



ARCSERVE (USA) LLC  
TERMS OF SERVICE  
FOR CLOUD-BASED SERVICES

These terms and conditions for Cloud-Based Services (the “Agreement”) are between Arcserve (USA) LLC (“Arcserve” “we,” “us,” or “our”) and you, the person or entity enrolling in the Services, on its own behalf or for the purpose of offering the Services to a third party as part of a managed service being provided thereby (“you,” “your,” or “Customer”).

## 1. DEFINITIONS

The capitalized terms used in this Agreement have the respective meanings specified in in this Section 1 or in the provision where the term is first used and defined.

- a. **“Acceptable Use Policy”** or **“AUP”** means the Arcserve Acceptable Use Policy located at <https://www.arcserve.com/CloudServices> which is hereby incorporated into this Agreement by this reference.
- b. **“Account”** means a unique Portal account assigned to a User for purposes of management and billing associated with one or more Cloud Products.
- c. **“Account Data”** means administrative data associated with an Account, including identifying information about the User, its use of the Services, applicable Service Level(s), Personal Data provided by the User and any sub-accounts associated with the Account. Account Data does not include Backup Data.
- d. **“Software”** means the software and related technology provided by Arcserve a list of which is available at <https://www.Arcserve.com/>. The software includes, but is not limited to, all downloadable software-, scripts and script interfaces.
- e. **“BAA”** means the Business Associate Agreement located at <https://www.Arcserve.com/CloudServices> which is hereby incorporated into this Agreement by reference, the terms of which shall only apply to Backup Data that constitutes protected health information as defined in the Health Insurance Portability and Accountability Act found at 45 CFR §160.103.
- f. **“Backup Analyzer”** is a component of File Backup and Recovery used to analyze the Backup Data. In addition to its above listed uses, a User may use File Backup and Recovery in an “analyze only” mode. In the “analyze only” mode, File Backup and Recovery does not back up, replicate, transfer, manage or store Backup Data.
- g. **“Backup Data”** means any and all data provided by you to Arcserve pursuant to your use of the Services, including but not limited to third party data, email messages, email attachments, PII and associated metadata.
- h. **“Cloud Backup”** means the Arcserve Cloud Backup Product and Service, which permits a User to backup, restore, and/or export Backup Data from third-party SaaS applications to a Datacenter.
- i. **“Cloud Product(s)”** or **“Product(s)”** refers to Arcserve Cloud Services, Arcserve File Backup and Recovery with Backup Analyzer, Arcserve Cloud Backup, and other off-premises backup solutions offered by Arcserve. The Cloud Products include software associated with, and necessary to the delivery of the Services, together with Documentation. Arcserve Software, however, is separately licensed and sold.



- j. **“Cloud Services”** means Arcserve Cloud Services, which is a Arcserve Cloud Product and Service.
- k. **“Cloud Storage”** means the amount of space a User’s Backup Data occupies on one or more hard drives in a Datacenter, or, in the case of File Backup and Recovery, the greater of the space occupied by the User’s Backup Data or the storage capacity purchased by the User..
- l. **“Datacenter”** means a facility that is engaged in the business of providing rack and floor space and "ping, power and pipe" for purposes of data hosting, administration, data colocation, and other customary and related services where, incident to delivery of a Service hereunder, and may include an Arcserve owned datacenter or a public cloud provider that Arcserve has retained to provide contract services.
- m. **“Data Protection Agreement”** or **“DPA”** means the Data Protection Agreement located at <https://www.Arcserve.com/CloudServices>, which is hereby incorporated into this Agreement by reference, under the circumstances set forth below.
- n. **“Data Protection Laws”** shall mean the acts, laws, and regulations set forth on the webpage located at <https://www.arcserve.com/>, which is hereby incorporated herein by this reference and which is subject to change without notice from time to time.
- o. **“Documentation”** means the user guides, specifications and readmes provided by Arcserve relating to the Services or Software.
- p. **“End User”** means the person or entity who owns or controls Backup Data, which Backup Data is backed up, replicated, transferred, monitored, managed, viewed and/or stored by the Customer using the Services.
- q. **“EULA”** means the End User License Agreement that an end user of Arcserve software must accept as a condition of using the Software. The EULA is available at <https://www.arcserve.com/eula/>.
- r. **“Export”** means as the term is defined in Section 3(e).
- s. **“Fees”** means the charges for the Services as set forth in an Order (including, but not limited to, any additional usage charges as described in the Order), and/or as otherwise agreed upon by Arcserve in accordance with the terms of this Agreement or otherwise.
- t. **“Hosted System”** means an information system (including, software, hardware and networking elements) maintained by Arcserve or an Arcserve contractor or subcontractor for certain of Arcserve’s customers (including, but not limited to, you).
- u. **“Import”** means as the term is defined in Section 3(e).
- v. **“Intellectual Property Rights”** means all patents, copyrights, moral rights, trademarks, trade secrets and any other form of intellectual property rights recognized in any jurisdiction, including applications and registrations for any of the foregoing.
- w. **“Laws”** means federal, national, regional, state, provincial, municipal and local laws, regulations, rules, judicial decrees, decisions and judgments in each and every jurisdiction applicable to Customer, Arcserve, the subject matter of this Agreement and/or the Services contemplated hereunder, including without limitation Data Protection Laws.



- x. **“Managed Service Provider” or “MSP”** means a person or entity providing managed onsite and/or offsite backup and disaster recovery services to an End User on a recurring subscription basis.
- y. **“Minimum Customer Terms”** means, for a Customer that is backing up, replicating, monitoring and/or managing Cloud Data owned or controlled by an End User or other third party, the minimum terms such Customer must include in a written agreement between the Customer and the End User or third party associated with delivery of the Services or a Cloud Product. The Minimum Customer Terms are set forth in Schedule A to this Agreement.
- z. **“Order”** means the documentation between you and Arcserve and/or Arcserve’s authorized representatives definitively establishing (i) the Services which you are permitted to use, (ii) the Fee (including the manner and timing of payment of the Fee) for such Services, and (iii) the Standard Term. An Order must be accepted by Arcserve. The Order may consist of one or more documents, and the documents may be in printed or electronic format.
- aa. **“Personally Identifiable Information” or “PII”** means: (i) a combination of any information that identifies an individual with that individual’s sensitive and non-public financial, health or other data or attribute, such as a combination of the individual’s name, address or phone number with the individual’s social security number or other government issued number, financial account number, date of birth, address, biometric data, mother’s maiden name, or other personally identifiable information; (ii) any “non-public personal information” as that term is defined in the Gramm-Leach-Bliley Act found at 15 USC Subchapter 1, § 6809(4); or (iii) “protected health information” as defined in the Health Insurance Portability and Accountability Act found at 45 CFR §160.103.
- bb. **“Portal”** means the Arcserve UDP cloud portal and/or the Arcserve Portal, each of which is a password-protected area on the Site that permits Customer to access certain functionality and information concerning the Services and Customer’s account.
- cc. **“Pricing Calculator”** means one or more Arcserve-provided pricing calculators that calculates and determines the Service Fees and other fees charged for use of Cloud Products.
- dd. **“Pricing Model”** means one or more methods of calculating the price of a Cloud Product or Service available to a Customer.
- ee. **“Privacy Policy”** means the Arcserve Privacy Policy available at <https://www.arcserve.com/about/privacy/>, which is hereby incorporated into this Agreement by reference.
- ff. **“Security Obligations”** means: (i) providing unique access credentials for each customer; (ii) encrypting all Backup Data transmitted between the Customer and the Services; and (iii) controlling and monitoring physical access to the sensitive areas of Arcserve’s facility where Backup Data is stored.
- gg. **“Service Level Standards”** means the service levels (applicable only during the Standard Term and solely with respect to the Services) located at <https://www.Arcserve.com/CloudServices>, which are hereby incorporated into this Agreement by this reference.
- hh. **“Services”** means the Arcserve products and services listed at <https://www.Arcserve.com/>.
- ii. **“Site”** means the Internet website located at [www.arcserve.com](http://www.arcserve.com) (or any successor or replacement thereto).



- jj. **“Software”** means all Arcserve and Arcserve software that is licensed by Arcserve or Arcserve on a perpetual or on a subscription basis, which may only be used by Customer and/or an End User in connection with the Services obtained thereby hereunder and shall at all times be subject to the terms of the EULA.
- kk. **“Standard Term”** means the period during which you are authorized to use the Services as specified in an Order.
- ll. **“Support Terms”** means the support terms for the Services applicable during the Standard Term located at <https://support.arcserve.com> which are hereby incorporated into this Agreement by this reference.
- mm. **“Support”** means the support services provided by Arcserve for the Services during the Standard Term pursuant to the Support Terms.
- nn. **“Trial Term”** means the period during which Arcserve may allow you to use certain services without charge which may be specified in an order or may be as otherwise determined by Arcserve in its sole discretion.

## 2. GENERAL

- a. This Agreement governs your use of any Service(s) (defined below), including: (i) any period during which you can use the Services during a Trial Term, whether or not such use is pursuant to an Order; or (ii) any period during which you pay to use the Services during a Standard Term, whether or not such use is pursuant to an Order.
- b. You will only be enrolled in the Standard Term if you (or a party acting on your behalf) pay the associated Fees (defined below) for Services for the Standard Term as specified in the applicable Order.
- c. BY CLICKING THE “ACCEPT” OR SIMILAR BUTTON OR BY ACCESSING AND USING THE SERVICES, YOU ARE HEREBY ACCEPTING THIS AGREEMENT AND YOU: (I) ACKNOWLEDGE AND AGREE THAT YOU HAVE READ ALL OF THE TERMS AND CONDITIONS SET FORTH HEREIN; (II) UNDERSTAND ALL OF THE TERMS AND CONDITIONS SET FORTH HEREIN; (III) AGREE TO BE BOUND BY ALL OF THE TERMS AND CONDITIONS SET FORTH HEREIN, AND THE TERMS AND CONDITIONS CONTAINED IN ANY DOCUMENT OR POLICY REFERENCED IN THIS AGREEMENT AND THE TERMS AND CONDITIONS OF ALL ASSOCIATED ACCEPTED ORDERS AND/OR ACCEPTED TRIAL ORDERS; AND (IV) ACKNOWLEDGE ON BEHALF OF THE CUSTOMER THAT YOU HAVE THE AUTHORITY TO BIND CUSTOMER TO THESE TERMS.
- d. THIS AGREEMENT TOGETHER WITH ALL ORDERS (AND TRIAL ORDERS) AND ANY OTHER DOCUMENT OR POLICY REFERENCED HEREIN CONSTITUTE AN ENFORCEABLE AGREEMENT BY AND BETWEEN YOU AND ARCSERVE.
- e. The “Effective Date” of this Agreement is the date you click the “ACCEPT” or similar button or otherwise access the Services, whichever is earlier.
- f. This Agreement applies to the Trial Term and Standard Term.
- g. If the Services are made available on a subscription basis, any renewal terms relating hereto shall be set forth in the relevant ordering portal, in the Order or by the generation of a new Order.



### 3. PRODUCTS AND SERVICES

As set forth in an Order, Arcserve or its authorized representatives, may provide one (1) or more of the services (“Services”) listed at <https://www.Arcserve.com/>. This Agreement (and any additional terms provided by Arcserve’s authorized representatives to you in writing) and the Order govern your use of the Services.

### 4. OBLIGATIONS AND GRANTS

- a. Subject to an Order for Services, the following obligations and grants will apply:
  - (i) During any Trial Term, Arcserve will use commercially reasonable efforts to provide the Services.
  - (ii) During any Standard Term, Arcserve will use commercially reasonable efforts to: (i) provide the Services and the Support; and (ii) meet the Service Level Standards.
- b. Subject to the terms and conditions of this Agreement and the EULA, and during the Standard Term and/or Trial Term, Arcserve grants to you a non-exclusive, non-sublicensable, non-assignable, non-transferable, revocable and limited right to: (i) use the Services solely for your internal purposes; (ii) make one copy of any materials provided by Arcserve relating to the Services for backup purposes; and (iii) download (from the Site) and use the Arcserve and/or the Arcserve Software solely for use with the Services. The foregoing rights are subject to suspension and/or termination as provided in this Agreement and/or in the EULA.
- c. You agree that you shall not: (i) make or permit the making of any modifications, additions, enhancements or derivative works to the Services or to any Arcserve or Arcserve Software; (ii) cause or permit the disassembly, de-compilation or reverse engineering of such Software; (iii) change or modify any mechanism that may be included with the Services, including any disabling mechanism; (iv) rent, timeshare, loan, lease, assign, sublicense, or otherwise transfer the Services, or permit any third party to access the functionality of the Services except as otherwise permitted by this Agreement or agreed upon by Arcserve in a separate written agreement; (v) use or manipulate the Services or any component thereof in a manner not expressly permitted by Arcserve; or (vi) remove or alter any proprietary notices associated with the Services, Software or the Documentation, including notices of patent, trademark, and copyright protection.

### 5. GENERAL

- a. You must use reasonable security precautions in connection with your use of the Services. You must comply with all Laws with respect to your use of the Services and with the Acceptable Use Policy. You must cooperate with Arcserve’s reasonable investigation of Service downtime/outages, security problems and any suspected breach of this Agreement.
- b. If (i) your use of any Service requires any license to use the Software or other of Arcserve’s proprietary software, and (ii) you have not otherwise agreed to Arcserve’s form of EULA, your acceptance of this Agreement is also acceptance of the EULA.

### 6. ACCESS IDENTITY

- a. You must register with Arcserve and create an account in order to use the Services. Customer agrees to keep its account information, including but not limited to Customer’s password and credentials (collectively “Identity”), true, accurate, complete, secure, and current as long as it continues to use the Services. As part of the Services, Arcserve may permit Customer to access the Portal. Customer may use the Services only in conjunction with Backup Data created in the country or geographical region associated with the Customer’s account.
- b. Absent fault attributed solely to Arcserve arising from gross negligence, reckless disregard, or



intentional misconduct, Customer is responsible for: (i) ensuring that only those persons to whom it has granted legal authorization have access to its Backup Data and if applicable its Identity for use of the Portal; (ii) all changes made to the Backup Data and its account through use of its Identity; (iii) all account activity and business transacted through the Portal through use of its Identity; (iv) maintaining the security of its Identity; and (v) payment to Arcserve (or its agent) of all Fees and other fees or charges due and owing for Services ordered or managed through use of its Identity, regardless of whether it has received payment from End Users. Customer understands that Arcserve has no obligation to save, maintain or monitor Customer's Identity and if Customer loses its Identity or any portion thereof, Customer will lose access to the Backup Data. Customer shall not share its Identity or any account passwords and/or credentials that Arcserve has provided unless Arcserve has agreed to such use in writing. If Arcserve consents to such sharing, Customer shall disclose to such third party all categories of information and data that may be disclosed to Arcserve as a result of such use, and Customer shall obtain in writing all necessary consents, waivers, and releases permitting such information and data to be disclosed to Arcserve in accordance with applicable law. While Arcserve has implemented security measures to prevent unauthorized access to accounts, Customer agrees that if a person possesses its Identity through no fault of Arcserve, Arcserve may assume that such person has been authorized by Customer to use Customer's Identity. If Customer becomes aware of unauthorized access to its Identity and/or its account, or any security breach related to its account or the Services, Customer will notify Arcserve immediately at [security@arcserve.com](mailto:security@arcserve.com). If Arcserve determines that a security breach has occurred or is likely to occur, it may suspend Customer's account and require it to change its passwords and other credentials. Arcserve shall not be liable for any loss suffered or incurred by Customer in relation to the suspension of its account or access to the Services under this Section.

- c. In some instances, Arcserve provides self-service capabilities for identity management and requires users to adhere to standard security practices with regard to the protection of its Identity. Customer is only permitted to assign an Identity to authorized users.

## **7.BACKUP DATA**

- a. The content of any Backup Data in any form provided to Arcserve for use with the Services is your responsibility and Arcserve does not control, verify, or endorse the content of such Backup Data.
- b. Customer hereby grants Arcserve a license to use, operate, copy, transmit, distribute, store and cache Backup Data solely to provide the Services to Customer. You represent and warrant that: (i) Customer has all necessary rights to grant the foregoing license to Backup Data and that Arcserve's exercise of such rights shall not violate the rights of any third party or any applicable Laws; (ii) all Backup Data about individuals has been collected in accordance with Customer's privacy guidelines and applicable Laws and that Customer's privacy guidelines comply with all applicable Laws; and (iii) Customer has obtained all consents required by the applicable Laws to transfer all of the Backup Data to Arcserve for storage. Customer acknowledges that the Services include features and functionality that backs up, replicates, and/or transfers electronic data and that these processes require the copying of such data, which may include digital files, software programs, and other data that may be protected by third-party intellectual property rights, such as copyrights. The laws and regulations governing the use and copying of such data vary by jurisdiction. Customer understands and agrees that Arcserve has no knowledge concerning the data contained in the Backup Data that is created, replicated, or transferred through use of the Services. Therefore, Arcserve has no knowledge of the third-party intellectual property rights applicable to the data contained within the Backup Data. Customer also understands and agrees that this Agreement does not grant Customer authority or license to copy or transfer any data contained in the Backup Data created by Customer. Customer represents and warrants that its use of the Services does not violate applicable international, national, state, regional or local laws or regulations governing the backup, copying, or transfer of the data contained in Backup Data, and Customer further agrees to



defend, indemnify, and hold Arcserve harmless against costs, expenses, and liabilities arising from any claim that its use of the Services to backup, copy, or transfer data violates third-party intellectual property rights.

- c. Notwithstanding any terms to the contrary in this Agreement, Arcserve may disclose Backup Data: (i) as required by any applicable Law; or (ii) in response to a subpoena or other compulsory legal process.
- d. If you are a Managed Service Provider or other business using the Services to view, access, manage, replicate, transfer, back up, or store Backup Data owned or controlled by End Users or other third parties, you represent and warrant that you have entered into a written agreement with such End User or third party which: (i) authorizes you to view, access, manage, replicate, transfer, back up, or store the Backup Data and other data through use of the Services as contemplated by this Agreement; (ii) is consistent with the requirements of this Agreement and all legal protections provided to Arcserve herein; and (iii) includes terms substantially identical to (and no less restrictive than) the Minimum Customer Terms.
- e. Notwithstanding any terms to the contrary in this Agreement, if Arcserve receives a notice from Customer requesting the deletion of Backup Data during the Trial Term or the Standard Term, Arcserve will use commercially reasonable efforts to promptly delete such Backup Data.

## **8. HIPAA**

Customer and Arcserve each represents and warrants that it is compliant with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), and Customer represents and warrants that neither its acts nor omissions will adversely affect Arcserve’s compliance with HIPAA. Each party is bound by the terms and conditions of the BAA as to Backup Data that is Protected Health Information, as such term is defined by HIPAA and in the BAA.

## **9. PERSONAL DATA PROTECTION**

If any of the Backup Data, in whole or in part, are or may be subject to the requirements of Data Protection Laws as it constitutes Personal Data as defined therein, Arcserve and Customer agree: (i) to be governed by the terms of the Arcserve Privacy Policy; and (ii) the Data Protection Agreement.

## **10. OWNERSHIP**

As between the parties, you own all right, title and interest in and to the Backup Data and any and all Intellectual Property Rights embodied therein. As between the parties and subject to the grants in this Agreement, Arcserve owns all right, title and interest in and to: (i) the Services and the Software provided by Arcserve for your use of the Services; (ii) the Hosted System; (iii) the Documentation; (iv) any work product developed by Arcserve as a result of the performance of the Services and/or the Support; and (v) any and all Intellectual Property Rights embodied therein (collectively “Arcserve IP”). Arcserve retains unconditional and unrestricted rights to market, sell, and distribute the Software and the Services to all current and potential customers and users. Arcserve retains exclusive ownership of its trademarks and logos as they are depicted in any respect and including without limitation their use with the Arcserve UDP Cloud Direct Client Software, Services and Documentation. This Agreement provides Customer with specified rights, and all rights not expressly granted herein are reserved by Arcserve. Customer agrees to take all reasonable precautions to protect Arcserve’s Intellectual Property Rights and other proprietary rights associated with the Arcserve IP.

## **11. PAYMENT OBLIGATIONS**

- c. Customer shall pay all Fees set forth in the Order or otherwise due and owing to Arcserve in accordance with the terms set forth herein, in such Order or as otherwise agreed upon by Arcserve. With respect to certain Arcserve products or Services, the pricelist, which may



include a Pricing Calculator and/or Pricing Model related to such Service or Customer may apply in determining applicable prices to be paid by a Customer hereunder. With respect to auto renewal Orders, Fees to be paid by Customer for Services during the renewal periods shall be adjusted as set forth in the applicable Order. If the Order does not provide for Fees to be adjusted upon renewal, then such Fees shall be adjusted to reflect the higher of Arcserve's then current pricing for the Services or the Fees then being paid by Customer for the Services on the date immediately preceding the commencement of the renewal term. The provision of each Service (and the Support) may be suspended or discontinued by Arcserve in its discretion for non-payment of the Fees in full, when due. If Customer licenses the Services on a subscription basis through a distributor, reseller, or master MSP (collectively referred to as "Distributor"), Customer understands and acknowledges that, in the event that such Distributor fails to pay fees associated with use or distribution of the Services, or otherwise breaches its agreement with Arcserve (or its subsidiary or affiliate), Customer's use of the Services, access to the Portal, if any, and/or Support may be suspended or terminated.

- d. For auto-renewal Orders, to cancel your subscription to prevent automatic renewal, you must send a cancellation notice by email to [cancel@arcserve.com](mailto:cancel@arcserve.com) not less than ten (10) days prior to the end of the then-current Standard Term. Cancellation will become effective at the end of the then-current Standard Term.
- e. Unless an Order provides otherwise, all payments must be made in U.S. Dollars and are due upon demand. Interest on any late payments will accrue at the rate of 1.5% per month, or the highest rate permitted by law, whichever is lower, from the date such amount is due until finally paid. Further, Arcserve may collect Fees owed using other collection mechanisms (including, but not limited to, charging other payment methods on file with Arcserve or retaining collection agencies and legal counsel).
- f. All Fees required by this Agreement are exclusive of federal, state, local and foreign taxes, duties, tariffs, levies, withholdings and similar assessments (including without limitation, sales taxes, use taxes and value added taxes), and Customer agrees to bear and be responsible for the payment of all such charges, excluding taxes based upon Arcserve's income. All amounts due hereunder shall be grossed-up for any withholding taxes imposed by any foreign government. If any federal, state, local or foreign government applies taxes to the Services that Arcserve is required to remit to the applicable taxing authority, Customer shall remit payment therefor to Arcserve promptly following receipt of Arcserve's invoice for the same.
- e. In the event Customer disputes the accuracy of an invoice, Customer must notify Arcserve (or its designee) in writing as soon as practicable of the dispute, but in no event later than sixty (60) days after the invoice date. If Customer fails to so notify Arcserve (or its designee), any dispute or objection concerning such invoice is forever waived and released.

## 12. SYSTEM MAINTENANCE

Maintenance is regularly conducted on the Hosted System used to manage and deliver the Services. During these maintenance periods, the Services, if applicable the Portal, and/or Customer's account may be unavailable or inaccessible. Arcserve will endeavor to provide Customer with prior and/or contemporaneous notice of such maintenance, but Customer acknowledges that such prior or contemporaneous notice may not be provided, depending on the nature of necessary maintenance at a particular time. Arcserve shall not be liable for any loss suffered or incurred by Customer in relation to maintenance or the inability to access the Services, the Portal or Customer's account during maintenance.





### **13. CONFIDENTIALITY**

“Confidential Information” means all information disclosed (whether in oral, written, or other tangible or intangible form) by one party (the “Disclosing Party”) to the other party (the “Receiving Party”) concerning or related to this Agreement or the Disclosing Party (whether before, on or after the Effective Date) which the Receiving Party knows or should know, given the facts and circumstances surrounding the disclosure of the information by the Disclosing Party, is confidential information of the Disclosing Party. Confidential Information includes, but is not limited to, pricing, the pricelist, the Services, the components of the business plans, financial plans, know-how, customer information, strategies and other similar information. The Receiving Party will, during the term of this Agreement, and thereafter maintain in confidence the Confidential Information of the Disclosing Party and will not use such Confidential Information except as expressly permitted herein. The Receiving Party will use the same degree of care in protecting the Disclosing Party’s Confidential Information as the Receiving Party uses to protect its own Confidential Information from unauthorized use or disclosure, but in no event less than reasonable care. Any Confidential Information of the Disclosing Party will be used by the Receiving Party solely for the purpose of carrying out the Receiving Party’s obligations under this Agreement. Subject to the terms and conditions of this Agreement, the Receiving Party (i) will not reproduce Confidential Information disclosed by the Disclosing Party, in any form, except as required to accomplish the Receiving Party’s obligations under this Agreement and (ii) will only disclose Confidential Information disclosed by the Disclosing Party to its directors, officers, employees and/or contractors who have a need to know such Confidential Information in order to perform their duties under this Agreement and if such directors, officers, employees and/or contractors have executed a non-disclosure agreement with the Receiving Party with terms no less restrictive than the non-disclosure obligations contained in this Section. Confidential Information will not include information that: (a) is in or enters the public domain without breach of this Agreement through no fault of the Receiving Party; (b) the Receiving Party can reasonably demonstrate was in its possession prior to first receiving it from the Disclosing Party; (c) the Receiving Party can demonstrate was developed by the Receiving Party independently and without use of or reference to the Disclosing Party’s Confidential Information; or (d) the Receiving Party receives from a third-party without restriction on disclosure and without breach of a nondisclosure obligation. Notwithstanding anything in this Agreement to the contrary, in the event of a termination or suspension, Customer agrees that Arcserve may communicate with End Users or other third parties for the purpose of avoiding a disruption in their services and making them aware of a change in the parties’ relationship. This provision shall survive the termination of this Agreement.

### **14. PUBLICITY**

Customer acknowledges and agrees that Arcserve may use, publish and display Customer’s name and logo on the Site and publicly-available printed materials identifying Customer as a customer of Arcserve.

### **15. DISCLAIMER**

- a. Arcserve is not responsible to you for the loss of or unauthorized access to Backup Data or the unauthorized use of the Services. You are solely responsible for: (i) the use of the Services by any employee of yours or any person to whom you have given access to the Services; and (ii) any person who gains access to Backup Data or the Services as a result of your failure to use reasonable security precautions (even if such use was not authorized by you).
- b. EXCEPT FOR THE SERVICE LEVEL STANDARDS, WHICH ONLY APPLY DURING THE STANDARD TERM AND TO CERTAIN ARCSERVE ARCSERVESERVICES, ARCSERVEARCSERVE AND ITS SUPPLIERS PROVIDE THE SERVICES AND THE SUPPORT “AS IS” WITH ALL FAULTS AND ON AN “AS AVAILABLE” BASIS WITHOUT ANY REPRESENTATIONS, WARRANTIES, COVENANTS OR CONDITIONS OF ANY KIND. ARCSERVEARCSERVE AND ITS SUPPLIERS DO NOT WARRANT THAT ANY OF THE SERVICES OR THE SUPPORT WILL MEET CUSTOMER’S REQUIREMENTS, BE UNINTERRUPTED, ERROR-FREE OR COMPLETELY SECURE, OR THAT ANY DEFECTS OR



ERRORS IN THE SERVICES WILL BE CORRECTED. CUSTOMER ACKNOWLEDGES AND AGREES THAT: (1) THE SERVICES MAY INCLUDE ACCESS TO AND USE OF THE PORTAL MADE AVAILABLE TO CUSTOMER BY ARCSERVE FOR USE DURING THE TERM OF THIS AGREEMENT; (2) THE SERVICES MAY REQUIRE ACCESS TO AND USE OF THE INTERNET; (3) ARCSERVE DOES NOT HAVE RESPONSIBILITY FOR OPERATING OR MAINTAINING CUSTOMER SERVERS AND CUSTOMER'S CONNECTION TO THE INTERNET TO ACCESS AND UTILIZE THE SERVICES; AND (4) THERE ARE RISKS INHERENT IN INTERNET CONNECTIVITY THAT COULD RESULT IN THE LOSS OF BACKUP DATA. ARCSERVE AND ITS SUPPLIERS DISCLAIM ANY AND ALL WARRANTIES AND REPRESENTATIONS (EXPRESS OR IMPLIED, ORAL OR WRITTEN) WITH RESPECT TO THE SERVICES AND THE SUPPORT WHETHER ALLEGED TO ARISE BY STATUTE, OPERATION OF LAW, BY REASON OF CUSTOM OR USAGE IN THE TRADE, BY COURSE OF DEALING OR OTHERWISE, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY; SATISFACTORY QUALITY; UNINTERRUPTED USE' FITNESS OR SUITABILITY FOR ANY PURPOSE (WHETHER OR NOT ARCSERVE KNOWS, HAS REASON TO KNOW, HAS BEEN ADVISED OR IS OTHERWISE AWARE OF ANY SUCH PURPOSE); NON-INFRINGEMENT AND/OR CONDITION OF TITLE. CUSTOMER ACKNOWLEDGES AND AGREES THAT THE SERVICES CONTAIN TECHNOLOGY THAT IS NOT FAULT TOLERANT AND IS NOT DESIGNED, MANUFACTURED, INTENDED OR SUITABLE FOR USE IN ENVIRONMENTS OR APPLICATIONS IN WHICH THE FAILURE OF THE SERVICES COULD LEAD TO DEATH, PERSONAL INJURY, OR SEVERE PROPERTY OR ENVIRONMENTAL DAMAGE. CUSTOMER ACKNOWLEDGES AND AGREES THAT IT HAS RELIED ON NO WARRANTIES. THIS DISCLAIMER AND EXCLUSION WILL APPLY EVEN IF THE AGREEMENT FAILS OF ITS ESSENTIAL PURPOSE.

#### **16. CHANGES TO ACCEPTABLE USE POLICY**

We may change the Acceptable Use Policy to add restrictions on use of the Services, provided that the changes are reasonable and consistent with hosting industry norms. If a change materially impacts Customer's existing use of the Services (in an adverse manner), Customer may terminate this Agreement without penalty in accordance with Section 20 below. If we make a change to the Acceptable Use Policy, we will publish a revised version of the Acceptable Use Policy on the Site and Customer agrees that publishing such revised Acceptable Use Policy shall constitute sufficient notice and Customer's continued use of the Services constitutes acceptance of the modified policy.

#### **17. COMPLIANCE AND EXPORT MATTERS**

Customer shall at all times comply with all applicable laws, including but not limited to the terms of the U.S. Foreign Corrupt Practices Act, the U.K. Anti-Bribery Act and all similar laws requiring ethical business practices, as well as, complying with the U.S. Export Administration Regulations and agrees that it will not directly or indirectly sell, export, transfer, assign, use, or otherwise dispose of any data, information or Products received hereunder in a manner which may result in any non-compliance therewith. Unless Customer expressly notifies Arcserve in writing of any applicable restrictions, Arcserve may perform any of the Services hereunder utilizing any Datacenter or Hosted System located in any jurisdiction. Customer represents and warrants that it is not on, or associated with any organization on the United States Department of Commerce's Bureau of Industry and Security's Denied Persons List or Unverified List; or the United States Department of the Treasury's Office of Foreign Assets Control lists, Specially Designated Nationals, Specially Designated Global Terrorists, Specially Designated Narcotics Traffickers, Specially Designated Narcotic Traffickers-Kingpin, or Specially Designated Terrorists List; or the United States Department of State's Designated Foreign Terrorist Organizations, Embargoed Countries list, or Debarred Persons List; or is subject to a denial order issued by the United States Department of Commerce.

## 18. INDEMNIFICATION

- a. Customer, at its sole expense, will defend, indemnify and hold Arcserve and its directors, officers, employees, contractors, agents, distributors, resellers, successors and assigns (“Arcserve Indemnitees”) harmless from and against any and all actual or threatened suits, actions, proceedings (at law or in equity), claims (groundless or otherwise), damages, payments, deficiencies, fines, judgments, settlements, liabilities, losses, costs and expenses (including, but not limited to, reasonable attorney fees, costs, penalties, interest and disbursements) resulting from any third party claim, suit, action, or proceeding (“Claim”) against an Arcserve Indemnitee, whether successful or not, resulting from or arising in connection with: (i) any negligence or willful misconduct by Customer; (ii) any breach by Customer of this Agreement (including, but not limited to, any breach by Customer of its representation or warranties); (iii) Backup Data (or any portion thereof); (iv) Customer’s breach, default, or nonperformance under any agreement Customer may have with End Users or other third parties for claims associated with products or services Customer provides or fails to provide to such third parties; or (v) Customer’s breach of laws or regulations applicable to its performance of this Agreement or its agreements with End Users or other third parties.
- b. Customer’s indemnification obligations under this Section are conditioned upon the indemnified party: (i) giving prompt notice of the Claim to the indemnifying party once the indemnified party becomes aware of the Claim; (ii) granting sole control of the defense and settlement of the Claim to the indemnifying party (except that the indemnified party’s prior written approval will be required for any settlement that reasonably can be expected to require an affirmative obligation of or result in any ongoing liability to the indemnified party); and (iii) providing reasonable cooperation to the indemnifying party and, at the indemnifying party’s request and expense, assistance in the defense or settlement of the Claim. Notwithstanding any terms to the contrary in this Agreement, the failure to give notice to the indemnifying party within a reasonable time of the commencement of any Claim under this Section will not relieve the indemnifying party of any liability to the indemnified party under this Section, other than to the extent that such failure materially prejudices the indemnifying party’s ability to defend such Claim.

## 19. LIMITATION OF LIABILITY

- a. EXCEPT FOR ANY ACTS OF FRAUD, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, CUSTOMER’S INDEMNIFICATION OBLIGATIONS OR CUSTOMER’S PAYMENT OBLIGATIONS, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY LOSS OF PROFITS, LOSS OF USE, LOSS OF REVENUE, LOSS OF GOODWILL, ANY INTERRUPTION OF BUSINESS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, THE SERVICES OR THE SUPPORT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, EVEN IF SUCH PARTY HAS BEEN ADVISED OR IS OTHERWISE AWARE OF THE POSSIBILITY OF SUCH DAMAGES.
- b. EXCEPT FOR ANY ACTS OF FRAUD, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, CUSTOMER’S INDEMNIFICATION OBLIGATIONS OR CUSTOMER’S PAYMENT OBLIGATIONS, IN NO EVENT WILL EITHER PARTY’S TOTAL LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, THE SERVICES OR THE SUPPORT EXCEED IN THE AGGREGATE REGARDLESS OF THE NUMBER OF CLAIMS MADE DURING THE TERM THE AMOUNTS PAID AND PAYABLE BY CUSTOMER TO ARCSERVE OR ARCSERVE’S AUTHORIZED REPRESENTATIVE WITH RESPECT TO THE SERVICE INVOLVED IN THE CLAIM DURING THE SIX (6) MONTH PERIOD PRIOR TO THE DATE THE CLAIM AROSE. THIS SECTION WILL BE GIVEN FULL EFFECT EVEN IF ANY REMEDY SPECIFIED IN THESE TERMS IS DEEMED TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.



- c. NOTWITHSTANDING ANY TERMS TO THE CONTRARY IN THIS AGREEMENT: (I) THE SOLE AND EXCLUSIVE REMEDY FOR ANY INABILITY TO ACCESS THE SERVICES OR OTHER FAILURE TO MEET ANY SERVICE LEVEL STANDARDS ARE THE SERVICE CREDITS PROVIDED UNDER THE SERVICE LEVEL AGREEMENT UNLESS SUCH FAILURE IS DUE TO ARCSERVE'S WILLFUL MISCONDUCT; AND (II) ARCSERVE WILL NOT BE LIABLE FOR ANY LOSS OF BACKUP DATA. IN ADDITION TO THE FOREGOING, IF ARCSERVE IS DEEMED TO BE LIABLE TO CUSTOMER OR ANY THIRD PARTY HEREUNDER, ARCSERVE'S MAXIMUM AND AGGREGATE LIABILITY HEREUNDER SHALL NOT EXCEED ONE TIMES THE AMOUNT PAID BY CUSTOMER TO ARCSERVE DURING THE 12 MONTH PERIOD PRIOR TO THE ACCRUAL OF THE FIRST CLAIM MADE BY CUSTOMER AGAINST ARCSERVE HEREUNDER, REGARDLESS OF THE NUMBER OF CLAIMS THAT MAY BE MADE THEREBY HEREUNDER.
- d. NOTWITHSTANDING ANY TERMS TO THE CONTRARY IN THIS AGREEMENT, CUSTOMER ACKNOWLEDGES AND AGREES THAT: (I) ARCSERVE MAY PROVIDE TO CUSTOMER THIRD PARTY SOFTWARE AND SERVICES; AND (II) CUSTOMER AGREES TO COMPLY WITH THE THIRD-PARTY TERMS AND LICENSES APPLICABLE TO SUCH THIRD-PARTY SOFTWARE AND SERVICES. ARCSERVE MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND TO CUSTOMER REGARDING SUCH THIRD-PARTY SOFTWARE AND SERVICES OR THAT SUCH TERMS OR CONDITIONS MAY NOT CHANGE OR BE ALTERED BY SUCH THIRD PARTIES AT ANY TIME.

## **20. TERM, TERMINATION & SUSPENSION OF SERVICES**

- a. The term of this Agreement will correspond to the length of the Trial Term or Standard Term as set forth in the Order (unless terminated as permitted in this Agreement).
- b. During the Trial Term only, either party may terminate this Agreement without cause, upon notice to the other party, and such termination will be effective immediately and without liability to the other party.
- c. Either party may terminate this Agreement and/or any Order as set forth in the Order or upon an Event of Default. Any one of the following is an event of default under this Agreement: (i) a party breaches any material provision of this Agreement, and fails to cure such breach within thirty (30) days of written notice (except for Customer's payment obligations which shall be cured promptly, but no more than fifteen (15) days, upon notice); (ii) a party becomes subject of a voluntary or involuntary petition in bankruptcy, or any proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors, which is not dismissed within sixty (60) days after commencement; (iii) Customer breaches the terms of any other agreement with Arcserve; or (iv) Customer infringes or aids in the infringement of Arcserve's Intellectual Property Rights.
- d. During the Standard Term, Arcserve may terminate this Agreement for convenience upon thirty (30) days' advance written notice; provided that if Arcserve terminates this Agreement for convenience, it shall refund a pro rata amount of any prepaid fees for the terminated portion of the then-current Standard Term. Notwithstanding any terms to the contrary in this Agreement: (i) failure to meet any Service Level Standard does not constitute a breach of this Agreement (or any portion thereof); and (ii) Customer will be responsible for all Fees incurred up to the effective date of termination.
- e. During the Trial Term or the Standard Term, Arcserve may suspend Services (or any portion thereof) without liability if: (i) Arcserve reasonably believes that the Services are being used in violation of this Agreement; (ii) there is an attack on the Hosted System or the Hosted System is accessed or manipulated



by a third party without Customer's or Arcserve's consent; (iii) Arcserve is required by any Law(s) to suspend the Services; or (iv) Arcserve reasonably believes that the suspension of the Services is required.

## 21. EFFECTS OF TERMINATION

- a. Upon any termination or expiration of this Agreement: (i) Customer must immediately pay all Fees (if applicable) accrued up to the effective date of termination or expiration of this Agreement (whichever is applicable); and (ii) all applicable licenses granted to Customer under this Agreement will immediately cease; provided that licenses granted to Arcserve with respect to Backup Data shall survive for the duration as provided below. No refunds will be issued except as otherwise expressly set forth in this Agreement.
- b. Provisions which, by their terms, are to survive expiration or termination of this Agreement, and the following sections will survive any expiration or termination of this Agreement – Products and Services, Additional Definitions, Backup Data (other than the licenses granted to Arcserve), Ownership, Payment Obligations, Confidentiality and Publicity, Disclaimer, Indemnification, Limitation of Liability, Effects of Termination, Transition Services and Miscellaneous.
- c. If you do not elect to use any Service at the end of the Trial Term, Arcserve may (but, is not obligated to) delete all Backup Data after the close of the Trial Term.

## 22. TRANSITION SERVICES

In the event of expiration or termination of this Agreement for any reason during the Standard Term, Arcserve will: (i) make not less than a commercially reasonable effort to provide Customer access to all Backup Data stored on the Arcserve equipment for up to thirty (30) days (or such longer period as mutually agreed to in writing by the parties, and unless specifically requested to delete Backup Data sooner); and (ii) within such 30 day time period shall use commercially reasonable efforts to transfer, at Customer's sole expense, such Backup Data to Customer or Customer's designated service provider. Notwithstanding any terms to the contrary in this Agreement, after such period, Arcserve will have the right (but not the obligation) to destroy all such Backup Data.

## 23. MISCELLANEOUS

- a. **Subcontractors.** Customer agrees, acknowledges, and understands that performance of the Services or Support may be accomplished by corporate affiliates of Arcserve and that Arcserve may, from time to time, subcontract any or all of the Services to trusted third-party providers. For purposes of this Agreement, performance of the Services by such affiliate or third-party provider shall be deemed performance by Arcserve itself.
- b. **Claims Limitation.** Any claim, action, or proceeding alleging breach of warranty, tort, negligence, misrepresentation, strict or product liability, or overpayment of any amounts due or paid under this Agreement (collectively the "Limited Claims") must be filed with a competent court or body within one (1) year of the termination or expiration of this Agreement, unless a shorter time period is otherwise specified in this Agreement. Any Limited Claims that are not brought within the applicable time period shall be forever barred, without regard to any other limitations period set forth by law or statute.
- c. **Monitoring.** In accordance with applicable law and applicable contractual obligations, Arcserve reserves the right to cooperate with appropriate legal authorities in investigations of claims of illegal activity involving the Services. Arcserve or its agents may use technical means to monitor activity into, and out of, its network facilities to prevent the introduction of viruses, malware, or other hostile code, to prevent intrusions, and otherwise to enforce the terms and conditions of this Agreement, and Customer agrees that Arcserve is authorized to monitor its activity through Arcserve's networks for



such purposes.

- d. **United States Government Restricted Rights.** The Software and Documentation are commercial in nature. The Software and Documentation are “Commercial Items”, as that term is defined in 48 C.F.R. § 2.101, consisting of “Commercial Computer Software” and “Commercial Computer Software Documentation”, as such terms are defined in 48 C.F.R. § 252.227-7014(a)(1), (4)-(5), and used in 48 C.F.R. § 12.212 and 48 C.F.R. § 227.7202, as applicable. Consistent with 48 C.F.R. §§ 12.212, 252.227-7015, 227.7202-1-4, and 52.227-14, and other relevant sections of the Code of Federal Regulations, as applicable, Arcserve Software and Documentation are licensed to United States Government users (i) only as Commercial Items, and (ii) with only those rights that are granted to all other Users of the Cloud Products, according to the terms and conditions contained in this Agreement.
- e. **Entire Agreement.** This Agreement (together with all Orders and any other documents, agreements, policies linked to this Agreement) are the entire agreement of the parties regarding the subject matter hereof, superseding all other agreements between them, whether oral or written, regarding the subject matter hereof. In the event of a conflict between the terms and conditions of an Order and the terms and conditions of this Agreement, the terms and conditions of this Agreement will govern. This Agreement shall not be superseded by any purchase order and the terms of any Customer purchase order or like document shall not have any force or effect.
- f. **Governing Law; Jurisdiction.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota, without regard to its choice of law provisions. The Parties irrevocably submit to the personal jurisdiction of the state or federal courts of Minnesota. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Any action for provisional relief concerning this Agreement or the Parties’ relationship hereunder, including but not limited to a temporary restraining order, preliminary injunction, attachment in aid of arbitration, or order for any interim or conservatory measure, shall be brought exclusively in Hennepin County, State of Minnesota, U.S.A. The Parties consent and submit to the exclusive jurisdiction of the state or federal courts in Hennepin County, State of Minnesota, U.S.A., for purposes of any action for such provisional remedy or interim or conservatory measure.
- g. **Dispute Resolution.** At the election of either party to this Agreement, any dispute, controversy, or claim arising out of, relating to, or in connection with the following may be submitted for final resolution by arbitration: the performance of the Services, including without limitation any alleged deficiency or defect; the existence or breach of a contractual, statutory, or common-law warranty associated with this Agreement or Services; the terms and obligations of this Agreement as they pertain to the foregoing; and the performance, termination, rescission, or alleged breach of this Agreement as they pertain to the foregoing (collectively, “Arbitral Dispute”). In the event arbitration is elected, both parties expressly waive any right to a trial by jury for any claim constituting an Arbitral Dispute. Any claim by Arcserve for infringement, violation of copyright, trademark, or Intellectual Property Rights, or breach of this Agreement arising from facts constituting infringement or violation of Intellectual Property Rights is not an Arbitral Dispute, but shall be brought exclusively before a court of competent jurisdiction in Hennepin County, State of Minnesota, U.S.A. If the claimant is the party electing arbitration, they must do so in writing before filing a complaint or otherwise bringing an action in court. If the respondent is the party electing arbitration, they must do so in writing on or before the last day to answer and/or respond to a summons and/or complaint brought by the other party. If Licensee is a resident of or is headquartered in the U.S., the arbitration shall be conducted by the American Arbitration Association (the “AAA”) in accordance with the AAA Commercial Arbitration Rules (“Rules”) in effect at the time of the arbitration, except as those rules may be modified by this Agreement or stipulation of the parties. If the Customer is not a U.S. resident or does not maintain a place of business in the U.S., the arbitration shall be conducted by the International Centre for Dispute



Resolution (the “ICDR”) in accordance with the ICDR International Arbitration Rules in effect at the time of the arbitration, except as those rules may be modified by this Agreement or stipulation of the Parties. The Commercial Arbitration Rules and International Arbitration Rules are collectively referred to as the “Rules.” Copies of the Rules can be obtained, free of charge, at <http://www.adr.org/>. The parties shall be entitled to conduct discovery as follows: twenty (20) interrogatories, twenty (20) requests for production of documents, three (3) subpoenas to third parties, three (3) oral depositions, and one (1) written-question deposition. The parties intend that any arbitration between them shall involve only the claims between the parties and not any claims by a party against a third party. No other dispute between a party and a third party shall be included in the arbitration. Class arbitration shall not be permitted. The arbitration shall be conducted by a single arbitrator selected in accordance with the Rules except that the arbitrator must be a retired state or federal judge or foreign equivalent who has previous experience in technology disputes. Filing fees, arbitrator fees, and other fees charged by the arbitral body shall be paid initially by the claimant in the proceeding. Arbitration shall be conducted in the English language. The place of arbitration shall be Hennepin County, State of Minnesota, U.S.A. Any award is final and binding on the parties and may be challenged in a court of competent jurisdiction only upon those grounds allowed under the Minnesota Uniform Arbitration Act. In the absence of challenge, judgment on the award may be entered in any court of competent jurisdiction. Without otherwise limiting the authority conferred on the arbitrator by this Agreement and the Rules, the arbitrator shall not have the authority to exercise equitable principles or award equitable remedies. By agreeing to Arbitration, the parties do not intend to deprive any court of competent jurisdiction in Hennepin County, State of Minnesota, U.S.A., of its ability to hear disputes that are not Arbitral Disputes or to issue any form of provisional remedy, including but not limited to a temporary restraining order, preliminary injunction, attachment in aid of arbitration, or order for any interim or conservatory measure. A request for such provisional remedy or interim or conservatory measure by a party to a court shall not be deemed a waiver of the agreement to arbitrate. In any Arbitral Dispute, the arbitrator may award the successful party all of its costs incurred in the proceeding, including if applicable and without limitation filing, arbitrator, and administrative fees, and other fees imposed by the arbitrator.

- h. **Assignment.** Neither this Agreement nor any right or duty under this Agreement may be transferred, assigned or delegated by Customer without the prior written consent of Arcserve, and any attempted transfer, assignment or delegation without such consent will be void and without effect; provided, however, that Customer may assign or transfer this Agreement in their entirety pursuant to a merger or other corporate reorganization or the sale of substantially all of Customer’s assets, in which case Customer shall provide notice to Arcserve of such assignment or transfer promptly following the same. Arcserve may freely transfer, assign or delegate this Agreement or its rights and duties under this Agreement. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the parties and their respective representatives, heirs, administrators, successors and permitted assigns.
- i. **Severability.** If any provision of this Agreement is invalid, illegal, or incapable of being enforced by any rule of law or public policy, all other provisions of this Agreement will nonetheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated by this Agreement is not affected in any manner adverse to any party. Upon such determination that any provision is invalid, illegal, or incapable of being enforced, the parties will negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled.
- j. **Force Majeure.** Except for payments due under this Agreement, neither party will be responsible for any failure to perform or delay attributable in whole or in part to any cause beyond its reasonable control, including but not limited to acts of God (fire, storm, floods, earthquakes, etc.), civil disturbances, disruption of telecommunications, disruption of power or other essential services,



interruption or termination of service by any service providers being used by Arcserve to link its servers to the Internet, labor disturbances, vandalism, cable cut, computer viruses or other similar occurrences, or any acts of any third party (each a “Force Majeure Event”). In the event of any such delay the date of delivery will be deferred for a period equal to the time lost by reason of the delay.

- k. **Electronic Communications.** Notwithstanding any terms to the contrary in this Agreement, Arcserve may choose to electronically deliver all communications with you, which may include: (i) email to your email address indicated in your communications with Arcserve or upon registration with the Site; or (ii) posting messages that are displayed to you when you log in to or access the Site. Arcserve’s electronic communications to you may transmit or convey information about action taken on your request, portions of your request that may be incomplete or require additional explanation, any notices required under applicable law and any other notices. You agree to do business electronically with Arcserve, and to receive electronically all current and future notices, disclosures, communications and information, and that the aforementioned provided electronically satisfies any legal requirement that such communications be in writing. An electronic notice will be deemed to have been received the day of receipt as evidenced by such email.
- l. **No Modification.** Other than modifications to the Acceptable Use Policy as provided above and modifications and updates to this Agreement accepted by Customer electronically or in writing, no other modification, addition or deletion, or waiver of any rights under this Agreement will be binding on a party unless agreed upon in writing by the parties or as set forth below. Arcserve may change the terms of this Agreement from time to time. If we make a change to this Agreement, we will publish a revised version of the Agreement on the Site and Customer agrees that publishing such revised Agreement shall constitute sufficient notice and Customer’s continued use of the Services constitutes acceptance of the modified terms for all Services purchased after the release of the revised version of the Agreement.
- m. **Waivers.** No failure or delay (in whole or in part) on the part of a party to exercise any right or remedy hereunder will operate as a waiver thereof or effect any other right or remedy. All rights and remedies hereunder are cumulative and are not exclusive of any other rights or remedies provided hereunder or by law. The waiver of one breach or default or any delay in exercising any rights will not constitute a waiver of any subsequent breach or default
- n. **Notices.** All notices required or permitted to be given or served under this Agreement shall be in writing and: (i) personally delivered to the Party to be notified, in which instance notice shall be deemed to have been given and received upon actual delivery; (ii) sent by a reputable international overnight commercial courier service (such as FedEx) addressed to the party to be notified, in which instance notice shall be deemed to have been given one (1) business day after deposit with such courier service for delivery; (iii) sent by email or facsimile, in which instance notice shall be deemed to have been given and received upon actual delivery; (iv) if to Customer, posted in or delivered through the Portal, in which event the notice is effective three (3) business days after Arcserve posts the notice; or (v) delivered to the party to be notified by any other means where it can be established that the party to be notified received such notice, in which instance notice shall be deemed to have been given and received upon the date of receipt. The point of contact of the parties for notice by any of the foregoing means shall be as follows: If to Arcserve: Arcserve (USA) LLC, Attn: Chief Financial Officer. If to Customer, to the address, email, and/or facsimile Customer provided with its account, or through the Portal. Either party may change its contact information for notice purposes by giving ten (10) days’ prior written notice to the other party in the manner described above.
- o. **Relationship.** The relationship between the parties is that of independent contractors. Neither party will have, nor represent that it has, any power, right or authority to bind the other party, or to assume or create any obligation or responsibility, express or implied, on behalf of the other party or in the other





party's name, except as herein expressly provided. Nothing stated in this Agreement shall be construed to suggest that the parties are joint venturers, partners, or affiliates, or have the relationship of employer/employee, franchiser/franchisee, or principal/agent.

- p. **Third-Party Beneficiary.** Except as otherwise expressly stated in this Agreement, nothing in this Agreement is intended or shall be construed to confer upon any person or entity other than the parties (and their successors or assigns) any rights or remedies under or by reason of this Agreement. End Users, if any, are not third-party beneficiaries.



**SCHEDULE A**  
**Minimum Customer Terms**

TERMS AND CONDITIONS REGARDING USE OF ARCSERVE SOFTWARE: This document concerns your use of Arcserve (USA) LLC (“Arcserve”) software provide to you by [\_\_\_\_\_] (hereinafter referred to as “Company”). Company will provide software services to you, which may include associated media, printed materials, and “online” or electronic documentation, including certain Arcserve software products that it offers on an MSP or subscription basis (individually and collectively, the “Software”). Company does not own the Software and its use is subject to certain rights and limitations identified herein. Your right to use the Software is subject to your customer service agreement (“Agreement”) with Company and your compliance with and consent to the following terms and conditions, which Company does not have authority to alter or amend.

1. **OWNERSHIP OF SOFTWARE.** The Software is licensed to Company by Arcserve. All title and intellectual property rights in and to the Software are owned by Arcserve and/or its licensors. The Software is protected by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. Your possession, access, or use of the Software does not transfer to you any ownership right to the Software.
2. **COPIES.** You may not make any copies of the Software. You must uninstall, erase or destroy all Software installed on your computer(s) upon termination or cancellation of your Agreement with Company, notice from Company, or transfer of your computer(s) to another person or entity, whichever occurs first. You may not copy any printed materials accompanying the Software.
3. **LIMITATIONS ON REVERSE ENGINEERING, DECOMPILATION AND DISASSEMBLY.** You may not reverse engineer, decompile, or disassemble the Software, unless applicable law, notwithstanding this limitation, expressly permits such activity.
4. **NO RENTAL.** You may not rent, lease, lend, pledge, or directly or indirectly transfer or distribute the Software to any third party, and you may not permit any third party to access or use the functionality of the Software.
5. **INTERNET CONNECTIVITY.** The Software must have an operating Internet connection permitting it to periodically communicate with Arcserve’s system to verify the validity of the Software license. If the Software is repeatedly unable to communicate with Arcserve’s system, the Software will deactivate.
6. **TERMINATION.** Without prejudice to any other rights, Company may suspend or terminate your rights to use the Software if you fail to comply with these terms and conditions. Further, your rights to use the Software may be suspended or terminated in the event that Company violates its agreement with Arcserve. In the event of suspension, termination or cancellation, the functionality of the Software may cease, the Software may deactivate, and/or you may be required to stop using the Software and destroy all copies of the Software and all of its component parts.
7. **COOPERATION.** Upon termination of your rights to use the Software, you will cooperate in: (a) removing or deactivating all copies of the Software from computers on which it is installed; and (b) returning or destroying all media containing the Software.
8. **NO ARCSERVE WARRANTIES OR LIABILITIES. THE SOFTWARE IS PROVIDED “AS IS” AND WITH ALL FAULTS. ARCSERVE MAKES NO WARRANTIES, REPRESENTATIONS, OR CONDITIONS, EXPRESS OR IMPLIED, WRITTEN OR ORAL, REGARDING THE SOFTWARE, THE COMPANY, OR SERVICES PROVIDED BY COMPANY OR IN CONNECTION WITH THIS**



AGREEMENT. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, ARCSERVE DISCLAIMS ALL WARRANTIES AND CONDITIONS, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY (IF ANY) WARRANTIES OR CONDITIONS OF OR RELATED TO: MERCHANTABILITY, DURABILITY, FITNESS FOR A PARTICULAR PURPOSE, LACK OF VIRUSES, NONINFRINGEMENT, WORKMANLIKE EFFORT, AND LACK OF NEGLIGENCE. ALSO, TO THE MAXIMUM EXTENT PERMITTED BY LAW, THERE IS NO WARRANTY, DUTY, OR CONDITION OF TITLE, NOR ARE ANY WARRANTIES CREATED BY ANY DESCRIPTION OR OTHER CORRESPONDENCE RELATED TO THE SERVICES. ANY WARRANTIES, LIABILITY FOR DAMAGES, AND REMEDIES, IF ANY, ARE PROVIDED SOLELY BY COMPANY AND NOT BY ARCSERVE. TO THE EXTENT PERMITTED BY APPLICABLE LAW, YOU DISCLAIM ANY LIABILITY BY ARCSERVE OR ITS LICENSORS FOR ANY DAMAGES, WHETHER DIRECT, INDIRECT, OR CONSEQUENTIAL, ARISING FROM THE USE OF THE SOFTWARE OR YOUR AGREEMENT OR RELATIONSHIP WITH THE COMPANY.

9. SUPPORT. Any support for the Services and/or Software is provided to you by Company and not by Arcserve.

10. NO FAULT TOLERANCE. THE SOFTWARE CONTAINS TECHNOLOGY THAT IS NOT FAULT TOLERANT AND IS NOT DESIGNED, MANUFACTURED, OR INTENDED FOR USE IN ENVIRONMENTS OR APPLICATIONS IN WHICH THE FAILURE OF THE SOFTWARE COULD LEAD TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL, PROPERTY OR ENVIRONMENTAL DAMAGE.

11. PRIVACY, EXPORT RESTRICTIONS. You understand that personal information (that is, information about a person from which that person's identity may be known or determined), that you may provide about yourself, your employees, and your Customers incidental to receiving this Agreement, establishing an account with Arcserve, or receiving products or services from Arcserve under this Agreement may be transferred outside your country of residence solely for purposes of billing, reporting, and general account administration. It is therefore your responsibility to obtain any consents required for this purpose under applicable law. For questions about how Arcserve handles your information, please consult the Arcserve Privacy Policy. You also understand that Arcserve is a U.S. company subject to U.S. law and therefore personal information may be subject to access by United States legal authorities. The Software is of U.S. origin for purposes of U.S. export control laws. You agree to comply with all applicable international and national laws that apply to the Software, including the U.S. Export Administration Regulations, as well as end-user, end-use and destination restrictions issued by U.S. and other governments.