CloudChomp, Inc.
Terms of Service / Software License Agreement / Confidentiality Agreement / Privacy Policy / Business Associate Agreement

Important – Please Read Carefully

1. INTRODUCTION

1.1. This agreement and the relevant "**Order Form**" (defined below), if any (collectively, "**this Agreement**") IS A CONTRACT entered into by and between CloudChomp (sometimes referred to as "we" and "us") and "you," as defined below. Apart from the exception below, YOU AGREE TO BE BOUND by this Agreement, including (for example) its limitations on authorized use, warranties and liability, and transferability.

1.2. EXCEPTION – IF: (1) You are being presented with this Agreement as part of a Web site sign-up process, or during installation of software on your computer, BUT (2) you and CloudChomp have previously agreed in writing to another agreement that: (i) governs your use of the Web site or of that software, (ii) excludes the applicability of this Agreement, and (iii) remains in effect; THEN: The other agreement, NOT this Agreement, will control your use of that Web site and/or software.

1.3. This Agreement grants you a limited, non-exclusive right (the "License") to use CloudChomp's "Technology":

(1) only during a specified time period (the "License term"),
(2) only for specific purposes not involving benchmarking and/or competition with CloudChomp (see section 3.5 below); and
(2) subject to the terms and conditions of this Agreement.

The License is expressly conditioned on payment of any required fees and on your compliance with the provisions of this Agreement.

NOTE: To speed up any necessary negotiation process and get to signature sooner, if you wish to revise any part of this Agreement, please do so by stating the proposed revisions in the "negotiated variations" space at section 19.32 below.

2. Definitions and usages

2.1. "CloudChomp" refers to CloudChomp, Inc., a Delaware corporation.

2.2. "You" refers to the corporation or other organization whose employee or other representative is either signing a hard copy of this Agreement, or signifying assent to this Agreement by clicking on "I agree" or taking comparable action.

2.3. "License unit" has the meaning set forth in Section 3.1.

2.4. "Order Form" refers to an order form from you that is accepted by CloudChomp.

> (a) An order form may take the form of (for example) a purchase order; a quotation signed by you to place an order; or an on-line sign-up form for obtaining access to the Service or for downloading a copy of the Software.
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> (b) An Order Form may refer to one or more usage plans, service plans, maintenance plans, or similar documents, in which case the provisions of the referenced plan(s) or other document(s) are deemed part of the Order Form.

2.5. "Service" refers to a CloudChomp online service; if you are attempting to obtain access to such a service as you read this, then the term specifically includes (for example) that service.

2.6. "Software" refers to one or more items of software provided to you by CloudChomp; if you are in the process of installing such an item of software on your computer as you read this, then the term specifically includes (without limitation) that software.

2.7. "Technology" refers to the Service and/or the Software, as the case may be.

2.8. "Usage plan" refers to a specific offering by CloudChomp, such as for example an authorized-usage package or a maintenance plan,

2.9. "Includes" (and its derivatives, e.g., including), "for example," and similar language are used by way of example and not of limitation unless expressly stated otherwise.

2.10 Terms defined elsewhere in this Agreement, e.g., in the Introduction (section 1), have the meanings stated there.

3. Provisions applicable to both the Service and the Software

3.1. You must not use the Technology in connection with more, in the aggregate, than the number of distinct corresponding "license units" (for example, workstations, servers, users, etc.) for which you are licensed as set forth in the applicable Order Form, except as otherwise provided in this Agreement.

> HYPOTHETICAL EXAMPLE: Suppose you are licensed to use the Software for 1,000 users. That means you may use the Software for an aggregate of 1,000 individual users in total; it does NOT mean that you may use it for an unlimited of total users as long as only 1,000 users are using the Software at any given time.

3.2. You must not use the Technology in providing services to third parties where functions performed by the Technology are a material part of those services unless otherwise provided in the applicable Order Form.

3.3. You are exclusively responsible for the supervision, management and control of your use of the Technology, and for the provision and proper maintenance of your hardware and supporting software (such as, for example, operating-system updates and virus-protection software).

3.4. You must not disable or work around any usage-control mechanism that may be built into the Technology.

3.5. You must not:

> (1) decompile, disassemble, or reverse engineer any part of the Technology;
>
> (2) access or use any part of the Technology for purposes of benchmarking or for developing a competitive product or service;
>
> (3) copy any nonpublic features or functions of the Technology; nor
>
> (3) permit or knowingly assist anyone else to do anything listed in subdivisions (1) through (3) above.

If applicable law permits you to engage in any such activity notwithstanding this Agreement, you agree to provide CloudChomp with advance notice and reasonably detailed information concerning your intended activities.

3.6. You must not rent, lease, sell, or sublicense any part of the Technology except to the extent, if any, permitted by the applicable usage plan. (See also the Assignments provisions in the General Provisions section of this Agreement.)

3.7. Cloud Chomp takes commercially-reasonable measures to prevent malware from being introduced into the Technology; “malware” refers to computer program instructions and/or hardware designed to do one or more of the following:

- alter, damage, destroy, disable, or disrupt the operation or use of software, hardware, and/or data;
- disable or bypass security controls; and/or
- allow unauthorized personnel to access data (including but not limited to personal data) and/or programming.

The term *malware* would normally be understood by those in the software- and Internet worlds as including, without limitation, the following terms (listed alphabetically): adware; back doors; ransomware; rootkits; snoopware; spyware; time bomb; trap doors; Trojan horses; viruses; and worms.

4. Specific provisions applicable to the Service

4.1. You represent that all registration information you have provided to us is complete and accurate in all material respects. If we ever have grounds to suspect otherwise, we may in our discretion suspend your access to the Service until the issue is cleared up.

4.2. You will not knowingly permit an unauthorized individual to access or use the Service.

4.3. For the avoidance of doubt, as between you and CloudChomp, you are solely responsible for the content of any information you send to, or store on, the Service.

4.4. Without limiting your other obligations under this Agreement, you must not use the Service in a manner that unreasonably interferes with the Service or with others' use of it.

5. Specific provisions applicable to Software

5.1. For the avoidance of doubt, if you are provided with a new or different version of an item of Software, that will not in itself increase the number of license units for which you are licensed even if the new or different version has a different license code.

5.2. The Software is licensed, not sold. CloudChomp or its supplier(s), as applicable, retain title and all ownership rights, of whatever nature, to the Software and to any tangible copy or copies of the Software provided to you by CloudChomp.

5.3. All rights not expressly granted herein are reserved by and to CloudChomp or its suppliers, as applicable.

5.4. The Software and its documentation remain the confidential property of CloudChomp or its suppliers.

5.5. You must not provide copies of the Software, nor disclose any license keys or license codes needed to operate it, to third parties except as permitted by this Agreement or with CloudChomp's prior written consent.

5.6. You may make a reasonable number of copies of the Software for backup purposes.

5.7. U.S. Government customers:

(a) The 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.

(b) Any use, modification, reproduction, release, performance, display or disclosure of the Software and accompanying documentation by the United States Government shall be governed solely by the terms of this Agreement and is prohibited except to the extent expressly permitted by the terms of this Agreement.

(c) The Manufacturer / Contractor is CloudChomp, Inc., 10333 Richmond Ave., Suite 400, Houston, Texas 77042.

5.8. During the License term, CloudChomp will provide you with general telephone support services for the item of Software during its normal business hours (currently 24x5 Sunday 10:15pm EST to Friday 9:15pm EST).

5.9. During the License term, CloudChomp will respond to your reports of errors in the Software in the same manner as provided in the Performance Warranty section of this Agreement (section 7).

5.10. CloudChomp reserves the right to discontinue support for 'outdated' Software versions (that is, any version more than six months after release of a subsequent major- or minor version).

6. Non-infringement warranty

6.1. CloudChomp warrants to you that:

(1) CloudChomp owns the Technology or is otherwise authorized to provide it pursuant to the Order Form; and

(2) neither the Technology nor your use of it in accordance with this Agreement and the applicable CloudChomp-provided user documentation, in and of themselves, will infringe any valid copyright or trade secret right, nor so far as CloudChomp knows, any patent right, of any third party.

YOUR EXCLUSIVE REMEDY for any breach of this warranty shall be to invoke the defense- and indemnity provisions of this section 6.

6.2. IF: A third party (other than your affiliate) claims that the Technology, or your use of it as authorized by CloudChomp, infringes the third party's patent rights, copyright, or trade secret rights;

THEN: CloudChomp will:

(1) defend you and your officers, directors, and employees (each a "protected person") against the claim, at CloudChomp's own expense; and

(2) if the claim is for copyright infringement and/or trade-secret misappropriation: pay any resulting court costs and -damages awarded against a protected person, if any, subject to the conditions below.

6.3. For a protected person to be entitled to the above defense and indemnity, either you or the protected person must:

(1) promptly notify CloudChomp of the claim, in writing;

(2) not make any non-factual admissions in respect of the claim;

(3) give CloudChomp sole control of the defense;

(4) not settle the claim without CloudChomp's consent; and

(5) assist CloudChomp in the defense if it so requests, at its expense.

6.4. In addition, CloudChomp will take action as described below if any of the following events occurs:

(1) (i) a court of competent jurisdiction orders you to stop using the Technology as a result of a third-party infringement claim covered by this section 6, and
(ii) CloudChomp is unable to have the order stayed or overturned on appeal before you do stop; or

(2) CloudChomp settles the claim on terms that require you to cease using the Technology; or

(3) CloudChomp reasonably determines that you should stop using the Technology.

In any of these cases, CloudChomp will, at its option and expense, do one or more of the following:

(x) replace or modify the Technology to make it non-infringing while still performing the same or substantially the same functions; and/or

(y) procure the right for you to continue using the Technology in accordance with the License; and/or

(z) if in CloudChomp's judgment neither of options (x) or (y) is commercially feasible:

(i) recommend to you (by notice in accordance with this Agreement) that you stop using the Technology, and

(ii) refund a prorated amount of the fee(s) that you paid for the usage period in question, prorated monthly as of the date you stop using the Technology, at which time your right to use the Technology will automatically be terminated.

6.5. Except for a reasonable transition period, CloudChomp will not be responsible for any infringing use that you may make of the Technology after CloudChomp recommends that you stop using the Technology as provided above.

7. Performance warranty

7.1. Except as otherwise stated in this section 7, the Technology is provided AS-IS, WITH ALL FAULTS AND WITH NO WARRANTY, EXPRESS OR IMPLIED.

7.2. CloudChomp will use commercially reasonable efforts to supply you with a correction or workaround for errors in the Technology that you report to CloudChomp during the periods set forth below.

(a) If for any reason CloudChomp does not do so, at your request it will give you a refund as stated below.

(b) The commitment of this section 7.2 is referred to as the "Performance Warranty."

(c) You acknowledge that, depending on the circumstances, commercially reasonable efforts might consist of supplying a correction or workaround in the next regular release of the Technology.

(d) You must provide CloudChomp with such information about the failure as CloudChomp reasonably requests.

7.3. The reporting periods and refund amounts for errors in the Technology are as follows:

(a) For errors in an item of Software reported on or before 90 days after your initial license purchase, your refund amount is 100% of the initial license fee you paid, if any.

(b) For errors in an item of Software reported after 90 days after your initial license purchase, your refund amount is 100% of a prorated portion of the maintenance fee you paid for the then-current maintenance period, if any.

(c) For an error in the Service reported while you are a subscriber, your refund amount is 100% of a prorated portion of the subscription fee for your then-current usage period.

(d) All pro-rata portions will be determined on a daily basis as of the date you first reported the error.

Your right to use the Technology will automatically be terminated as of the date your refund request.

7.4. The foregoing is the EXCLUSIVE REMEDY for any failure by CloudChomp to comply with the Performance Warranty and for any errors or malfunctions in the Technology.

7.5. Unless CloudChomp agrees otherwise in writing, you must make any such refund request by notice to CloudChomp no later than 90 days after the end of the Performance Warranty Period or 120 days after your notice to CloudChomp of the failure, whichever is later.

8. Disclaimer of other warranties

8.1. CLOUD CHOMP DOES NOT WARRANT that the Technology will be error free, will meet your needs, or will operate without interruption.

8.2. CLOUD CHOMP DOES NOT WARRANT that the Technology will perform as documented in cases of —

(1) hardware malfunction;

(2) misuse of the Software;

(3) modification of the Software by any party other than CloudChomp — this subdivision does not grant you the right to make or have made any such modification;

(4) use of the Software with other software other than as described in the documentation; or

(5) bugs in other software with which the Software interacts, for example, operating systems, instant-messaging clients, or add-ons to any of them.

8.3. Except to the extent (if any) explicitly stated otherwise in this Agreement, THE TECHNOLOGY 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.

8.4. On behalf of CloudChomp and its suppliers, to the maximum extent permitted by law, CLOUD CHOMP DISCLAIMS ANY AND ALL WARRANTIES, DUTIES, CONDITIONS, TERMS OF QUALITY, OR REPRESENTATIONS (express or implied, oral or written), with respect to the Technology or any part thereof, that are not expressly stated in this Agreement or in a document expressly incorporated by reference herein.

8.5. The above disclaimers extend, without limitation, to any implied warranties, duties, conditions, or representations (as opposed to those expressly stated in this Agreement) of any of the following: title, non-infringement, quiet enjoyment, merchantability, fitness or suitability for any purpose — whether or not CloudChomp or any of its suppliers have reason to know, have been advised, or are otherwise in fact aware of any such purpose — absence of viruses, results, workmanlike effort, or implied term of quality, whether alleged to arise by law, by reason of custom or usage in the trade, or by course of dealing.

8.6 CLOUD CHOMP ALSO DISCLAIMS, for itself and its suppliers, any warranty, duty, condition, term of quality, or representation to any person other than you with respect to the Technology.

9. Limitation of remedies

9.1. You agree to the remedy limitations of this Agreement as part of its overall allocation of risk between the parties. You agree that each remedy limitation is to be enforced:

(1) to the maximum extent permitted by applicable law;

(2) independently of any other applicable remedy limitation, even if a particular remedy is held to have failed of its essential purpose; and

(3) independently of any warranty-disclaimer provisions of this Agreement.

You acknowledge that otherwise CloudChomp would not have accepted the Order Form on the economic terms stated in it and agree not to seek remedies in excess of such limitations.

9.2. Except as expressly provided otherwise in this Agreement:

(a) NEITHER PARTY nor its subsidiaries, parent company, employees, officers, directors, or affiliates, if any, WILL BE LIABLE TO THE OTHER PARTY or any person claiming through the other party, in contract, tort, or otherwise, for any INDIRECT, CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE, EXEMPLARY, OR SIMILAR DAMAGES, arising from or relating to any alleged or actual breach of this Agreement or from the use of, the results of the use of, or the inability to use the Technology.

(b) The exclusion of specific types of damages in subdivision (a) encompasses, as examples but not limitations, (i) lost profits or other economic loss from collateral business arrangements, as well as (ii) such types of damages when arising from loss of privacy or of confidential information due to the use of, the results of the use of, or the inability to use the Technology, even if the liable party was advised of the possibility of such damages.

9.3. Except as expressly provided otherwise in this Agreement, to the greatest extent permitted by law, THE MAXIMUM AGGREGATE LIABILITY OF EITHER PARTY and its suppliers, subsidiaries, parent company, or affiliates, if any, to the other party, or to any person

claiming rights through you, in respect of any and all claims arising from or related to this Agreement, in contract, tort, or otherwise, WILL BE:

> (a) THE AGGREGATE AMOUNT OF THE APPLICABLE FEES PAID BY YOU FOR THE THEN-CURRENT SUBSCRIPTION PERIOD (FOR THE SERVICE) OR FOR THE LICENSE FEE, OR
>
> (b) THE AGGREGATE AMOUNT OF YOUR INITIAL LICENSE FEE AND THE MAINTENANCE FEE FOR YOUR THEN-CURRENT MAINTENANCE PERIOD (FOR THE SOFTWARE), IF ANY.

9.4. EXCEPTION: The maximum-aggregate-liability limitation of section 9.3 does not apply to (i) any provision of this Agreement that requires one party to defend and/or indemnify another party against third-party claims, nor (ii) to the extent, if any, that the parties unambiguously agree otherwise in writing for particular categories of damages.

9.5. No remedy limitation of this Agreement will apply in any case where enforcement of the limitation would be contrary to law, including for example in cases of injury (including death) to persons or tangible property that proximately result from breach of this Agreement.

9.6. Some jurisdictions do not permit limitation or exclusion of remedies under some circumstances, so some or all of the foregoing limitations might not apply to you.

10. Confidential information; data privacy; business associate agreement

10.1. You represent that, to the best of your knowledge, applicable law does not prohibit you from using the Technology.

10.2. If you manage the personal data of one or more individuals using the Technology, you represent and warrant that you have been authorized to do so by each such individual.

10.3. You must comply at all times with all applicable laws, regulations, and requirements concerning the protection of privacy and personal information including without limitation, the European Union's General Data Privacy Regulation ("GDPR") (collectively, "**Privacy Law**").

10.4. You acknowledge that Privacy Law may require, for example, that you register as a data controller with a local privacy data office and obtain the consent of the licensed user of the Software before you install and use it.

10.5. You agree to notify CloudChomp promptly if you suspect:

(i) that someone else has obtained access to your user ID or password, or

(ii) that a breach of security has occurred, is about to occur, or is being planned, where the breach concerns the Technology.

10.6. You agree that CloudChomp may collect, store, and use non-public and/or personal information that you provide to CloudChomp as stated in — and subject to the restrictions of — this section 10.

10.7. During and after the License term, CloudChomp will NOT use your non-public and/or personal information collected by the Software (collectively, "**Your Information**"); disclose it to third parties; nor transfer it to other countries, EXCEPT as follows:

(1) we may use and/or disclose Your Information as stated in this Agreement or otherwise with your consent;

(2) we may use Your Information in connection with providing the Service;

(3) we may use Your Information in connection with making efforts to improve the Service and/or to develop new products and/or services; and/or

(4) we may use Your Information in connection with creating statistical analyses and industry-segment profiles, which we may publish or otherwise disclose, publicly or privately — BUT in any such disclosure, any content derived from Your Information will be anonymized and/or aggregated so that it is not identifiable to you or your users;

(5) we may disclose Your Information to our contractors for purposes of our use or processing of the information under subdivisions (2) through (4) above — BUT any such disclosure must impose confidentiality obligations on the contractor that are substantially similar to those of this Agreement UNLESS otherwise stated in this section 10;

(6) we may use and/or disclose Your Information as provided by law or required by compulsory legal process — BUT in any such case, unless prohibited by law or requested otherwise by law enforcement, we will:

(i) endeavor to promptly alert you to any such disclosure requirement;

(ii) provide reasonable cooperation in any efforts you make to limit the disclosure; and

(iii) disclose only so much of Your Information as is required by the law or legal process (as finally determined by our legal counsel);

(7) we may disclose Your Information as part of a sale or other disposition of substantially all of the assets of CloudChomp's business associated with the Service.

10.8. If your account is canceled or otherwise terminated (whether by you or us), then the following will apply:

(a) CloudChomp reserves the right to delete information collected by the Software your stored information in due course.

In case your account is reactivated, CloudChomp normally will not delete your stored information sooner than 30 days after the effective date of termination of your account. After that, it might not be possible to retrieve your stored information from CloudChomp's backup systems.

(b) CloudChomp will delete Your Information (if any) that is stored in the Software's data stores if you so request in writing — see our contact information in section 10.10 below — SUBJECT TO THE EXCEPTIONS in sections 10.9 below.

10.9. CloudChomp reserves the right:

(1) to retain your stored information in its backup systems after termination of your account, pending overwriting of that information — generally within 12 months after termination — in accordance with CloudChomp's usual processes for reusing backup media; CloudChomp will continue to abide by this section 10 in respect of any such retained information;

(2) to indefinitely retain and use anonymized and/or aggregated information under section 10.7(4); and

(3) to indefinitely retain and use normal customer-relationship information concerning you and/or your personnel such as (without limitation) billing records, contact information, and the like.

10.10. EUROPEAN UNION GDPR DISCLOSURE: CloudChomp's contact information can be found at our Web site at https://www.cloudchomp.com/contact.html.

In addition, VeraSafe has been appointed as CloudChomp's representative in the European Union for data protection matters, pursuant to Article 27 of the General Data Protection Regulation of the European Union.

VeraSafe can be contacted as CloudChomp's representative, but only on matters related to the processing of personal data. To make such an inquiry, please contact VeraSafe using this contact form: https://www.verasafe.com/privacy-services/contact-article-27-representative or via telephone at: +420 228 881 031.

Alternatively, VeraSafe can be contacted at: VeraSafe Ireland Ltd., Unit 3D North Point House, North Point Business Park, New Mallow Road, Cork T23AT2P, Ireland.

If you reside in a member state of the European Union ("EU"), you may have certain rights under the EU's General Data Protection Regulation, including the right to lodge a complaint with a supervisory authority.

10.11. DISCLOSURE TO CALIFORNIA RESIDENTS: If you are a consumer residing in California, you have certain rights under the California Consumer Privacy Act, including:

(a) the right to request deletion of your personal information — but if we delete your personal information, it's very likely that you would no longer be able to use the Service;

(b) the right to request information about what personal information of yours we have retained, sold, and/or disclosed for commercial purposes;

(c) the right to request a list of the categories of personal information we have sold about consumers in the preceding 12 months, tracking specified enumerated categories;

(d) the right to request a separate list of the categories of personal information we have disclosed about consumers for a business purpose in the preceding 12 months, tracking the same specified enumerated categories; and

(e) the right to opt out of the sale of your personal information.

10.12. You agree that CloudChomp may provide your data to a third-party CloudChomp business associate (that has agreed to keep your data confidential) for purposes of discussing with you whether you wish to engage the business associate to help you in data migration.

(a) Whether or not to engage such a business associate is entirely up to you.

(b) You agree that CloudChomp WILL NOT BE LIABLE for any actions, errors, or omissions by the business associate in its dealings with you.

10.13. You might have signed up to use the Technology via a reseller or other third party, and that third party is providing you with technical support for your use of the Technology; if that is the case, then CloudChomp may provide that third party with access to your information for support purposes or for other purposes of your agreement with CloudChomp and/or with that third party.

10.14. BUSINESS ASSOCIATE AGREEMENT NOT NECESSARY: CloudChomp assumes that the Technology will be used "[f]or the proper management and administration" of your business under 45 C.F.R. § 164.504(e)(4)(i)(A); consequently, even if you are a "business associate" of a "covered entity" under HIPAA, a business associate agreement between you and CloudChomp should not be necessary.[1]

10.15. You acknowledge that CloudChomp has not made any other representations or warranties on any of the matters that are the subjects of this section 10.

11. Payment; taxes

11.1. If you have not paid by credit card, then unless otherwise agreed in writing, for example in the Order Form, all invoices are due in U.S. dollars net 30 days from the date of your order.

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[1] **Check with your lawyer** to confirm that under 45 C.F.R. § 164.504(e)(4)(ii)(B), a business associate is allowed to disclose protected health information to its subcontractors for its own management purposes as long as: "(1) The business associate obtains reasonable assurances from the person to whom the information is disclosed that it will be held confidentially and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person; and (2) The person notifies the business associate of any instances of which it is aware in which the confidentiality of the information has been breached."

In its January 2013 comments in the Federal Register concerning this part of the rule, the Department of Health and Human Services had this to say (see the bottom of the left-hand column):

> Disclosures by a business associate pursuant to § 164.504(e)(4) and its business associate contract *for its own* management and administration or legal responsibilities **do not create a business associate relationship** with the recipient of the protected health information because such disclosures are made outside of the entity's role as a business associate.
>
> However, for such disclosures that are not required by law, the Rule requires that the business associate obtain reasonable assurances from the person to whom the information is disclosed that it will be held confidentially and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person and the person notifies the business associate of any instances of which it is aware that the confidentiality of the information has been breached. See § 164.504(e)(4)(ii)(B).

(Extra paragraphing, bold-faced emphasis, and link added, italics in original.) See also this 2013 memo from Holland & Hart (a major law firm).

DO NOT RELY ON THE ABOVE INFORMATION AS A SUBSTITUTE FOR ADVICE FROM YOUR OWN LICENSED LEGAL COUNSEL

11.2. Unless otherwise agreed in writing, CloudChomp will (1) separately itemize any applicable sales taxes on the relevant invoice(s); and (2) timely report and remit those sales taxes to the proper authorities. For purposes of this Agreement, "sales tax" refers to any sales, excise, use, or similar tax, but not to any tax imposed on CloudChomp's net income.

11.3. If any amount due under the applicable Order Form or otherwise under this Agreement is not timely paid, CloudChomp may suspend or terminate your access to the Service, including permanently deleting stored information after the end of any applicable grace period.

11.4. CloudChomp reserves the right to charge you interest on amounts remaining unpaid 30 days after the due date, beginning on that date, and you agree to pay such interest, at the rate of 1.5% per month or if less, the maximum amount permitted by law. Any interest charged in excess of that maximum amount will be deemed the result of a mistake and refunded with interest at the maximum legal rate.

11.5 IF: You subscribe to a License under an Order Form that calls for you to pay on the basis of the number of license units with which you use the Technology (for example, the number of servers, user accounts, etc.); THEN: CloudChomp may periodically determine your usage and invoice you for any usage in excess of that for which you previously paid.

12. Export controls

12.1. You must not transfer the Software, or any other software or documentation provided by CloudChomp, except in compliance with U.S. export-control regulations or other applicable export laws.

> (a) For example, you must not export or re-export any of the foregoing (i) to any person on a government-promulgated export restriction list, nor (ii) to any U.S.-embargoed countries.
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> (b) NOTE: Under U.S. law, unauthorized exports of the Software can occur, among other ways, by physical shipment; by electronic transmission of the Software; or by transfer or disclosure to a non-U.S. citizen within the U.S.

12.2. It is your responsibility to assure that any export, re-export or other transfer (including, but not limited to, any electronic transfer) of the Software by you is authorized in accordance with the applicable export laws.

12.3. You represent and warrant that:

> (a) you are not listed in any export restriction list;

(b) you are not a citizen or resident of any U.S.-embargoed country;

(c) you have not had your export privileges suspended, revoked, or denied by a governmental authority having jurisdiction.

12.4. If CloudChomp so requests, you must sign written assurances and other export-related documents as may be required to comply with applicable export laws.

12.5. The information on export laws provided in this Agreement is not necessarily complete. For more information on export laws, please refer to the United States Commerce Department Bureau of Export Administration at (202) 482-2440, or (202) 482-4811.

13. Beta testing

13.1. This section applies if the parties agree that you will be a beta tester of a new version of the Technology or some portion thereof ("Beta Technology").

13.2. You must advise CloudChomp of any problems that you encounter in using the Beta Technology.

13.3 CloudChomp will have the right to adopt, adapt, and/or use any ideas or suggestions that you make or give to CloudChomp relating to the Beta Technology, permanently and throughout the world, without compensation to you.

13.4 You must provide CloudChomp with reasonable information about the performance of the Beta Technology upon request;

13.5. You must not, without CloudChomp's prior written consent, disclose any information about the Beta Technology, its design and performance specifications, its code, or the existence of the beta test and its results to anyone other than your employees who are performing the testing; and

13.6. The test period will last from the date CloudChomp delivers the Software to you until CloudChomp gives you notice that the testing period is ending.

13.7 Your right to use the Beta Technology Software will terminate at the end of the test period or when CloudChomp asks you to cease using the Beta Technology, whichever occurs first.

13.8 Upon the conclusion of the testing period or at CloudChomp's request, you will promptly destroy the original and all copies of any software provided to you as part of the Beta Technology.

14. Amendments & modifications

14.1. CloudChomp reserves the right, at any time it deems appropriate, to modify the Technology; to offer new service plans and discontinue existing ones (subject to your existing rights under your then-current subscription); and to modify its pricing on a going-forward basis.

14.2. This Agreement will govern any new features or enhancements to the Technology that CloudChomp may release from time to time (in our sole discretion) unless CloudChomp elects to release them under a separate agreement.

14.3. Any subsequent version of CloudChomp's license agreement to which you agree will supersede this Agreement in respect of the applicable Software.

14.4. CloudChomp may unilaterally modify this Agreement — on a going-forward basis only unless otherwise agreed — by giving you notice in accordance with the written notice provisions of this Agreement.

> (a) The modification will take effect 30 days after the effective date of the notice. Your use of the Technology after that time will constitute your agreement to the modification.
>
> (b) If you wish not to agree to the modification, you must terminate your License and cease using the Technology — if you do so, and you previously paid for an annual subscription period, then CloudChomp will refund a pro-rata portion of your payment for the remaining portion of your subscription period, prorated daily on a straight-line basis as of the effective date of termination.
>
> (c) Any modification to the dispute-resolution provisions of this Agreement will not apply to any then-pending claim you have unless you specifically agree otherwise.

14.5 Otherwise, this Agreement may be amended only by a writing that so states and is signed by the parties; each party agrees not to assert otherwise in any forum.

14.6. If you provide CloudChomp (or previously provided CloudChomp) or an authorized CloudChomp reseller with a purchase order or similar document, then any terms, conditions, or provisions appearing therein will be given effect if and only if the purchase order meets the conditions of this "Amendments & modifications" section.

15. Breach

15.1. **Notice of breach:** The party alleging breach must inform the breaching party in writing of any breach promptly after learning of circumstances alleged to constitute a breach of this Agreement.

15.2. **Cure periods for specific breaches**: The breaching party will have a cure period as follows:

- Failure to pay an undisputed amount when due: 10 business days.
- Curable failure to meet an agreed written deadline without a specified cure period: 5 business days.
- Curable breach of a confidentiality obligation: 3 business days.
- Curable breaches not otherwise specified: 30 days.
- Non-curable breaches: no cure period.

15.3. **Suspension:** If you materially breach this Agreement, CloudChomp reserves the right to immediately suspend your right to use the Service by notice to you.

By way of example and not of limitation, pursuant to the safe-harbor provisions of the Digital Millennium Copyright Act (DMCA), we may suspend your right to use the Service if we conclude that —

- you have infringed the intellectual property rights (for example, copyrights, trademarks, patents, rights in confidential information) of CloudChomp or its providers, or
- you are inducing, permitting, or knowingly assisting others to do anything prohibited by this Agreement.

16. Relationship maintenance

16.1. **Status review conferences:** Each party will participate in conferences, by phone or in person, to review status and assumptions and to plan future actions, as reasonably requested by either party. The parties anticipate that the standard agenda for such conferences will include, as appropriate: • progress made; • problems encountered or anticipated; • plans for future action; and • assumptions being made.

16.2. **Early neutral evaluation (non-binding):** In any dispute, at either party's request the parties will jointly consult an experienced, knowledgeable, neutral individual — informally,

via video-conference, and in confidence — for non-binding advice as to what would constitute a responsible resolution of the dispute.

> Any procedural disagreement concerning the consultation will be resolved by reference to the Early Neutral Evaluation Procedures of the American Arbitration Association, to the extent not inconsistent with this Agreement.

17. Termination

17.1. **Termination for material breach**: If a material breach of this Agreement is not timely cured (see Breach), then the other party may terminate this Agreement by written notice of termination to the breaching party.

17.2. **Survival after termination**: Termination of this Agreement will not affect already-accrued rights and obligations. The rights and obligations set forth in herein (if any) concerning the following subjects will survive termination, no matter how caused: • confidentiality • indemnification and defense against third-party claims • intellectual-property ownership • warranty rights and -disclaimers • remedy limitations.

17.3. **Post-termination actions**: Upon any termination of this Agreement, the parties will take such action as may be reasonably necessary to wind up their relevant business together in a responsible manner, each at its own expense unless otherwise agreed in writing.

18. Arbitration

18.1. All disputes arising out of this Agreement will be resolved by binding English-language arbitration via video-conference (e.g., Zoom), under the (U.S.) Federal Arbitration Act and (to the extent not inconsistent with the FAA) the law governing this Agreement.

> Any resulting award will be enforceable in any court of competent jurisdiction.

18.2 EXCEPTION: A party seeking temporary, interim, or preliminary injunctive relief in respect of a dispute may do so in any court of competent jurisdiction without waiving its right to arbitration of the dispute or of other disputes.

18.3. The arbitration is to be conducted before an arbitration panel consisting of a single arbitrator, in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA").

18.4. Unless otherwise agreed, the arbitration will be administered by the AAA.

18.5. The arbitration panel is specifically authorized and directed to take all reasonable measures to streamline and expedite the proceedings.

18.6. YOU ACKNOWLEDGE THAT BY ENTERING INTO THIS AGREEMENT YOU ARE WAIVING YOUR RIGHT TO TRIAL BY JURY.

19. General provisions

19.1. **Applicability**: For the avoidance of doubt, this Agreement governs your use of any updates, supplements or add-on components of the Technology that CloudChomp may provide or make available to you, unless accompanied by separate standalone terms that exclude the applicability of this Agreement.

19.2. **Assignment restrictions**: In the context of assignments of this Agreement, the term "restricted party" refers to **each party**.

> (a) A restricted party must not assign this Agreement without the prior written consent of the other party except to the extent (if any) expressly authorized by this Agreement.
>
> (b) Any other purported assignment of this Agreement by a restricted party will be void.

19.3. **Assignment with business assets**: Either party may assign this Agreement without consent in conjunction with assignment of substantially all the assets of its business related specifically to this Agreement. As a non-limiting example, CloudChomp may assign this Agreement without your consent in conjunction with the assignment of substantially all of its business concerning the Technology or a relevant portion thereof (for example, if CloudChomp were to “spin off” a portion of the Technology that is covered by the License).

19.4. **Assignment - prompt notice afterwards**: Any party assigning this Agreement will notify the other party promptly thereafter.

19.5. **Assignment - any prior notice is confidential**: IF: A party elects to give another party prior notice of an impending assignment in connection with a transaction that has not been publicly announced; THEN: At the assigning party's request the other party will keep all information disclosed to it about the transaction (including for example the existence or the pending negotiation of the transaction) in strict confidence, including compliance with any applicable insider-trading laws, until the disclosed information be-comes publicly known.

19.6. **Authorized signatures**: Each person signing this Agreement on behalf of a party other than himself or herself (whether by signing a hard copy, clicking on "I agree" or comparable language, or in any other manner) represents that he or she has been duly authorized to do so.

19.7. **Change of address**: You agree to notify CloudChomp promptly if your email address or other contact information changes.

19.8. **Effective date – when signed or clicked**: This Agreement is effective as follows:

> (a) IF: This Agreement is being signed in hard copy, or if it is incorporated by reference in a signed hard-copy agreement (such as, for example, a CloudChomp sales quotation signed by you); THEN: This Agreement is effective when signed by the last party to do so.
>
> (b) IF: You are presented with this Agreement on-screen as part of a Web site sign-up process or during installation of software on your computer; THEN: This Agreement is effective when you click on "I agree" or take comparable action.

19.9. **Email and FAX communications**: You authorize CloudChomp to communicate with you by email and FAX as well as postal and delivery services.

19.10. **English language**: By express agreement of the parties, this Agreement and certain of its appendixes, exhibits, and attachments, if any, are written in and shall be interpreted for all purposes in accordance with the English language as used in the United States of America.

> French translation*: Les parties conviennent expressément que le présent Accord ainsi que toutes ses annexes seront rédigés en langue Anglaise et interprétés par référence à la terminologie utilisée aux États-Unis*.
>
> In the event of a disparity between the English version and any non-English version of this Agreement, the English version will govern.

19.11. **Entire agreement**: This Agreement, including any exhibits, attachments, riders, or appendices as well as any other document expressly incorporated by reference, is the parties' final, complete, exclusive, and binding statement of the terms and conditions of their agreement concerning its subject matter.

(a) For the avoidance of doubt, in entering into this Agreement, neither party is relying on any promise or representation by the other party that is not stated in (or expressly incorporated by reference into) this Agreement.

(b) Other or additional terms and conditions may apply to specific portions or features of the Technology; in case of a conflict between them and this Agreement, the former will control, but only as to your use of the relevant portion or feature.

19.12. **Force majeure**:

(a) Except as expressly provided otherwise in this Agreement, Neither party (the 'nonperforming party') will be liable for failure of timely performance if:

> (1) the failure resulted from one or more events beyond the reasonable control of the nonperforming party, and
>
> (2) the failure-causing effect of the event(s) could not reasonably have been avoided by the nonperforming party.

(b) In any such case:

> (1) the nonperforming party will keep the other party reasonably informed about any such failure; and
>
> (2) any deadlines for performance will be equitably extended.

(c) BUT: Failure to pay money due is excused by this clause only if the failure resulted from a failure in third-party payment systems.

19.13. **Forum selection**: In addition to any other court having jurisdiction, the court(s) having subject-matter jurisdiction in Houston, Texas, USA will have non-exclusive jurisdiction of any action or proceeding arising out of this Agreement that this Agreement does not require to be resolved by arbitration (see section 18).

19.14. **Governing law**: All disputes arising out of this Agreement are to be decided in accordance with the law of the United States of America and the State of Texas that would be applied, by the courts having jurisdiction there, to contracts made and performed entirely there by residents thereof.

19.15. **Governing law - exclusion of UN CISG Convention:** The parties exclude application of the United Nations Convention on Contracts for the International Sale of Goods.

19.16. **Governing law - exclusion of UCITA**: The Uniform Computer Information Transactions Act will not govern this Agreement.

19.17. **Headings**: The headings in this Agreement are used for convenience only and are not to be deemed as expanding or limiting any right or obligation herein.

19.18. **Independent contractors**: Except as may be expressly provided otherwise in this Agreement, the parties intend for their relationship defined by this Agreement to be strictly that of independent contractors; each party will conduct itself accordingly.

19.19. **Independent contractors – specific requirements**: • Neither party will hold itself out as an employee, agent, partner, joint venture, division, subsidiary, or branch of the other party. • Neither party has, nor will it hold itself out as having, authority to make commitments or representations on behalf of the other party except to the extent, if any, that this Agreement expressly states otherwise.

19.20. **Invalidity of provision**: If any provision of this Agreement is held to be invalid, void, unenforceable, or otherwise defective by a court or other tribunal of competent jurisdiction, then: • all other provisions will remain enforceable, and • the provision will be deemed modified, solely in the jurisdiction in question, to the minimum extent necessary to cure the defect.

19.21. **Legal challenges**: If a court or other authority issues a ruling or order, or a legislative or administrative body enacts a statute, regulation, or interpretation, and CloudChomp concludes that an aspect of the Technology or of this Agreement may be in conflict therewith, then CloudChomp reserves the right to suspend or terminate all or any relevant aspect of the Service.

19.22. **Limitation period**: Any action for breach of this Agreement, in any judicial or other forum, must be commenced within **one year** following the accrual of the right of action.

19.23. **Logo usage:** CloudChomp will not use your company name or logo for marketing purposes without your specific written consent.

19.24. **Mitigation of damages**: In the event of a breach of this Agreement, the other party must use reasonable efforts to mitigate its damages arising from or relating to the breach.

19.25. **Notices**: We may give any notice under this Agreement:

> (1) by making it available on our Web site and displaying a suitable advisory on the site while you are accessing it, or
>
> (2) sending you an email to the address you have listed in our records.

All other notices required or permitted by this Agreement: (x) must be in writing; (y) must be marked for the attention of a specific individual or position; and (z) are effective when received or refused by that individual or position as shown for example by delivery-service confirmation or an email "delivered" or "read" confirmation message.

19.26. **Notices – additional provisions**: (1) Notices may be sent to the parties' respective addresses shown in this Agreement, or to such other address as a party designates by notice or by other reasonable written communication. (2) Any party sending notice of breach or termination is encouraged (but not required) to separately send a courtesy copy, by any reasonable method, to the attention of legal counsel of the party being notified.

19.27. **Prohibitions**: Wherever this Agreement prohibits or restricts a party from doing something, that party is also prohibited or restricted from attempting to do so and from inducing, soliciting, permitting, or knowingly assisting anyone else to do so, whether for its own benefit or otherwise.

19.28. **Redlining**: If this Agreement is signed by the parties after exchanging drafts of it, then each party represents that it has "redlined" or otherwise flagged its revisions (if any) of drafts of this Agreement and associated documents that it has sent to the other party.

19.29. **Signature & delivery of this Agreement**: If this Agreement is to be signed manually, it may be signed and delivered (including but not limited to electronic delivery of signature pages in PDF format) in separate counterpart originals. All signed counterparts constitute one and the same instrument. Any counterpart may comprise one or more duplicates, any of which may be signed by less than all of the parties provided that each party whose execution is required signs at least one of the same.

19.30. **Third-party beneficiaries disclaimed**: For the avoidance of doubt, no individual or organization is entitled to claim any right, remedy, or benefit, of any kind, under this Agreement except for: • the signatories to this Agreement and their respective successors and permitted assigns; and • to the extent, if any, that this Agreement expressly states otherwise.

19.31. **Waivers**: A waiver by either party of a particular condition, right, or obligation arising under this Agreement (1) is to be given effect only if it is expressly stated in a document signed by that party, and (2) is to be strictly construed.

19.32 **Signatures:** The blank signature blocks below are provided in case any variations to the terms of this Agreement are stated in section 19.33 below; all such variations (if any) are part of this Agreement. NOTE: **Signatures are not required** if you agree to this Agreement with no such variations.

AGREED – "you":	AGREED – "CloudChomp"
[FILL IN LEGAL NAME], a [FILL IN ENTITY TYPE &, JURISDICTION], by:	CloudChomp, Inc., a Delaware corporation, by:
_____	_____

Signature	Signature
_____	_____
Printed name	Printed name
_____	_____
Title	Title
_____	_____
Date signed	Date signed

19.33. **Negotiated variations:** The following additional- or different terms are agreed to and will take precedence in case of any conflicts with the above terms — for each such variation, please identify the specific section above to which the variation applies: **NO VARIATIONS AGREED TO**.

— END —