

**FALCONSTOR SOFTWARE, INC.
HABANERO SUBSCRIPTION AGREEMENT**

READ THIS SUBSCRIPTION AGREEMENT CAREFULLY; BY CLICKING THE “I ACCEPT” OR “YES” BUTTON, YOU INDICATE YOUR ACCEPTANCE OF THE TERMS OF THE FOLLOWING AGREEMENT AND THAT YOU HAVE FULL AUTHORITY TO BIND AGREEMENT TO THESE TERMS.

THIS SUBSCRIPTION AGREEMENT (“Agreement”) is between you (“Customer”) and FALCONSTOR SOFTWARE, INC. (“FalconStor”), a Delaware Corporation with its principal offices at 111 Congress Avenue, Suite 500, Austin, TX, 78701.

WHEREAS, FalconStor has developed a managed data protection service known as Habanero, that combines cloud-based and on-premises technologies to deliver secure backup, replication, retention, and management of Customer data (“Service”);

WHEREAS, FalconStor offers the Service via the technology infrastructure used by or on behalf of FalconStor, including all cloud-based systems, computers, software, hardware, databases, electronic systems, servers, and networks, whether operated by cloud service providers (“CSPs”) or within Customer’s own on-premise infrastructure (“Systems”); and

WHEREAS, Customer is desirous of utilizing the Service for its business purposes and acquiring a license to do so; and

WHEREAS, FalconStor is willing grant a license to Customer for the use of the Service under the terms of this Agreement.

NOW THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, FalconStor and Customer agree as follows.

AGREEMENT

1. Grant of Access and Use.

1.1 As part of the service, FalconStor will be installing and using its software, as a limited, personal, non-exclusive, non-sublicensable, non-transferable, non-assignable license to access and use the Service through the Systems solely for Customer’s own internal business purposes, subject to compliance with the terms and conditions of this Agreement.

1.2 The Service shall only be used by Customer’s employees, consultants, contractors, and agents: (a) who are authorized by Customer to access and use the Service under the rights granted to Customer pursuant to this Agreement; and (b) for whom access to the Service has been purchased hereunder (“Authorized Users”).

1.3 Customer agrees to make available appropriate personnel to advise FalconStor in the performance of obligations under this Agreement and to provide FalconStor with any data or information required for FalconStor to perform its obligations under this Agreement. FalconStor shall not be responsible for any delay in the delivery of Service or support, including implementation, that is due to Customer's failure to provide assistance as required under this Agreement.

1.4 Customer acknowledges that the Service is designed to be compatible only with that software and those systems specified as compatible in any technical documents and manuals relating to the end use of the Service ("Documentation"), and FalconStor does not warrant or represent that the Service will be compatible with any other software, hardware, or systems.

1.5 Customer shall, at its expense, obtain and maintain any and all governmental authorizations, registrations and filings that may be required under the laws of each jurisdiction in which Customer operates and/or uses the Service. Customer shall indemnify and hold harmless FalconStor against any and all claims arising out of its non-compliance with all laws, regulations and other legal requirements including tax and foreign exchange legislation governing distribution and of the Service.

1.6 Customer will comply with all obligations of the US Foreign Corrupt Practices Act, as well as any other similar laws, rules and regulations in any jurisdiction where the Service is used. Specifically, Customer will not use any payment or other benefit derived from FalconStor to offer, promise or pay any money, gift or any other thing of value to any person for the purpose of influencing official actions or decisions affecting this Agreement, while knowing or having reason to know that any portion of this money, gift or thing will, directly or indirectly, be given, offered or promised to an employee, officer or other person acting in an official capacity for any government or agency or any political party, party official or candidate for political office.

1.7 Customer shall be solely responsible for all other compliance with any laws, rules, or regulations governing the export, re-export, import or use of the Service, including, without limitation, the procurement and renewal of all export, re-export or import licenses or approvals required under U.S. or any foreign law for the export, re-export, import or use of the Service or any portion thereof, and shall pay all costs and other expenses in connection with such procurement and renewal. Customer shall not export or re-export the Service or any portion thereof, or provide services using the Service, directly or indirectly, without first obtaining any required export license from the U.S. Department of Commerce or any other agency of the U.S. Government or foreign governmental entity having jurisdiction over such transaction. Customer acknowledges that restrictions imposed by U.S. government agencies on the export of software are subject to change without notice and that Customer shall be solely responsible for compliance with all such export restrictions. Customer agrees to indemnify FalconStor and hold FalconStor harmless for any violation of any statute, rule or regulation regarding the export of the Service.

1.8 Customer will not export, re-export, transfer or sell any Service or Documentation provided under this Agreement, or the direct product of such Service or Documentation, or use the Service to directly or indirectly provide services:

- a. to any person, entity, organization or other party identified on the U.S. Department of Commerce's Table of Denial Orders, "Unverified List," "Entity List," or General Order No. 3 to Part 736 of the Export Administration Regulations, or on the U.S. Department of Treasury's lists of "Specially Designated Nationals and Blocked Persons," as published and revised from time to time; or
- b. to any national of any nation or jurisdiction prohibited by any United States Governmental agency determination or policy; or
- c. for any nuclear, chemical/biological weapons or missile proliferation end-use or to end-users (including certain military end-users), as defined in Part 744 of the U.S. Export Administration Regulations; except as authorized by U.S. export license, approval, law or regulation

2. Restrictions.

2.1 In using the Service Customer shall not and shall ensure that its Authorized Users shall not: (a) duplicate any portion of the Service, or any Documentation or training materials (except for Customer's internal use); (b) modify, translate, decompile, reverse engineer, disassemble, or adapt the Service; (c) attempt to develop any other service or product that possess the same "look and feel" of the Service; (d) rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer, or otherwise make available any Service or any materials provided by FalconStor to any person, including on or in connection with the internet or any time-sharing, service bureau, software as a service, cloud, or other technology or service; (e) use the Service, or allow the transfer, transmission, export, or re-export of the Service or portion thereof in violation of any applicable law, regulation or rule; (f) develop any software or product that is similar in function to or competes with the Service; (g) bypass, hack or breach any security device or protection used by the Service or Systems, or access or use the Service, with or without automated means (such as scrape, crawl or spider); (h) remove, modify or obscure any identification or proprietary or restrictive rights markings or notices from the Service or any component thereof; (i) input, upload, transmit, or otherwise provide to or through the Service or Systems, any information or materials that are unlawful or injurious, including the distribution or publication of information that is contrary to public order or public morality, or contain, transmit, or activate any software, hardware, or other technology, device, or means, including any virus, worm, malware, or other malicious computer code; or (j) aid or assist any third parties in doing any of the above.

2.2 If the Authorized User or any other person authorized by Customer to use the Service violates the restrictions or threatens to violate them, FalconStor is entitled to intervene without prior consultation with Customer to terminate the violation or to prevent this imminent danger, for example by disabling the account of the relevant Authorized User. Customer is liable

for any damage caused by the Authorized User or any other person using the Service with Customer's credentials, that is the result of a violation of these restrictions. FalconStor is at all times entitled to report criminal offenses it has discovered and is never liable for the damage of Customer that may result from such reports.

2.3 Customer shall ensure that passwords associated with Authorized User accounts remain confidential and secure, and will report compromise of passwords or the suspicion thereof to FalconStor as soon as possible.

3. Subscription Fees.

3.1 Customer shall pay the fees agreed upon when Customer signed up for the Service on the CSP's order form ("Fees").

4. Term.

4.1 This Agreement commences in accordance with the selections made on the CSP's order form ("Initial Services Term") unless sooner terminated in accordance with this Agreement.

4.2 Upon expiration of the Initial Services Term, this Agreement shall renew as specified on the CSP's order form (each a "Renewal Term")The Initial Services Term and each Renewal Term are collectively referred to as the "Term."

5. Intellectual Property Rights.

5.1 Customer acknowledges and agrees that FalconStor owns all rights in and to the Service, software, and all other materials created by FalconStor or provided by FalconStor to Customer under this Agreement. This Agreement does not grant to Customer any title or right of ownership in or to the Service, or any related software application or component thereof, or to any associated materials or intellectual property, or in or to any enhancements, modifications, updates, or improvements of any of the foregoing. FalconStor shall own any and all such enhancements, modifications, updates, or improvements to the Service, or other materials provided by FalconStor, whether created by FalconStor or Customer, and Customer agrees to execute any and all documents requested by FalconStor in order to perfect and protect FalconStor's ownership in same. Customer hereby assigns in advance to FalconStor all (future) intellectual property rights related to the Service, to the extent these intellectual property rights are created by Customer or Customer's use of the Services. To the extent necessary, Customer will fully cooperate with the transfer of the future intellectual property rights to FalconStor, at FalconStor's first request.

5.2 FalconStor shall have and retain sole ownership of any and all FalconStor trademarks and trade names, including all related goodwill. Customer shall not remove or alter any of FalconStor's proprietary or copyright notices, trademarks or logos. Customer shall not, at any time during or after the Term of this Agreement, take or cause any action, which would be

inconsistent with or tend to impair the rights of FalconStor or its affiliates or dispute or contest, directly or indirectly, FalconStor's exclusive right and title to the Service, other materials provided by FalconStor, or the validity thereof.

5.3 Customer may not independently use or reproduce the Service, software, applications, data and other materials of which the intellectual property rights lie with FalconStor or any other party for any purpose other than its own commercial use nor shall Customer copy, modify, compile, merge, assemble, reproduce or disassemble, or try to abstract the source code from the software underlying the Service or the applications in any other way. Customer is prohibited to provide the Service, applications or other software and materials of which the intellectual property rights lie with FalconStor, to third parties for further development and/or use.

6. Support, Maintenance, and Modifications.

6.1 Subject to the terms and conditions of this Agreement, so long as Customer is not in breach of this Agreement, FalconStor shall provide the support stated in the Service Level Agreement attached hereto as Schedule 1 ("Support").

6.2 FalconStor may modify the Service, at any time, with or without prior notice to Customer, and Customer agrees that FalconStor shall not be liable to Customer or any third party for any such modification, provided such modification performs substantially the same function as the Service as it currently exists.

7. Customer Data.

7.1 All data that originates with Customer or that is input via the Service by Customer and reports and materials generated by Customer via the Service with such data (collectively, "Customer Data") shall remain, as between Customer and FalconStor, the exclusive property of Customer. Customer agrees that FalconStor may collect, archive and use Customer Data and related information relating to Customer's use of the Services: (a) to facilitate the provision of Service updates, (b) to provide product Support and other services to Customer; (c) to defend any claim that it did not perform any of its obligations under this Agreement or that it violated any applicable law, (d) to comply with any applicable law, (e) for the purpose of improving, developing, and training machine learning and artificial intelligence systems, provided that such use complies with applicable data protection laws and such Customer Data is anonymized and/or aggregated to prevent identification of any individual person or entity; and (f) for any reason not prohibited by applicable law. FalconStor shall own any de-identified or anonymized aggregated data generated by or for FalconStor from the Customer Data, and may use such data in any manner not prohibited by applicable law.

7.2 FalconStor expressly disclaims any representation or warranty that Customer's use of and access to the Service, including without limitation the transfer and storage of Customer Data, will comply with any laws, rules or regulations applicable to Customer. FalconStor

disclaims any warranty that Customer's use of the Service or the FalconStor Systems will guarantee Customer's compliance with any laws, rules or regulations that are applicable to Customer.

8. Suspension.

FalconStor shall have the right to limit, suspend or terminate Customer's access to the Service and withhold all Support and maintenance in the event that, in FalconStor's reasonable determination: (a) Customer's use is materially adversely affecting FalconStor, the Service, the Systems, or FalconStor's ability to provide products and service to other customers; (b) if Customer's use of the Service is for any unlawful, unauthorized or fraudulent purpose; (c) if Customer acts in material breach of its obligations and restrictions under this Agreement; or (d) if Customer fails to make payments when due.

9. Termination.

9.1 Either party may terminate this Agreement, with or without cause, according to the terms of the CSP's order form ("Termination Notice").

9.2 If either party breaches any of the terms, conditions or provisions of this Agreement, and fails to cure such breach within thirty (30) days after written notice thereof, the other party shall have the right to terminate this Agreement without any further notice.

9.3 FalconStor shall also have the right to terminate this Agreement immediately and cancel any unfilled portion of it if: (a) Customer ceases business, files for bankruptcy or becomes bankrupt or insolvent, or enters into any arrangement or composition with its creditors or if a receiver is appointed to direct the business of Solution Provider; (b) Customer attempts to sell or assign, or sells or assigns any or all of its rights, duties or obligations under this Agreement, or the Agreement itself, to any person or entity, in whole or in part, whether by assignment, merger, transfer of assets, sale of stock, operation of law or otherwise, without FalconStor's prior written consent; (c) Customer violates any condition of Section 4; or (d) Customer violates any of the conditions of Section 14.

9.4 Upon the expiration or termination of this Agreement, the parties shall cooperate in good faith to terminate relations in an orderly manner. FalconStor will return all Customer Data to Customer in a suitable format to allow Customer to transition such Customer Data to another provider. If an appliance was provided by FalconStor to Customer for on-premises use, Customer shall return said appliance to FalconStor within thirty (30) days of expiration or termination of this Agreement, with shipping paid by Customer. Notwithstanding anything to the contrary herein, Customer shall pay all fees as agreed to on the CSP's order form.

9.5 In the event of a party's uncured breach of this Agreement, the non-breaching party may, in addition to the right to withhold its performance under and/or terminate this Agreement, avail itself of all other rights, remedies and causes of action available at law, in equity or otherwise, against such party for damages as a result of such breach. Unless otherwise provided in this Agreement, remedies shall be cumulative and there shall be no obligation to

exercise a particular remedy.

9.6 Customer will not be entitled under local law or otherwise to receive any payment from FalconStor whether for actual, indirect, special or consequential damages, costs or expenses as a result of expiration or termination of this Agreement, all of which Customer expressly waives. CUSTOMER ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, UNDERSTANDS THE TERMS UTILIZED HEREIN AND AGREES TO THE ENFORCEMENT OF THE TERMS AND CONDITIONS AS SET FORTH HEREIN.

9.7 Any expiration or termination of this Agreement shall not prejudice, limit or restrict any other rights or remedies either party may have arising prior to such expiration or termination.

10. Confidentiality.

10.1 In connection with this Agreement, each Party may have access to or be exposed to information of the other Party that is not generally known to the public, such as software, product plans, pricing, marketing and sales information, customer lists, "know-how," intellectual property rights or trade secrets, which may be designated as confidential or which, under the circumstances surrounding disclosure, ought to be treated as confidential (collectively, "Confidential Information"). Confidential Information may not be shared with third parties unless such disclosure is to the receiving Party's personnel, including employees, agents, and subcontractors, on a "need-to-know" basis in connection with this Agreement, so long as such personnel have agreed in writing to treat such Confidential Information under terms at least as restrictive as those herein. Each Party agrees to take the necessary precautions to maintain the confidentiality of the other Party's Confidential Information by using at least the same degree of care as such Party employs with respect to its own Confidential Information of a similar nature, but in no case less than a reasonable standard of care to maintain confidentiality.

10.2 The foregoing shall not apply to information that: (a) was known by the receiving party prior to its receipt from disclosing party or is or becomes public knowledge through no fault of the receiving party; or (b) is rightfully received by the receiving party from a third party without a duty of confidentiality. If a receiving party is required by a court or government agency to disclose Confidential Information, the receiving party shall provide reasonable advance notice to disclosing party before making such a disclosure to enable the disclosing party to see an appropriate protective order or other such remedy.

11. Data protection.

11.1 Without prejudice to the scope of Section 10 (Confidentiality), both parties will in the execution of this Agreement observe all applicable national and international laws and regulations on privacy protection and data protection as further set forth in the Data Protection Addendum attached as Schedule 2.

11.2 Insofar as Customer uses the Service for the storing or processing personal information of any individual, FalconStor qualifies as a “processor” or “service provider” or such similar entity as those terms are defined in applicable data privacy laws.

11.3 FalconStor will comply with applicable laws and take commercially reasonable physical, technical, and administrative security procedures to maintain the security of Customer Data, including limiting the number of people who have physical access to such Customer Data and training its personnel in relation to data security, as well as employing encryption systems, electronic security systems, and password protections that guard against unauthorized access, destruction, use, modification, or disclosure. Unfortunately, despite FalconStor’s best efforts, the electronic transmission and storage of data cannot be guaranteed to be 100% secure. As such, FalconStor will not be liable for any breach of the security or loss of Data resulting from causes or events that are beyond FalconStor’s control, including, without limitation, Customer’s own acts or omissions, corruption of storage media, failures by CSPs, defects in third-party data security products or services, power failures, natural phenomena, riots, acts of vandalism, hacking, sabotage, or terrorism.

12. Disclaimer of Warranties/Limitation of Liability.

12.1 Both parties represent and warrant that they have the right to enter into this Agreement. FalconStor warrants that, provided the Customer uses the Service for its intended purpose in conformity with the Documentation and other instructions of Customer, the then current, unmodified version of the Service will operate substantially in conformance with the then current version of the published Documentation for a period of ninety (90) days from the time Customer begins using the Service. IF IT IS DETERMINED THAT THE SERVICE DOES NOT PERFORM AS WARRANTED, FALCONSTOR’S ONLY RESPONSIBILITY WILL BE TO USE REASONABLE EFFORTS, CONSISTENT WITH INDUSTRY STANDARDS, TO CURE THE DEFECT.

12.2 OTHER THAN AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, FALCONSTOR MAKES NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICE, DOCUMENTATION, MAINTENANCE RELEASES, NEW VERSIONS, SOFTWARE, COLLATERAL OR ANY OTHER MATERIALS, PRODUCTS, OR SERVICES PROVIDED BY FALCONSTOR (COLLECTIVELY, “FALCONSTOR MATERIALS”), INCLUDING BUT NOT LIMITED TO, QUALITY, PERFORMANCE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, LOSS OF PRODUCTION, OR LOSS OF OR CORRUPTION OF DATA, THE WARRANTY AND REMEDIES SET FORTH ABOVE ARE EXCLUSIVE AND IN LIEU OF ALL OTHERS, ORAL OR WRITTEN, EXPRESS OR IMPLIED. FALCONSTOR DOES NOT REPRESENT OR WARRANT THAT THE FALCONSTOR MATERIALS ARE ERROR FREE OR WILL SATISFY ALL OF CUSTOMER’S REQUIREMENTS. FALCONSTOR MAKES NO WARRANTY OR REPRESENTATION IN RELATION TO ANY HARDWARE OR SOFTWARE PROVIDED BY THIRD-PARTIES OR FOR THE ACTIONS OR INACTIONS OF ANY CSP USED BY FALCONSTOR, AND FALCONSTOR SHALL HAVE NO LIABILITY FOR HARDWARE OR SOFTWARE FAILURES CAUSED BY ANY CSP OR ANY THIRD-PARTY HARDWARE OR SOFTWARE. TO THE

MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAW, ALL OTHER WARRANTIES, CONDITIONS AND REPRESENTATIONS, WHETHER EXPRESS OR IMPLIED, VERBAL, STATUTORY OR OTHERWISE, AND WHETHER ARISING UNDER THIS AGREEMENT OR OTHERWISE ARE HEREBY EXCLUDED. FALCONSTOR SHALL NOT BE BOUND BY OR LIABLE FOR ANY REPRESENTATIONS OR WARRANTIES, WHETHER WRITTEN OR ORAL, WITH RESPECT TO THE PRODUCTS MADE BY SERVICE PROVIDER OR ITS AGENTS, EMPLOYEES OR REPRESENTATIVES.

12.3 IN NO EVENT WILL FALCONSTOR BE LIABLE FOR DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE USE OR INABILITY TO USE THE FALCONSTOR MATERIALS, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS OR REVENUE OR DATA OR INFORMATION LOSS, INCURRED BY EITHER PARTY OR ANY THIRD PARTY, IN THE PERFORMANCE OF THIS AGREEMENT, OR RELATED TO THE FALCONSTOR MATERIALS, WHETHER IN AN ACTION IN CONTRACT OR TORT, EVEN IF THE OTHER PARTY OR ANY OTHER PERSON HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY EVENT, EXCEPT AS SET FORTH SPECIFICALLY IN THIS AGREEMENT, THE TOTAL LIABILITY OF FALCONSTOR TO CUSTOMER FOR ANY REASON AND UPON ANY CAUSE OF ACTION OR CLAIM SHALL BE LIMITED TO THE FEES PAID BY CUSTOMER DURING THE PREVIOUS 12-MONTH PERIOD LEADING UP TO THE CAUSE OF ACTION OR CLAIM. THIS LIMITATION APPLIES TO ALL CAUSES OF ACTION OR CLAIMS IN THE AGGREGATE, INCLUDING WITHOUT LIMITATION BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, MISREPRESENTATIONS, CLAIMS FOR FAILURE TO EXERCISE DUE CARE IN THE PERFORMANCE OF SERVICES HEREUNDER AND OTHER TORTS. BOTH PARTIES UNDERSTAND AND AGREE THAT THE REMEDIES, EXCLUSIONS AND LIMITATIONS HEREIN ALLOCATE THE RISKS OF SERVICE NONCONFORMITY BETWEEN THE PARTIES. . THE FEES HEREIN REFLECT, AND ARE SET IN RELIANCE UPON, THIS ALLOCATION OF RISK AND THE EXCLUSION OF CONSEQUENTIAL DAMAGES AND LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT. THIS EXCLUSION ALSO INCLUDES ANY LIABILITY THAT MAY ARISE OUT OF THIRD-PARTY CLAIMS AGAINST CUSTOMER. ANY ACTION BY A PARTY MUST BE BROUGHT WITHIN THE EARLIER OF TWO (2) YEARS AFTER SUCH PARTY OBTAINS KNOWLEDGE OF THE FACTS LEADING TO SUCH ACTION OR THE APPLICABLE STATUTE OF LIMITATIONS FOR SUCH CLAIM, WHICHEVER IS SHORTER.

12.4 As part of the Service, FalconStor may make available, operate, manage on behalf or in any other manner provide Customer access to third party systems and software including associated services, including CSPs ("Third Party Property"). Customer acknowledges that: (a) FalconStor has limited control over the functionality or operation of the Third Party Property; (b) if such third parties provide data or other information related to use of the Third Party Property, FalconStor has no control over the accuracy or completeness of that information; (c) Customer acknowledges and agrees to the terms and conditions (including service levels) and must abide by the rules and regulations of the supplier of such Third Party Property, as applicable, with respect to the Service, as from time to time promulgated by the supplier of such Third Party Property.

13. Indemnification.

13.1 FalconStor, at its expense, shall defend any action brought against Customer to the extent that it is based on a claim that any Service infringes a third party's copyright or a patent duly issued by the United States of America. FalconStor shall pay all damages and costs finally awarded against Customer in such action, provided that FalconStor is notified in writing of the existence of such claim against Customer within fifteen (15) days of Customer's first learning of the same; and provided that FalconStor is given full authority to control the defense, costs and settlement of the claim and that FalconStor receives reasonable cooperation and assistance from Customer. FalconStor will not be obligated to defend or otherwise indemnify Customer in any lawsuit or as to any claim which arises from or relates to any combination of the Service with another product not supplied by FalconStor, or if such claim is based upon a use of the Service for a purpose for which it was not designed, or if the Service has been modified by any party other than FalconStor, or if Customer has not installed or used the Service as directed by FalconStor. In addition to the foregoing indemnification obligations, FalconStor shall have the option, at its expense, either to procure for a Customer the right to continue using the Service or to replace or modify the Service so that it is no longer infringing or, if such options are not, in FalconStor's sole discretion, reasonably available, to terminate this Agreement. The foregoing states the entire obligation of FalconStor with respect to the infringement of intellectual property rights of any third party.

13.2 Customer shall indemnify and hold FalconStor harmless from and against all claims, judgments, awards, costs, expenses, damages and liabilities (including reasonable attorneys' fees) of whatsoever kind and nature that may be asserted, granted or imposed against FalconStor directly or indirectly arising from or in connection with: (a) any claims that any software or services supplied by Customer (other than any unmodified Services provided by FalconStor) infringes any third party intellectual property rights; (b) any violation of any applicable laws by Customer; (c) any use of the Service for any fraudulent or illegal purpose or for any purpose not authorized by FalconStor.

14. Binding Arbitration Agreement and Class-Action Waiver

NOTICE OF ARBITRATION: This agreement required Customer to submit most disputes to mandatory arbitration, which means that customer agrees to submit any disputes related to this agreement or the services provided by FalconStor to binding individual arbitration rather than proceeding in court, except for small claims court. IS SET FORTH BELOW.

14.1 Except as otherwise stated below, any claim or dispute between FalconStor and Customer arising out of relating in any way to this Agreement or the Service shall be resolved through final, binding arbitration. This arbitration obligation applies regardless of whether the claim or dispute involves a breach of contract, tort, fraud, misrepresentation, product liability, negligence, violation of a statute, or any other legal theory. Both FalconStor and Customer

specifically acknowledge and agree to waive their respective right to bring a lawsuit based on such claim or dispute as well as the right to have such lawsuit resolved by a judge or a jury.

14.2 This agreement to arbitrate shall be governed by the Federal Arbitration Act, (9 U.S.C. § 1 *et seq.*). Any arbitration will be commenced and administered by JAMS under the rules of JAMS. Provided JAMS's criteria are met by the nature of the dispute, the arbitration shall be conducted under JAMS Streamlined Arbitration Rules & Procedures [<https://www.jamsadr.com/rules-streamlined-arbitration/>]. Each party will pay the fees for its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. If JAMS is unavailable, unwilling, or otherwise unable to administer an arbitration in accordance with these rules, then another administrator that will do so will be selected by agreement of the parties.

14.3 The arbitrator has the same authority to award relief on an individual basis that a judge in a court of law would have. The award of the arbitrator is final and binding. Additionally, the arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, except that this sentence shall not apply to the Class Action Waiver provisions described below. The arbitrator will render a decision in writing. A court of competent jurisdiction shall have the authority to enter judgment upon the arbitrator's decision/award.

14.4 The following Disputes are excluded from this agreement to arbitrate: (a) any dispute, claim, or controversy arising out of or relating to an alleged violation of a party's intellectual property rights, including but not limited to claims of patent, copyright, trademark, or trade secret infringement, which category of claims and disputes shall be resolved through litigation in a court of competent jurisdiction, rather than through arbitration; (b) individual claims brought in small claims court; (c) any claim that an applicable federal statute expressly states cannot be arbitrated; and (d) any claim for injunctive relief. Any challenges or issues as to the enforceability or applicability of the arbitration and class-action waiver provisions shall be decided in the first instance by the arbitrator.

14.5 To fullest extent permitted by applicable law, Customer and FalconStor agree to bring any claim or dispute, whether in arbitration or court as permitted by these terms, ON AN INDIVIDUAL BASIS ONLY, AND NOT AS A CLASS ACTION OR COLLECTIVE ACTION. There shall be no right or authority for any claim or dispute to be brought, heard or arbitrated as a class or collective action ("Class Action Waiver"). The arbitration will decide the rights and liabilities, if any, of FalconStor and Customer. The arbitration proceeding will not be consolidated with any other matters or joined with any other cases or parties. The arbitrator may award any remedy to which a party is entitled under applicable law, but remedies shall be limited to those that would be available to a party in their individual capacity. Regardless of anything else in this Agreement

and/or the applicable JAMS rules, the interpretation, applicability, enforceability or formation of this Class Action Waiver may only be determined by a court and not an arbitrator. This Class-Action Waiver will survive the expiration of this Agreement.

14.6 BOTH CUSTOMER AND FALCONSTOR HEREBY WAIVE ANY CONSTITUTIONAL AND STATUTORY RIGHTS TO SUE IN COURT AND HAVE A TRIAL IN FRONT OF A JUDGE OR A JURY, except as provided herein. The parties are instead mutually electing that all disputes, claims, or requests for relief shall be resolved by arbitration under this Agreement, except as specified herein. An arbitrator can award on an individual basis the same damages and relief as a court and must follow this Agreement as a court would. However, the parties acknowledge that there is no judge or jury in arbitration, and court review of an arbitration award is subject to very limited review.

14.7 Customer has the right to opt out of the arbitration requirement by sending written notice of Customer's decision to opt out to the following e-mail address: legal@falconstor.com within thirty days after first becoming subject to this Agreement. In the event Customer opts out, all other parts of this Agreement will continue to apply. Opting out of arbitration has no effect on any other obligations to arbitrate that Customer may currently have, or may enter in the future have, with FalconStor. This opt-out right does not apply to the class-action waiver provision.

14.8 This Section 14 shall survive the expiration or termination of this Agreement.

15. Miscellaneous.

15.1 Export Law Assurances. Customer agrees to comply with all applicable international and national laws that apply to the Service, including the U.S. Export Administration Regulations, as well as end-use and destination restrictions issued by U.S. and other governments.

15.2 U.S. Government End Users. If Customer is a U.S. federal government end user, the Service is a "Commercial Item" as that term is defined at 48 C.F.R. §2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation", as those terms are used in 48 C.F.R. §12.212 or 48 C.F.R. §227.7202. Consistent with 48 C.F.R. §12.212 or 48 C.F.R. §227.7202-1 through 227.7202-4, as applicable, these Service is licensed to Customer with only those rights as provided under the terms and conditions of this Agreement..

15.3 Inspection. Customer hereby grants FalconStor, or an agent designated by FalconStor, the right to perform an inspection of Customer's use of the Service during normal business hours. Customer agrees to cooperate with FalconStor in such inspection, and Customer agrees to provide FalconStor with all records reasonably related to Customer's use of the Service.

The inspection will be limited to verification of Customer's compliance with the terms of this Agreement.

15.4 Independent Contractors. The Parties are independent contractors. No provision of this Agreement will or shall be deemed to create an association, trust, partnership, joint venture or other entity or similar legal relationship between FalconStor and Customer, or impose a trust, partnership or fiduciary duty, obligation, or liability on or with respect to such entities. Neither Party will have any rights, power, or authority to act or create an obligation, express or implied, on behalf of another party except as specified in this Agreement.

15.5 Force Majeure. Neither Party shall be liable to the other for any failure to perform any of its obligations (except payment obligations) under this Agreement during any period in which such performance is delayed by circumstances beyond its reasonable control, such as fire, flood, war, embargo, strike, riot, terrorism, epidemic or pandemic, the intervention of any governmental authority, or failure of a CSP system (a "Force Majeure"). In such event, however, the delayed Party must promptly provide the other Party with written notice of the Force Majeure. The delayed Party's time for performance will be excused for the duration of the Force Majeure, but if the Force Majeure event lasts longer than 90 days, then the other Party may immediately terminate, in whole or in part, this Agreement by giving written notice to the delayed Party.

15.6 Transferability and Subcontracting. Neither all nor any part of Customer's rights or obligations under this Agreement are assignable or transferable by Customer, whether directly or indirectly, by merger, acquisition, change of control, operation of law or otherwise, without the prior written consent of FalconStor, and any attempt to do so shall be void. FalconStor has the right to freely assign all or part of its rights and obligations under this Agreement or to make use of the services of third parties by subcontracting. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

15.7 Entire Agreement; Severability. This Agreement, including the schedules or exhibits attached to this Agreement, is the entire agreement between Customer and FalconStor with respect to its subject matter and supersedes all prior oral and written understandings, communications, or agreements between Customer and FalconStor relating to the Services. General terms and conditions of Customer are not applicable and expressly excluded. No amendment to or modification of this Agreement, in whole or in part, will be valid or binding unless it is in writing and executed by authorized representatives of both Parties. If any provision of this Agreement should be found to be void or unenforceable, such provision will be stricken or modified, but only to the extent necessary to comply with the law, and the remainder of this Agreement will remain in full force and will not be terminated.

15.8 Governing Law/Venue. To the fullest extent permitted by applicable laws, this Agreement, and any dispute that might arise between FalconStor and Customer will be governed by the laws of the State of New York and applicable federal laws of the United States of America,

consistent with the Federal Arbitration Act (9 U.S.C. § 1 et seq.), without regard to any principle of conflict-of-laws. The parties further agree that any dispute that is not subject to arbitration or eligible for small claims actions shall be heard, venued and decided exclusively by the appropriate court of competent jurisdiction located in the County and State of New York.

15.9 Notices. Any notice, request, demand, or other communication to be provided under this Agreement shall be in writing, and shall be delivered personally, sent by a reputable delivery service using a trackable method, or sent by email to the email addresses provided by each Party with a delivery confirmation, or at such other address as a Party may later designate by written notice to the other Party.

15.10 Headings. The section headings in this Agreement are inserted for convenience of reference only and shall not affect the meaning or interpretation of the Agreement.

15.11 Amendments. Any modification or amendment to this Agreement must be made in writing and executed by an authorized representative of each Party.

15.12 Publicity. FalconStor may use Customer's name, logo, and marks solely to identify Customer as a FalconStor customer on FalconStor's website and other marketing materials.

15.13 Nothing in this Agreement is meant to modify or amend any agreement Customer may have with a CSP. To the extent that any provisions herein conflict with any agreement between Customer and CSP, the provisions of the CSP agreement with Customer will govern.

SCHEDULE 1

SERVICE LEVEL AGREEMENT

The following matrix will govern the Service:

Operation	SLA	Details
Backup	On-Demand/Immediate	Backup software writes directly to tapes via FalconStor software in real-time as backup begins
Restore (local server)	On-Demand/Immediate	Customer administrator initiates restore directly from local tapes using FalconStor software
Restore (replica server)	On-Demand/Immediate	Customer administrator initiates restore from replica using FalconStor software
Restore (exported tapes)	On-Demand/Immediate	Customer administrator initiates restore from exported tapes using FalconStor software
Support	Response within 1 hour	See FalconStor Support Handbook (link below)
Infrastructure	According to CSP SLA	Typically, 99.9% or more

https://www.falconstor.com/wp-content/uploads/2020/07/FalconStor_Support_Handbook.pdf

SCHEDULE 2

DATA PROTECTION ADDENDUM

As part of the Services that FalconStor provides to Customer pursuant to the Agreement, FalconStor has been given, has had access, will be given or will have access to Personal Information, as that term is used and understood under Data Privacy Laws (defined below). Therefore, The parties seek to implement a DPA that complies with the requirements of Data Privacy Laws and protects Personal Information from unauthorized disclosure or use.

NOW THEREFORE, IT IS AGREED AS FOLLOWS:

1. Definitions

- a. "Cross-context behavioral advertising" means the targeting of advertising to a consumer based on the consumer's personal information obtained from the consumer's activity across businesses, distinctly- branded websites, applications, or services, other than the business, distinctly-branded website, application, or service with which the consumer intentionally interacts.
- b. "Data Privacy Laws" means all applicable laws, rules, regulations, and other legal or self-regulatory requirements in any jurisdiction relating to privacy, data protection, data security, breach notification, or the Processing (as defined below) of Personal Information.
- c. "Personal Information" includes all information that identifies a person as defined by Applicable Data Privacy Laws.
- d. "Personnel" means any and all officers, directors, employees, contactors, subcontractors, and/or agents of a Party.
- e. "Process" and "Processing" mean any operation or set of operations performed in relation to Personal Information, including but not limited to the collection, storage, and use of Personal Information.
- f. "Security Breach" means the unauthorized or unlawful use, destruction, loss, alteration, disclosure, or Processing of Personal information.
- g. "Sale" or "Sell" or "Third Party" shall have the meanings set forth in California Civil Code § 1798.140 and other applicable Data Privacy Laws.
- h. "Share," "Shared," or "Sharing" shall have the meanings set forth in California Civil Code § 1798.140 and other applicable Data Privacy Laws.

- i. “Subprocessor” means any subcontractor that Processes Personal Information on FalconStor’s behalf.

2. **FalconStor Obligations**

- a. FalconStor will Process Personal Information for the limited and sole purpose of providing the Services to Customer enumerated in the Agreement or as otherwise instructed by Customer in writing. All Processing of Personal Information by FalconStor and FalconStor’s Personnel shall be in compliance with Data Privacy Laws.
- b. Without limiting the foregoing, FalconStor shall not: (i) Sell Personal Information; (ii) Share Personal Information for Cross-context Behavioral Advertising or other advertising purposes; (iii) retain, use, or disclose any Personal Information for any purpose, including any commercial purpose, other than for the business purposes specified in the Agreement or as otherwise instructed by Customer in writing; (iv) disclose any Personal Information to any third party except as described in 2(d) below; (v) violate any applicable restrictions enumerated in Data Privacy Laws, including those on combining the Personal Information that FalconStor receives from, or on behalf of, Customer with Personal Information that FalconStor receives from, or on behalf of, another person or persons, or that FalconStor collects from any interaction between itself and any individual; or (vi) engage in any Processing of Personal Information that is prohibited or not permitted by applicable Data Privacy Laws.
- c. FalconStor shall not attempt to re-identify any pseudonymized, anonymized, aggregate, or de-identified Personal Information. FalconStor shall take reasonable measures to ensure that any deidentified or anonymized data cannot be associated with any individual.
- d. In the event FalconStor is legally obligated to provide any Personal Information to a third party: (i) FalconStor will promptly provide Customer with a reasonable opportunity to contest the legal obligation or to seek protection for the disclosure; and (ii) FalconStor, after consultation with Customer and its legal counsel, will disclose only the minimum amount of Personal Information necessary to comply with the legal obligation.
- e. FalconStor shall promptly notify Customer if FalconStor determines that it can no longer meet its obligations under this DPA or Data Privacy Laws or that it has breached any of its obligations in this DPA or violated any Data Privacy Laws.
- f. Except as may be necessary to comply with legal obligations, FalconStor will delete all Personal Information from its systems upon the end of the Services relating to the

Processing. In the event that FalconStor is legally required to maintain such Personal Information, FalconStor shall provide notice of the same to Customer. Thereafter, such Personal Information may continue to be stored within FalconStor's system, but shall not be Processed in any other way and shall comply with all applicable Data Privacy Laws.

- g. FalconStor grants to Customer the right, upon reasonable notice, to take reasonable and appropriate steps to stop and remediate any unauthorized use of Personal Information or to comply with any Data Privacy Laws.
- h. The parties shall provide their reasonable cooperation to each other to modify or amend this DPA in the event new or changed Data Privacy Laws require such modification or amendment.

3. **Assistance with Processing.** If FalconStor engages any Subprocessor or other person to assist it in Processing Personal Information, it shall notify Customer of such engagement, and such Subprocessors or persons engaged shall:

- a. Have been selected through steps reasonably designed to ensure such Subprocessor's or person's reliability, competence and trustworthiness, including conducting appropriate background checks where legally able to do so;
- b. Have received the training necessary to facilitate FalconStor's compliance with this DPA;
- c. Have entered into an appropriate written agreement obligating such Subprocessor or person to comply with Data Privacy laws and to Process Personal Information only as allowed by this DPA; and
- d. Receive from FalconStor access to Personal Information only to the extent that such access is needed to enable the Subcontractor or person to carry out the obligations for which such Subcontractor or person has been engaged.

4. **Assistance With Data Privacy Law Compliance.** The parties will reasonably cooperate with and assist each other to ensure their respective compliance obligations under the Data Privacy Laws, taking into account the nature of the FalconStor's processing and the information available to the FalconStor. Without limiting the foregoing:

- a. FalconStor shall notify Customer as soon as possible, but at least within three (3) business days of receiving any request or complaint related to any Personal Information.
- b. FalconStor shall not respond to any such requests unless Customer has authorized FalconStor in writing to do so, except to the extent FalconStor has an obligation under applicable law to respond directly.

- c. If FalconStor has an obligation under applicable law to respond directly, it shall notify Customer of this requirement prior to making the initial notification and comply with Customer's reasonable instructions in responding to such request.
 - d. In the event Customer requests FalconStor to delete or modify any Personal Information, FalconStor shall promptly do so and shall pass along those deletion or modification requests to downstream parties, including FalconStor's Personnel, in accordance with Data Privacy Laws.
- 5. **Security.** FalconStor shall implement appropriate physical, technical, and administrative measures to ensure a level of security for the Personal Information appropriate to the risk and in all cases such measures shall be in compliance with industry standards and applicable Data Privacy Laws.
- 6. **Security Breach.** FalconStor will comply with all Security Breach-related obligations applicable to it under Data Privacy Laws, and FalconStor will provide reasonable assistance to Customer in complying with Customer's Security Breach-related obligations. FalconStor will notify Customer in writing promptly (and in any event within twenty four (24) hours) whenever FalconStor reasonably believes that there has been or is likely to be any accidental, willful, or unauthorized access, acquisition, use, modification, disclosure, loss, destruction of or damage to Personal Information or any other unauthorized Processing or use of Personal Information. FalconStor will investigate the Security Breach, take steps necessary to eliminate or contain the exposure of the Personal Information, keep Customer informed of the status of the Security Breach, and follow all of Customer's reasonable instructions in accordance therewith. FalconStor will not notify any individual or any third party other than law enforcement, FalconStor's counsel, or FalconStor's insurance carrier, of any Security Breach or potential Security Breach, without first obtaining written permission of Customer. In addition, within ten (10) days of identifying a Security Breach, FalconStor will develop and execute a remediation plan that reduces the likelihood of a recurrence of a Security Breach and shall provide Customer a copy of any such remediation plan.