

# Master Services Agreement (MSA)

[Updated: 3/10/2020](#)

This Master Services Agreement (the "MSA" or "Agreement") is between Fluid Networks, a California corporation with its principal place of business located at 80 North Wood Road, Suites 308/312, Camarillo, CA 93010 ("us", "our", "we" or "Fluid"), and Customer ("you", "your", "Client" or "Customer"). Collectively, these two entities are known as "the Parties".

WHEREAS, Fluid Networks is in the business of providing technology outsourcing and consulting services;

WHEREAS, Customer desires to engage Fluid Networks to perform Services and/or purchase or license certain Products as defined herein; and

WHEREAS, the Parties shall recognize their respective roles and responsibilities for technical, administrative and physical requirements to protect the confidentiality, integrity and availability of the data in accordance with all relevant laws, regulations and industry standards.

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements contained herein, the Parties have agreed to do as follows:

## 1. SCOPE OF SERVICES; SOW.

This Agreement governs all services we perform for you (collectively, the "Services"). The Services will be described in one or more statements of work we provide to you (each, a "SOW"), and once you and we mutually agree to a SOW (either by signing it or by electronic acceptance), the SOW will become a part of, and governed under, the terms of this Agreement. If there is a material difference between the language in a SOW and the language in this Agreement, then the language of the SOW will control, except in situations involving warranties, limitations of liability or termination of this Agreement. Under those limited circumstances, the terms of this Agreement will control unless the SOW expressly states it is overriding the conflicting provisions of this Agreement.

## **2. GENERAL REQUIREMENTS.**

### **2.1. System / Seat Configuration.**

For the purposes of this Agreement, “System” means, collectively, any computer network, computer system, peripheral or device installed, maintained, monitored or operated by Fluid pursuant to this Agreement; and, “Seats” means the number of users authorized to use and/or access simultaneously an applicable software application. Our fees are based upon the total number of supported User Seats (as applicable) as of the effective date of the applicable SOW.

If the quantity of Seats changes for any reason, then we will adjust the scope of services and/or the fees charged to you under the applicable SOW to accommodate those changes.

### **2.2. Requirements.**

At all times, all software on the System must be genuine and licensed, and you agree to provide us with proof of such licensing upon our request. If we require you to implement certain minimum hardware or software requirements in a SOW (“Minimum Requirements”), you agree to do so as an ongoing requirement of Fluid providing its Services to you.

### **2.3. Maintenance; Updates.**

If patches and other software-related maintenance updates (“Updates”) are to be provided by Fluid under a SOW, Fluid will install the Updates only if Fluid has determined, in its reasonable discretion, the Updates will be compatible with the particular configuration of the System and materially beneficial to the features or functionality of the applicable software or hardware.

Fluid will not be responsible for any downtime or losses arising from or related to the installation or use of any Update, provided the Update was installed in accordance with the manufacturer’s or applicable vendor’s instructions.

### **2.4. Third Party Support.**

If, in Fluid’s discretion, a hardware or software issue requires vendor or OEM support, Fluid may contact the vendor or OEM (as applicable) on your behalf and pass through to you, without markup, all fees and costs incurred in that process. If such fees or costs are anticipated in advance or exceed \$150, Fluid will obtain your permission before incurring such expenses on your behalf unless exigent circumstances require otherwise.

## **2.5. Insurance.**

If you are supplied with Fluid Equipment, you agree to acquire and maintain, at your sole cost, insurance for the full replacement value of that equipment. Fluid shall be listed as an additional insured on any policy acquired and maintained by you hereunder, and the policy shall not be canceled or modified during the term of the applicable SOW without prior notification to Fluid.

Upon Fluid's request, you agree to provide proof of insurance to Fluid, including proof of payment of any applicable premiums or other amounts due thereunder.

## **2.6. Advice; Instructions.**

From time to time, we may provide you with specific advice and directions related to our provision of the Services or the maintenance or administration of the System. (For illustrative purposes, such advice or directions may include installing cooling mechanisms or environmental controls in a server room, increasing the System's server or hard drive capacity, replacing obsolete equipment, etc.). You agree to promptly follow and implement any directions we provide to you related to the Services which, depending on the situation, may require you to make additional purchases or investments in the System or the environment in which the System is maintained, at your sole cost. Fluid will not be responsible for any System downtime caused by your failure to promptly follow Fluid's advice or directions. If your failure to follow or implement Fluid's advice renders part or all of the Services economically or technically unreasonable in Fluid's discretion, then Fluid may terminate the applicable SOW for cause by providing notice of termination to you. Any services required to correct or remediate issues caused by your failure to follow Fluid's advice or directions, as well as any services required to bring the System up to the Minimum Requirements, will be billed to you at Fluid's then-current hourly rates.

## **2.7. Prioritization.**

Unless otherwise stated in a SOW, all Services will be performed on a schedule, and in a prioritized manner, as determined by Fluid.

## **2.8. Authorized Contact(s).**

You understand and agree Fluid will be entitled to rely on any directions or consent provided by your personnel or representatives who are authorized in a SOW to provide such directions or consent ("Authorized Contacts"). If no Authorized Contact is identified in an applicable SOW, then your Authorized Contact will be the person(s) (i) who signed this Agreement, and/or (ii) who signed the applicable SOW. If you desire to change your Authorized Contact(s), please notify Fluid of such changes in writing which, unless exigent circumstances are stated in the notice, will take effect three (3) business days thereafter.

### **3. FEES; PAYMENT.**

You agree to pay the fees described in each SOW. If the SOW does not include a fee schedule, then you agree to pay Fluid on an hourly basis pursuant to Fluid's standard hourly rate schedule, which will be provided to you prior to the commencement of Services.

#### **3.1. Schedule.**

Unless otherwise stated in a SOW, all undisputed fees will be due and payable in advance of the calendar month in which the Services are to be provided to you. If applicable, payments made by ACH will be deducted from your designated bank account on the first business day of the month in which the Services are to be provided. For prepaid fees or fees paid pursuant to a service plan, payment must be made in advance of work performed, unless other arrangements are expressly stated in the SOW.

#### **3.2. Nonpayment.**

Fees that remain unpaid for more than thirty (30) days after the date on the invoice will be subject to interest on the unpaid amount(s) until and including the date payment is received, at the lower of either 1.5% per month or the maximum allowable rate of interest permitted by applicable law. Fluid reserves the right, but not the obligation, to suspend part or all of the Services without prior notice to you in the event any portion of undisputed fees are not timely received by Fluid. Notice of disputes related to fees must be received by us within sixty (60) days after the applicable Service is rendered or the date on which you pay an invoice, whichever is later; otherwise, you waive your right to dispute the fee thereafter. A re-connect fee may be charged to you in the event Fluid suspends the Services due to your nonpayment. Time is of the essence in the performance of all payment obligations by you.

### **4. ACCESS.**

You hereby grant to Fluid the right to monitor, diagnose, manipulate, communicate with, retrieve information from, and otherwise access the System for the purpose of enabling Fluid to provide the Services. It is your responsibility to secure, at your own cost and prior to the commencement of any Services, any necessary rights of entry, licenses, permits or other permissions necessary for Fluid to provide Services to the System and, if applicable, at your designated premises.

## 5. LIMITED WARRANTIES; LIMITATIONS OF LIABILITY.

### 5.1. Hardware / Software Purchased Through Fluid

Unless otherwise stated in a SOW, all hardware, software, peripherals or accessories purchased through Fluid ("Third Party Products") are nonrefundable once the applicable purchase order is placed in Fluid's queue for delivery. We will use reasonable efforts to assign, transfer and facilitate all warranties (if any) and service level commitments (if any) for the Third Party Products to you, but will have no liability whatsoever for the quality, functionality or operability of any Third Party Products, and we will not be held liable as an insurer or guarantor of the performance, uptime or usefulness of any Third Party Products. Unless otherwise expressly stated in a SOW, all Third-Party Products are provided "as is" and without any warranty whatsoever as between Fluid and you (including but not limited to implied warranties).

### 5.2. Warranty Application.

Notwithstanding any provision to the contrary in this Agreement, any warranty provided by Fluid shall be deemed null and void if the applicable hardware or product is (i) altered, modified or repaired by persons other than Fluid, including, without limitation, the installation of any attachments, features, or devices not supplied or approved by Fluid; (ii) misused, abused, or not operated in accordance with the specifications of Fluid or the applicable manufacturer or creator of the hardware or product, or, (3) subjected to improper site preparation or maintenance by persons other than Fluid or persons approved or designated by Fluid.

### 5.3. Liability Limitations.

**This paragraph limits the liabilities arising under this Agreement or any SOW, and is a bargained-for and material part of this Agreement.** In no event shall either party be liable for any indirect, special, exemplary, consequential or punitive damages, or for lost revenue, loss of profits (except for fees due and owing to Fluid), savings, or other indirect or contingent event-based economic loss arising out of or in connection with this Agreement, any SOW, or the Services, or for any loss or interruption of data, technology or services, or for any breach hereof or for any damages caused by any delay in furnishing Services under this Agreement or any SOW, even if a party has been advised of the possibility of such damages. Except for your payment obligations and your indemnification obligations described in this Agreement, a responsible party's ("Responsible Party's") aggregate liability to the other party ("Aggrieved Party") for damages from any and all claims or causes whatsoever, and regardless of the form of any such action(s), that arise from or relate to this Agreement (collectively, "Claims"), whether in contract, tort, indemnification, or negligence, shall be limited solely to the amount of the Aggrieved Party's actual and direct damages, not to exceed the amount of fees paid by you to Fluid for the specific Service upon which the applicable claim(s) is/are based during the three (3) month period immediately prior to the date on which the cause of action accrued. The

foregoing limitation shall not apply to the extent that the Claims are caused by a Responsible Party's willful or intentional misconduct, or gross negligence. Similarly, a Responsible Party's liability obligation shall be reduced to the extent that a Claim is caused by, or the result of, the Aggrieved Party's willful or intentional misconduct, or gross negligence.

## **6. INDEMNIFICATION.**

You agree to indemnify, defend and hold Fluid harmless from and against any and all losses, damages, costs, expenses or liabilities, including reasonable attorneys' fees, (collectively, "Damages") that arise from, or are related to, your breach of this Agreement, or which relate to any act or omission undertaken or caused by you. The foregoing indemnification obligation includes Damages arising out of any alleged infringement of copyrights, patent rights and/or the unauthorized or unlicensed use of any material, property or other work in connection with the performance of the Services. Fluid will have the right, but not the obligation, to control the intake, defense and disposition of any claim or cause of action for which indemnity may be sought under this section. No claim for which indemnity is sought by Fluid will be settled without Fluid's prior written consent, which shall not be unreasonably delayed or withheld.

## **7. TERM; TERMINATION.**

This Agreement will begin as of the latest date of the signatures of the parties below, and will continue until terminated as described in this Section. Additionally, each SOW will have its own term, and will be terminated only as provided herein, unless otherwise expressly stated in the applicable SOW. The termination of one SOW shall not, by itself, cause the termination of (or otherwise impact) the status or progress of any other SOW between the parties.

### **7.1. Termination Without Cause.**

Unless otherwise agreed by the parties in writing, no party will terminate a SOW without cause prior to the SOW's natural expiration date. If you terminate a SOW without cause, then you will be responsible for paying the early termination fee described in the applicable SOW. If no early termination fee is listed, then prior to the effective date of termination of the SOW or this Agreement (as applicable) without cause, you agree to pay Fluid an amount equal to (i) all expenses incurred by Fluid in its preparation and provision of the Services to you, *e.g.*, licensing fees incurred by Fluid, non-mitigatable hard costs, etc. ("Hard Costs"), as well as (ii) seventy-five percent (75%) of all fees that would have been paid to Fluid had the term not been terminated prematurely. Without limiting the foregoing and unless a SOW provides otherwise, any month-to-month SOW may be terminated without cause only upon the provision of sixty (60) days prior written notice to the non-terminating party.

## 7.2. Termination for Cause.

In the event that one party (a “Defaulting Party”) commits a material breach under a SOW or under this Agreement, the non-Defaulting Party will have the right, but not the obligation, to terminate immediately this Agreement or the relevant SOW (a “For Cause” termination) provided (i) the non-Defaulting Party has notified the Defaulting Party of the specific details of the breach in writing, and (ii) the Defaulting Party has not cured the default within thirty (30) days, fifteen (15) days for non-payment by Client) following receipt of written notice of breach from the non-Defaulting Party. If Fluid terminates this Agreement or any SOW For Cause, then Fluid shall be entitled to receive, and you hereby agree to pay to Fluid, (i) all amounts that would have been paid to Fluid had this Agreement or SOW (as applicable) remained in effect, and (ii) all Hard Costs. If you terminate this Agreement or a SOW for cause, then you will be responsible for paying only for those services that were properly delivered and accepted by you up to the effective date of termination.

## 7.3. Client Activity as A Basis for Termination

In the event that any Client-supplied equipment, hardware or software, or any action undertaken by you, causes the System or any part of the System to malfunction or requires remediation by Fluid on three (3) occasions or more (“System Malfunction”), and you fail to remedy, repair or replace the System Malfunction as directed by Fluid (or you fail to cease the activity causing the System Malfunction, as applicable), then Fluid will have the right, upon ten (10) days prior written notice to you, to terminate this Agreement or the applicable SOW For Cause or, at Fluid’s discretion, amend the applicable SOW to eliminate from coverage any System Malfunction or any equipment or software causing the System Malfunction.

## 7.4. Consent.

You and we may mutually consent, in writing, to terminate a SOW or this Agreement at any time.

## 7.5. Equipment / Software Removal.

Upon termination of this Agreement for any reason, you will provide Fluid with access, during normal business hours, to your premises or any other locations at which Fluid-owned equipment or software (collectively, “Fluid Equipment”) is located to enable Fluid to remove all Fluid Equipment from the premises. If you fail or refuse to grant Fluid access as described herein, or if any of the Fluid Equipment is missing, broken or damaged (normal wear and tear excepted) or any of Fluid-supplied software is missing, Fluid will have the right to invoice you for, and you hereby agree to pay immediately, the full replacement value of any and all missing or damaged items.

## 7.6. Transition; Deletion of Data.

In the event that you request Fluid's assistance to transition to a new service provider, Fluid will provide such assistance if (i) all fees due and owing to Fluid are paid to Fluid in full prior to Fluid providing its assistance to you, and (ii) you agree to pay Fluid its then-current hourly rate for such assistance, with up-front amounts to be paid to Fluid as may be required by Fluid. For the purposes of clarity, it is understood and agreed the retrieval and provision of passwords, log files, administrative server information, or conversion of data are transition services, and are subject to the preceding requirements. **Unless otherwise expressly stated in a SOW, Fluid will have no obligation to store or maintain any Client data in Fluid's possession or control beyond fifteen (15) calendar days following the termination of this Agreement.**

Fluid will be held harmless for, and indemnified by you against, any and all claims, costs, fees, or expenses incurred by either party that arise from, or are related to, Fluid's deletion of your data beyond the time frames described in this section.

## 8. RESPONSE; REPORTING.

### 8.1. Response.

Fluid warrants and represents that Fluid will provide the Services, and respond to any notification received by Fluid of any error, outage, alarm or alert pertaining to the System, in the manner and within the time period(s) designated in an applicable SOW ("Response Time"), except for (i) those periods of time covered under the Onboarding Exception (defined below), or (ii) periods of delay caused by Client-Side Downtime (defined below), or (iii) periods in which Fluid is required to suspend the Services to protect the security or integrity of your System or Fluid's equipment or network, or (iv) delays caused by a force majeure event.

#### 8.1.1. Scheduled Downtime.

For the purposes of this Agreement, Scheduled Downtime will mean those hours, as determined by Fluid but which will not occur between the hours of 9 AM and 5:30 PM PST (or PDT, as applicable), Monday through Friday without your authorization or unless exigent circumstances exist, during which time Fluid will perform scheduled maintenance or adjustments to its network. Fluid will use its best efforts to provide you with at least twenty-four (24) hours of notice prior to scheduling Scheduled Downtime.

#### 8.1.2. Client-Side Downtime.

Fluid will not be responsible under any circumstances for any delays or deficiencies in the provision of, or access to, the Services to the extent that such delays or deficiencies are caused by your actions or omissions ("Client-Side Downtime").

### **8.1.3. Remedies; Limitations.**

Except for the Onboarding Exception, if Fluid fails to meet its service level commitment in a given calendar month and if, under such circumstances, Fluid's failure is not due to your activities, omissions, or inactivity, then upon receiving your written request for credit, Fluid will issue you a pro-rated credit in an amount equal to the period of time of the outage and/or service failure. All requests for credit must be made by you no later than thirty (30) days after you either (i) report the outage or service failure to Fluid, or (ii) if applicable, receive a monthly report showing the outage and/or failure. The remedies contained in this paragraph are in lieu of (and are to the exclusion of) any and all other remedies that might otherwise be available to you for Fluid's failure to meet any service level commitment during the term of this Agreement.

## **8.2. Onboarding Exception.**

You acknowledge and agree that for the first sixty (60) days following the commencement date of a SOW, the Response Time commitments described in this Agreement will not apply to Fluid, it being understood there may be unanticipated downtime or delays due to Fluid's initial startup activities with you (the "Onboarding Exception").

## **9. CONFIDENTIALITY.**

### **9.1. Defined.**

For the purposes of this Agreement, Confidential Information means any and all non-public information provided to Fluid by you, including but not limited to your customer data, customer lists, internal documents, and related information. Confidential Information will not include information that: (i) has become part of the public domain through no act or omission of Fluid, (ii) was developed independently by Fluid, or (iii) is or was lawfully and independently provided to Fluid prior to disclosure by you, from a third party who is not and was not subject to an obligation of confidentiality or otherwise prohibited from transmitting such information.

### **9.2. Use.**

Fluid will keep your Confidential Information confidential, and will not use or disclose such information to any third party for any purpose except (i) as expressly authorized by you in writing, or (ii) as needed to fulfill Fluid's obligations under this Agreement. If Fluid is required to disclose the Confidential Information to any third party as described in part (ii) of the preceding sentence, then Fluid will ensure that such third party is required, by written agreement, to keep the information confidential under terms that are at least as restrictive as those stated in this [Section 9](#).

## 9.3. Due Care.

Fluid will exercise the same degree of care with respect to the Confidential Information it receives from you as Fluid normally takes to safeguard and preserve its own confidential and proprietary information, which in all cases will be at least a commercially reasonable level of care.

## 9.4. Compelled Disclosure.

If Fluid is legally compelled (whether by deposition, interrogatory, request for documents, subpoena, civil investigation, demand or similar process) to disclose any of the Confidential Information, Fluid will immediately notify you in writing of such requirement so you may seek a protective order or other appropriate remedy and/or waive Fluid's compliance with the provisions of this [Section 9](#). Fluid will use its best efforts, at your expense, to obtain or assist you in obtaining any such protective order. Failing the entry of a protective order or the receipt of a waiver hereunder, Fluid may disclose, without liability hereunder, that portion (and only that portion) of the Confidential Information Fluid has been advised by written opinion of counsel reasonably acceptable to Fluid it is legally compelled to disclose.

# 10. THIRD-PARTY SERVICES.

## 10.1. EULAs.

Portions of the Services may require you to accept the terms of one or more third party end user license agreements ("EULAs"). EULAs may contain service levels, warranties and/or liability limitations different than those contained in this Agreement. You agree to be bound by the terms of such EULAs and will look only to the applicable third-party provider for the enforcement of the terms of such EULAs. If, while providing the Services, Fluid is required to comply with a third-party EULA and the third party EULA is modified or amended, Fluid reserves the right to modify or amend any applicable SOW with you to ensure Fluid's continued compliance with the terms of the third party EULA.

## 10.2. Third Party Services.

Portions of the Services may be acquired from, or rely upon the services of, third party manufacturers or providers, such as data hosting services, domain registration services, and data backup/recovery services ("Third Party Service"). Fluid will not be responsible, and will be held harmless, for the failure of any third-party provider or manufacturer to provide Third Party Services to Fluid or you.

## 10.3. Data Loss.

Under no circumstances will Fluid be responsible for any data lost, corrupted or rendered unreadable due to (i) communication and/or transmissions errors or related failures, (ii) equipment failures (including but not limited to silent hardware corruption-related issues), or (iii) Fluid's failure to backup or secure data from portions of the System not expressly designated in the applicable SOW as requiring backup or recovery services.

## 10.4. BYOD.

You hereby represent and warrant Fluid is authorized to provide the Services to all devices, peripherals and/or computer processing units, including mobile devices (such as notebook computers, smart phones and tablet computers) (i) connected to the System, and (ii) have been designated by you to receive the Services, regardless of whether such device(s) are owned, leased or otherwise controlled by you. Unless otherwise stated in a SOW, devices will not receive or benefit from the Services while the devices are detached from or unconnected to the System. You understand that by connecting a device to the System (wirelessly or otherwise) without Fluid's knowledge or consent, the security of the System may be compromised and/or made vulnerable to hackers, malware, or related threats. Fluid will not be responsible for errors, issues or downtime arising from or related to the use or attachment of mobile devices or external peripherals to the System unless such use or attachment was directed or authorized by Fluid. Any remedial work required to correct System issues, errors, or downtime due to the connection of mobile devices or external devices to the System will be billed at Fluid's then-current hourly rates.

## 11. OWNERSHIP.

Each party is, and will remain, the owner and/or licensor of all works of authorship, patents, trademarks, copyrights and other intellectual property owned or licensed by such party ("Intellectual Property"), and nothing in this Agreement or any SOW shall be deemed to convey or grant any ownership rights in one party's Intellectual Property to the other party.

## 12. ARBITRATION.

If the parties are unable to resolve a dispute informally, the dispute will be settled by final and binding arbitration. The arbitration will be initiated and conducted according to the JAMS Comprehensive Arbitration Rules and Procedures (except as modified herein) including the Optional Expedited Arbitration Procedures and Optional Appeal Procedure, in effect at the time the request for arbitration is made (the "Rules"). In the event of any inconsistency between the Rules and the procedures set forth below, the procedures set forth below will control. The arbitrator, and not any federal, state, or local court or agency, will have exclusive authority to resolve any dispute relating to the interpretation, enforceability or formation of this Agreement

including, but not limited to any claim that all or any part of the Agreement is void or voidable. The arbitration shall be heard by a single arbitrator, to be selected by the parties and experienced in contract, intellectual property and information technology transactions. If the parties cannot agree on an arbitrator within fifteen (15) days after a demand for arbitration is filed, JAMS shall select the arbitrator. The arbitration shall take place in the venue described in Section 13, below. The arbitrator shall determine the scope of discovery in the matter, however, it is the intent of the parties any discovery proceedings be limited to the specific issues in the applicable matter, and that discovery be tailored to fulfill that intent. The cost of the arbitration shall be split evenly between the parties; however, the party prevailing in the arbitration shall be entitled to an award of its reasonable attorneys' fees and costs.

## **13. MISCELLANEOUS.**

### **13.1. Assignment.**

Neither this Agreement nor any SOW may be assigned or transferred by a party without the prior written consent of the other party. This Agreement will be binding upon and inure to the benefit of the parties hereto, their legal representatives, and permitted successors and assigns. Notwithstanding the foregoing, Fluid may assign its rights and obligations hereunder to a successor in ownership in connection with any merger, consolidation, or sale of substantially all of the assets of the business of Fluid, or any other transaction in which ownership of more than fifty percent (50%) of Fluid's voting securities are transferred; provided, however, such assignee expressly assumes Fluid's obligations hereunder.

### **13.2. Amendment.**

No amendment or modification of this Agreement or any SOW will be valid or binding upon the parties unless such amendment or modification is originated in writing by Fluid, specifically refers to this Agreement.

### **13.3. Time Limitations.**

The parties mutually agree any action for any matter arising out of this Agreement or any SOW (except for issues of nonpayment by Client) must be commenced within six (6) months after the cause of action accrues or the action is forever barred.

### **13.4. Severability.**

If any provision hereof or any SOW is declared invalid by a court of competent jurisdiction, such provision will be ineffective only to the extent of such invalidity, illegibility or unenforceability so the remainder of that provision and all remaining provisions of this Agreement or any SOW will be valid and enforceable to the fullest extent permitted by applicable law.

## **13.5. Other Terms.**

Fluid will not be bound by any terms or conditions printed on any purchase order, invoice, memorandum, or other written communication between the parties unless such terms or conditions are incorporated into a duly executed SOW.

## **13.6. No Waiver.**

The failure of either party to enforce or insist upon compliance with any of the terms and conditions of this Agreement, the temporary or recurring waiver of any term or condition of this Agreement, or the granting of an extension of the time for performance, will not constitute an Agreement to waive such terms with respect to any other occurrences.

## **13.7. Merger.**

This Agreement, together with any and all SOWs, sets forth the entire understanding of the parties and supersedes any and all prior agreements, arrangements or understandings related to the Services, and no representation, promise, inducement or statement of intention has been made by either party which is not embodied herein. Any document that is not expressly and specifically incorporated into this Agreement or SOW will act only to provide illustrations or descriptions of Services to be provided, and will not act to modify this Agreement or provide binding contractual language between the parties. Fluid will not be bound by any agents' or employees' representations, promises or inducements not explicitly set forth herein.

## **13.8. Force Majeure.**

Fluid will not be liable to you for delays or failures to perform Fluid's obligations under this Agreement or any SOW because of circumstances beyond Fluid's reasonable control. Such circumstances include, but will not be limited to, any intentional or negligent act committed by you, or any acts or omissions of any governmental authority, natural disaster, act of a public enemy, acts of terrorism, riot, sabotage, disputes or differences with workmen, power failure, communications delays/outages, delays in transportation or deliveries of supplies or materials, cyberwarfare, cyberterrorism, or hacking, malware or virus-related incidents that circumvent then-current anti-virus or anti-malware software, and acts of God.

## **13.9. Non-Solicitation.**

You acknowledge and agree that during the term of this Agreement and for a period of one (1) year following the termination of this Agreement, you will not, individually or in conjunction with others, directly or indirectly solicit, induce or influence any of Fluid's employees or subcontractors to discontinue or reduce the scope of their business relationship with Fluid, or

recruit, solicit or otherwise influence any employee or agent of Fluid to discontinue such employment or agency relationship with Fluid. In the event you violate the terms of the restrictive covenants in this Section 13(i), you acknowledge and agree the damages to Fluid would be difficult or impracticable to determine, and you agree that in such event, as Fluid's sole and exclusive remedy therefore, you will pay Fluid as liquidated damages and not as a penalty an amount equal to ninety-five percent (95%) percent of that employee or subcontractor's first year of base salary with you (including any signing bonus). In addition to and without limitation of the foregoing, any solicitation or attempted solicitation for employment directed to any of Fluid's employees by you will be deemed to be a material breach of this Agreement, in which event Fluid shall have the right, but not the obligation, to terminate this Agreement or any then-current SOW immediately For Cause.

### **13.10. Survival.**

The provisions contained in this Agreement by their context are intended to survive termination or expiration of this Agreement will survive.

### **13.11. Insurance.**

Fluid and you will each maintain, at each party's own expense, all insurance reasonably required in connection with this Agreement or any SOW, including but not limited to, workers compensation and general liability. Fluid agrees to maintain a general liability policy with a limit not less than \$1,000,000 per occurrence. All of the insurance policies described herein will not be canceled, materially changed or renewal refused until at least thirty (30) calendar days written notice has been given to the other party by certified mail.

### **13.12. Governing Law; Venue.**

This Agreement and any SOW will be governed by, and construed according to, the laws of the state of California. You hereby irrevocably consent to the exclusive jurisdiction and venue of the state courts in Ventura County, California, for any and all claims and causes of action arising from or related to this Agreement. YOU AND WE AGREE EACH OF US WAIVES ANY RIGHT TO A TRIAL BY JURY for any and all claims and causes of action arising from or related to this Agreement.

### **13.13. Usage in Trade.**

It is understood and agreed no usage of trade or other regular practice or method of dealing between the Parties to this Agreement will be used to modify, interpret, supplement, or alter in any manner the terms of this Agreement.

## **13.14. Business Day**

If any time period set forth in this Agreement expires on a day other than a business day in Ventura County, California, such period will be extended to and through the next succeeding business day in Ventura County, California.

## **13.15. Notices; Writing Requirement.**

Where notice is required to be provided to a party under this Agreement, such notice may be sent by U.S. mail, overnight courier, fax or email as follows: notice will be deemed delivered three (3) business days after being deposited in the United States Mail, first class mail, certified or return receipt requested, postage prepaid, or one (1) day following delivery when sent by FedEx or other overnight courier, or one (1) day after notice is delivered by fax or email. Notice sent by email will be sufficient only if (i) the sender emails the notice to the last known email address of the recipient, and (ii) the sender includes itself in the "cc" portion of the email and preserves the email until such time it is acknowledged by the recipient. Notwithstanding the foregoing, any notice from you to Fluid regarding (a) any alleged breach of this Agreement by Fluid, or (b) any request for indemnification, or (c) any notice of termination of this Agreement or any SOW, must be delivered to Fluid either by U.S. mail or fax, unless such requirement is expressly and specifically waived by Fluid. All electronic documents and communications between the parties will satisfy any "writing" requirement under this Agreement.

## **13.16. Independent Contractor.**

Each party is an independent contractor of the other, and neither is an employee, partner or joint venturer of the other.

## **13.17. Subcontractors.**

Generally, Fluid does not utilize subcontractors; however, should Fluid elect to subcontract a portion of the Services, Fluid shall guarantee all work performed by any Fluid-designated subcontractor as if Fluid performed the subcontracted work itself.

## **13.18. Data Access/Storage.**

Depending on the Service provided, a portion of your data may occasionally be accessed or stored on secure servers located outside of the United States. You agree to notify us in the event your company requires us to modify our standard access or storage procedures.

## 13.19. Attorneys' Fees.

If Fluid is required to bring an action to enforce the terms of this Agreement, Fluid shall be entitled to an award of the reasonable attorneys' fees and costs it incurred at all stages of the action, including without limitation, at trial and appeal.

## 13.20. Counterparts.

The parties may sign and deliver this Agreement and any SOW in any number of counterparts, each of which will be deemed an original and all of which, when taken together, will be deemed to be one agreement. Each party may sign and deliver this Agreement (or any SOW) electronically (e.g., by digital signature and/or electronic reproduction of a handwritten signature), and the receiving party will be entitled to rely upon the apparent integrity and authenticity of the other party's signature for all purposes.

## Revision History

3/10/2020

- Updated language to support new online version, instead of per/customer.
- Initial publishing of online MSA.