). Content Usage Fees are the Fees that are charged to archive a specific Content Type on a per-User basis (“**Content Usage Fees**”). Added Functionality Fees are those Fees charged for any functionality add-ons purchased (“**Added Functionality Fees**”). Professional Services Fees are the fees for hourly, monthly or flat rate professional services (“**Professional Service Fees**”). Smarsh reserves the right to increase Fees at any time following the Initial Term.
- 2.2. *Minimum Commitment.* Client’s total minimum purchase commitment for the applicable Service during the Term (as defined in Section 7.1) is either the sum of the monthly Content Usage Fees, Added Functionality Fees, and the Platform Fee, or the total of the other usage metric specified on the applicable Order Form. With respect to Content Usage Fees or other usage metric, the minimum commitment will be the greater of the minimum commitment specified on the Order Form or the actual Content Usage (or other usage metric) as of Activation Date.
- 2.3. *Payment of Fees.* Beginning on the Activation Date, Smarsh will invoice Client for the Platform Fees, any Added Functionality Fees, and Content Usage Fees according to the invoice schedule specified on the Order Form. One-Time Fees are invoiced upon execution of the Order Form. Professional Services will be invoiced according to the terms of the Professional Service Agreement: <http://www.smarsh.com/professional-services-agreement>. 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 suspend Client’s access to the Services in the event Client fails to pay the Fees when due.
- 2.4. *Content Type Review.* Smarsh may review Client’s account within the Service to compare the number of Users of the Services within each Content Usage in the Order Form. If the number of Users exceeds the applicable Content Usage, Smarsh will invoice and Client will pay the additional Content Usage Fees due for such usage for all periods in which Client’s actual usage exceeded the allowable Content Usage.
- 2.5. *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. Client Responsibilities; Client Use of Services.

- 3.1. *Accounts.* 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. The Services may only be used by Client's authorized employees, agents or contractors in the performance of their duties to Client. 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 or not such person is or was acting within the scope of their employment, engagement or agency relationship.
- 3.2. *Acceptable Use of Services.* Client will comply with Smarsh's Acceptable Use Policy available at <http://www.smarsh.com/legal-acceptable-use-policy>. 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 such content 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 and 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 (as Client's agent) in violation of any website terms and conditions included on the website.
- 3.3. *Client Data Transmission.* It is Client's sole responsibility to monitor Client Data to be transmitted to the Platform 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 Platform. It is Client's responsibility to ensure that Smarsh is notified of all Users to be archived.
- 3.4. *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 3. 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.

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) the 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 recipient of Confidential Information.

5. Intellectual Property. As between Smarsh and Client, all server hardware, technology, software (including the Software) and applications required to operate the Services, other associated technology or documentation, data regarding the use of the Platform or 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 in Section 1.2, nothing in this Agreement will serve to transfer to Smarsh any intellectual property rights in the Client Data.

6. Third Party Services; Software.

- 6.1. *Third Party Services.* Certain Services offered by Smarsh may be dependent on third party software, applications, platforms (such as third party social media or business networking platforms), systems, messaging or communication services or API's (“**Third Party Services**”). These Third Party Services are not offered, controlled or provided by Smarsh. In some cases the Third Party Service may make changes to its service, or components thereof, or discontinue a service without notice to Smarsh. Accordingly, Smarsh expressly disclaims any liability related to, or arising from, these Third Party Services, including Client's use thereof, or any updates, modifications, outages, delivery failures, corruptions, discontinuance of services or termination of Client's account by the Third Party Service. Smarsh is not responsible or liable for how the Third Party Service transmits, accesses, processes, stores, uses or provides data to Smarsh. Client is solely responsible for complying with any Third Party Services terms and conditions. In order to integrate the 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 order to receive Client Data. In such cases, in order 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.
- 6.2. *Software.* Certain Services require Client to install data capture or other 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 the Software not expressly granted to Client. If Software is provided to Client by Smarsh, 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 Content Usage, 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 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 according to 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 6.2, and the obligation to provide support, do not apply to any software which is not provided by Smarsh or which is licensed by Client directly with the 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 Resale License terms located at <http://www.smarsh.com/legal/>. In the case of a conflict between the Software Terms and this Agreement, the Software Terms will apply.

7. Term.

- 7.1. *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, 12 months (“**Initial Term**”). The Initial Term will renew automatically for additional, successive 12 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 Renewal Term. The Initial Term plus any Renewal Term are, collectively, the “**Term.**” Any Order Form or other purchase of Services effected subsequent to the Effective Date will co-terminate with the then current Term and be subject to any renewals thereof.
- 7.2. *Termination for Breach.* Either party may terminate this Agreement if the other party materially breaches its obligations under this Agreement and the breach remains uncured for a period of thirty (30) days following the non-breaching party’s written notice of the breach 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.
- 7.3. *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.
- 7.4. *Effect of Termination.* Upon any termination or expiration the Agreement: (a) all rights and licenses to the Services 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 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.

8. Warranties; Disclaimers of Warranties.

- 8.1. *Performance Warranty.* Smarsh represents and warrants that it will provide the Services in accordance with generally accepted industry standards.
- 8.2. *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 to.
- 8.3. *Compliance with Laws.* Smarsh warrants that it will comply with the laws and regulations applicable to Smarsh's business.
- 8.4. *Disclaimer of Warranty.* EXCEPT AS SET FORTH IN SECTIONS 8.1 — 8.3 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.

9. Remedies; Limitations of Remedies.

- 9.1. *Remedies.* In the event of a breach of any warranty under Section 8, 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 8.
- 9.2. *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.

- 9.3. 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.

10. Indemnification.

- 10.1. 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) or (b) are commercially feasible, then Smarsh may upon thirty (30) days prior written notice to Client, terminate the applicable Service.
- 10.2. The indemnification obligation contained in this Section 10, will be Client's sole remedy, and Smarsh's sole obligation, with respect to claim of infringement.

11. General Provisions.

- 11.1. *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.

- 11.2. *U.S. Government End User Provisions.* Smarsh provides the Services to federal government end users solely in accordance with the following: government technical data and software rights related to the Services include only those rights customarily provided to the public as defined in this Agreement. This customary commercial license is provided in accordance with FAR 12.211 (Technical Data) and FAR 12.212 (Software) and, for Department of Defense transactions, DFAR 252.227-7015 (Technical Data – Commercial Items) and DFAR 227.7202–3 (Rights in Commercial Computer Software or Computer Software Documentation). Software and its accompanying documentation are "commercial computer software" and "commercial computer software documentation," respectively, pursuant to DFAR Section 227.7202 and FAR Section 12.212, as applicable. Any use, modification, reproduction, release, performance, display or disclosure of the Software and accompanying documentation by the United States Government will be governed solely by the terms of this Agreement and is prohibited except to the extent expressly permitted by the terms of this Agreement. If a government agency has a need for rights not conveyed under these terms, it must negotiate with Smarsh to determine if there are acceptable terms for transferring such rights, and a mutually acceptable written addendum specifically conveying such rights must be included in any applicable contract or agreement.
- 11.3. *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.
- 11.4. *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.
- 11.5. *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.
- 11.6. *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.
- 11.7. *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.
- 11.8. *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.

- 11.9. *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.
- 11.10. *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 affect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.
- 11.11. *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.
- 11.12. *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.
- 11.13. *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.

11.14. **WHERE CLIENT IS LOCATED IN EUROPE THE FOLLOWING TERMS APPLY:**

11.14.1. Section 9.2 and 9.3 of this Agreement are replaced with the following Sections 9.2, 9.3 and the addition of 9.4:

"9.2 Subject to 9.4, 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.

9.3 Subject to Sections 9.2 and 9.4, 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.

9.4 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."

11.14.2. Client appoints Smarsh as data processor of Client Data. Smarsh will not assume any responsibility for determining the purposes for which and the manner in which Client Data is processed, and Client will comply with those applicable legal obligations as a data controller. "Data controller" and "data processor" have the meanings assigned to them in the EU Data Protection Directive 95/46/EC.

11.14.3. Section 11.5 is replaced with the following:

“11.5 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.”