

# Continuity Software Subscription Service Agreement

This Subscription Service Agreement (the “Agreement”) is made between the Continuity Software entity (“Continuity”) and the customer entity (“Customer”) on the ordering document and becomes effective on the last signature date of the ordering document issued by Continuity (“Effective Date”).

The Agreement is deemed to include the General Terms and Conditions below, and any other terms expressly referenced herein or in other incorporated documents, all of which are expressly deemed incorporated in the Agreement by this reference. Pursuant to a separate transaction between Customer and Continuity’s authorized reseller (“Reseller”), Customer has purchased from Reseller certain services to be delivered by Continuity. This Agreement specifies the terms and conditions under which those services will be provided, apart from price, payment and other terms specified in the separate agreement between Customer and Reseller.

## GENERAL TERMS AND CONDITIONS

### 1. DEFINITIONS

- 1.1 “Affiliates” means any person or entity directly or indirectly Controlling, Controlled by, or under common Control with a party, where “Control” means the legal power to direct or cause the direction of the general management of the company, partnership, or other legal entity.
- 1.2 “Ancillary Software” means software licensed by Continuity to Customer that is deployed on machines operated by or for Customer to facilitate operation of the Subscription Service or interoperation of the Subscription Service with other software, hardware, or services. Ancillary Software may include code that is licensed under third-party license agreements, including open source made available or provided with the Ancillary Software.
- 1.3 “Claim” means any third-party suit, claim, action, or demand.
- 1.4 “Confidential Information” means: (a) Continuity Core Technology (which is Confidential Information of Continuity); (b) Customer Data and Customer Technology (which is Confidential Information of Customer); (c) any information of a party that is disclosed in writing or orally and is designated as Confidential or Proprietary at time of disclosure (and, for oral disclosures, summarized in writing within 30 days of initial disclosure and delivered in written summary form to the receiving party), or that, due to the nature of the information or circumstances of disclosure, receiving party would understand it to be disclosing party’s confidential information; and (d) the specific terms of this Agreement, any Use Authorization, any SOW, and any amendment or attachment to any of these, between the parties (which will be deemed Confidential Information of both parties). Confidential Information excludes any information that: (i) is or becomes generally known to the public through no fault or breach of this Agreement by receiving party; (ii) was already rightfully in receiving party’s possession, without restriction on use or disclosure, when receiving party received it under this Agreement; (iii) is independently developed by receiving party without use of disclosing party’s Confidential Information; or (iv) was or is rightfully obtained by receiving party, without restriction on use or disclosure, from a third party not under a duty of confidentiality to disclosing party.
- 1.5 “Customer Data” means electronic data uploaded by or for Customer or Customer’s agents, employees, or contractors, and processed in the Subscription Service, excluding Continuity Core Technology.
- 1.6 “Customer Technology” means software, methodologies, templates, business processes, documentation, or other material originally authored, invented, or otherwise created by Customer (or on Customer’s behalf, other than by Continuity or at Continuity’s direction) for use with the Subscription Service, excluding Continuity Core Technology.
- 1.7 “Deliverable” means anything that is created by or on behalf of Continuity for Customer in the performance of Professional Services.
- 1.8 “Documentation” means the then-current Continuity product documentation relating to the operation and use of the Subscription Service or Ancillary Software published by Continuity or its successor website. Documentation includes technical program or interface documentation, user manuals, operating instructions, and release notes.
- 1.9 “Intellectual Property Rights” means all intellectual property or other proprietary rights worldwide, including patents, copyrights, trademarks, moral rights, trade secrets, and any other intellectual or industrial property, including registrations, applications, renewals, and extensions of such rights.
- 1.10 “Law” means any applicable law, rule, statute, decree, decision, order, regulation, judgment, code, and requirement of any government authority (federal, state, local, or international) having jurisdiction.
- 1.11 “Newly Created IP” means Intellectual Property Rights in the inventions or works of authorship that are made by Continuity specifically for Customer in the course of performing Professional Services for Customer that are expressly identified as “Newly Created IP” in an SOW, excluding Continuity Core Technology.
- 1.12 “Order Form” means a form signed by Continuity and Customer which shall set forth the commercial terms under which the Subscription Services and/or the Professional Services and/or the Deliverables shall be provided by Continuity to the Customer.

- 1.13 “Product Overview” means Continuity’s published description of its products and their functionalities, solely to the extent attached to or expressly referenced in a Use Authorization.
- 1.14 “Professional Services” means any consulting, development, or educational services provided by or on behalf of Continuity pursuant to an agreed SOW or Service Description.
- 1.15 “Service Description” means the written description for a packaged Professional Service, attached to or referenced in a Use Authorization.
- 1.16 “Continuity Core Technology” means: (a) the Subscription Service, Ancillary Software, Documentation, and technology and methodologies (including products, software tools, hardware designs, algorithms, templates, software (in source and object forms), architecture, class libraries, objects, and documentation) created by or for, or licensed to, Continuity; and (b) updates, upgrades, improvements, configurations, extensions, and derivative works of the foregoing and related technical or end user documentation or manuals.
- 1.17 “Continuity Products” means, collectively, the Subscription Service, Ancillary Software, Documentation, and Deliverables.
- 1.18 “SOW” means a statement of work that describes scoped Professional Services.
- 1.19 “Subscription Service(s)” means the Continuity software-as-a-service offering ordered by Customer under a Use Authorization.
- 1.20 “Subscription Term” means the period of authorized access to and use of the Subscription Service, as set forth in a Use Authorization.
- 1.21 “Use Authorization” means a written document provided to Customer specifying the services that Customer has purchased, along with the term and scope of the authorized use thereof.
- 1.22 “Website” means the Continuity Website

## **2 ACCESS AND USE RIGHTS; RESTRICTIONS; PROVISION OF PROFESSIONAL SERVICES**

- 2.1 ACCESS AND USE RIGHTS. For each Subscription Term, Continuity grants the access and use rights set forth in this Section 2 for the Continuity Core Technology described in that Use Authorization.
  - 2.1.1 SUBSCRIPTION SERVICE. Subject to the terms of this Agreement, Continuity authorizes Customer to access and use the Subscription Service during the Subscription Term stated in the applicable Use Authorization, solely for its internal business purposes in accordance with the Documentation. Customer will not otherwise access or use the Subscription Service in a manner that exceeds Customer’s authorized access and use rights as set forth in this Agreement and the applicable Use Authorization.
  - 2.1.2 ANCILLARY SOFTWARE. Continuity grants Customer a limited, personal, worldwide, non-sublicensable, non-transferable (except as set forth in Section 12.1 (Assignment)), non-exclusive, royalty-free license during the Subscription Term to install and execute Ancillary Software on machines operated by or for Customer, solely to facilitate Customer’s authorized access to and use of the Subscription Service.
- 2.2 RESTRICTIONS. With respect to the Continuity Core Technology, Customer will not (and will not permit others to): (a) use it in excess of contractual usage limits (including as set forth in a Use Authorization), or in a manner that circumvents usage limits or technological access control measures; (b) license, sub-license, sell, resell, rent, lease, transfer, distribute, time share, or otherwise make any of it available for access by third-parties, except as may otherwise be expressly stated in a Use Authorization; (c) access it for the purpose of developing or operating products or services for third-parties in competition with the Continuity Core Technology; (d) disassemble, reverse engineer, or decompile it; (e) copy, create derivative works based on, or otherwise modify it, except as may be otherwise expressly stated in this Agreement; (f) remove or modify a copyright or other proprietary rights notice in it; (g) use it to reproduce, distribute, display, transmit, or use material protected by copyright or other Intellectual Property Right (including the rights of publicity) without first obtaining permission of the owner; (h) use it to create, use, send, store, or run viruses or other harmful computer code, files, scripts, agents, or other programs, or otherwise engage in a malicious act or disrupt its security, integrity, or operation; or (i) access or disable any Continuity or third-party data, software, or network (other than Customer’s instance of the Subscription Service under this Agreement). Before Customer engages in any of the foregoing acts that it believes it may be entitled to, it will provide Continuity with 30-days’ prior notice, and reasonably requested information to allow Continuity to assess Customer’s claim. Continuity may, in its discretion, provide alternatives that reduce adverse impacts on Continuity’s Intellectual Property Rights or other rights.
- 2.3 PROVISION OF PROFESSIONAL SERVICES. Customer and Continuity may enter into one or more SOWs or Use Authorizations subject to this Agreement, and which may incorporate one or more Service Descriptions for the provision of Professional Services. Continuity will perform the Professional Services, subject to the fulfillment of any responsibilities and payments due from Customer, as stated in the SOW or the Use Authorization.

### **3 ORDERING, FEES, INVOICING AND PAYMENT**

#### **3.1 DIRECT ORDERS.**

- 3.1.1 Customer may order and purchase the Subscription Services and Professional Services from Continuity by placing an Order Form or SOW. For each order, Continuity will provide Customer with a Use Authorization for Customer to sign and return to Continuity. In consideration for the Subscription Services and/or Professional Services, Customer will pay Continuity the fees set forth in the Order form or SOW (the "Fees").
- 3.1.2 Continuity will invoice Customer in advance and otherwise in accordance with the relevant Order Form or SOW. Customer will pay Continuity the Fees in accordance with the payment terms set forth in the Order Form or SOW. Except as otherwise specified in an Order Form or SOW, payment obligations are non-cancelable and the Fees paid are non-refundable. All costs associated with the wire transfer of such payments shall be fully met by Customer.
- 3.1.3 If any invoiced amount is not received by Continuity by the due date, then without limiting Continuity's rights or remedies, (a) those charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, and/or (b) Continuity may condition future Subscription Services and Professional Services on payment terms shorter than those specified in this section 3.1.
- 3.1.4 If any charge owing by Customer under this Agreement or any other Order Form or SOW is 30 days or more overdue, Continuity may, without limiting its other rights and remedies, accelerate Customer's unpaid fee obligations so that all such obligations become immediately due and payable, and suspend the Subscription Services and/or Professional Services until such amounts are paid in full, provided that, Continuity will give Customer at least 10 days' prior notice that its account is overdue before suspending services to Customer.
- 3.1.5 Continuity will not exercise its rights under sections 3.1.3 and 3.1.4 if Customer is disputing the applicable charges reasonably and in good faith and is cooperating diligently to resolve the dispute.
- 3.1.6 The Fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including, for example, value-added, sales, use or withholding taxes, assessable by any jurisdiction whatsoever (collectively, "Taxes"). Customer is responsible for paying all Taxes associated with its purchases hereunder. If Continuity has the legal obligation to pay or collect Taxes for which Customer is responsible under this section, Continuity will invoice Customer and Customer will pay that amount unless Customer provides Continuity with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, Continuity is solely responsible for taxes assessable against it based on its income, property and employees.

#### **3.2 WEBSITE ORDERS.**

- 3.2.1 Customer may order and purchase the Subscription Services by registering and creating an account with Continuity on the Website (the "Account(s)").
- 3.2.2 Customer agrees to provide accurate, current and complete information during the registration process and to update such information to keep it accurate, current and complete. Continuity reserves the right to suspend or terminate the Account at any time, including if any information provided during the registration process or thereafter proves to be inaccurate, not current or incomplete. Customer is solely responsible for safeguarding the Account password. Customer agrees not to disclose the Account password to any third party and Customer will take sole responsibility for any activities or actions under the Account, whether or not Customer has authorized such activities or actions. Customer will immediately notify Continuity of any unauthorized use of the Account. An administrator of an Account may authorize an unlimited number of authorized users per Account; provided, however, that an administrator will add authorized users by providing such user's username, e-mail address and password to Continuity. The Customer representative who created the Account as an administrator will administer the use of such Account by such authorized users.
- 3.2.3 Continuity offers paid subscription plans (the "Paid Plan(s)") for all Accounts. A description of the applicable fees (the "Plan Fees") and features associated with these Paid Plans is available on the Website.
- 3.2.4 If at any time Customer selects to subscribe to a Paid Plan, Customer agrees to pay the applicable Plan Fees and any taxes and other fees that may accrue in relation to the use of the Subscription Services.

- 3.3 **RESELLER ORDERS.** Customer may order and purchase the Subscription Service and Professional Services directly from Reseller pursuant to a separate agreement specifying price, payment and other commercial terms. Continuity is not a party to such separate agreement but will provide the purchased services pursuant to this Agreement. For each order, Reseller or Continuity will provide Customer with a Use Authorization for Customer to sign and return to Continuity. Continuity will have no obligation to provide services unless and until it has received a Use Authorization signed by Customer. Reseller is not authorized to make any changes to this Agreement

(including any Use Authorizations issued hereunder) or bind Continuity to any additional or different terms or conditions.

- 3.4 **USE VERIFICATION.** Continuity or Reseller may remotely review Customer's use of the Subscription Service, and on Continuity or Reseller's written request, Customer will provide reasonable assistance to verify Customer's compliance with the Agreement, and access to and use of the Subscription Service. If Continuity or Reseller determines that Customer has exceeded its permitted access and use rights to the Subscription Service, Continuity will notify Customer and within 30 days thereafter Customer shall either: (a) disable any unpermitted use, or (b) purchase additional subscriptions commensurate with Customer's actual use.

#### **4 INTELLECTUAL PROPERTY**

- 4.1 **CONTINUITY OWNERSHIP.** As between the parties, Continuity and its licensors exclusively own all right, title, and interest in and to all Intellectual Property Rights in the Continuity Core Technology, notwithstanding anything in this Agreement purportedly to the contrary. Except for the access and use rights, and licenses expressly granted in Section 2 (Access and Use Rights; Restrictions; Provision of Professional Services) of this Agreement, Continuity, on behalf of itself and its licensors, reserves all rights in the Continuity Core Technology and does not grant Customer any rights (express, implied, by estoppel, through exhaustion, or otherwise). Any Continuity Core Technology delivered to Customer or to which Customer is given access shall not be deemed to have been sold, even if, for convenience, Continuity makes reference to words such as "sale" or "purchase" in the applicable Use Authorization or other documents.
- 4.2 **CUSTOMER OWNERSHIP.** As between the parties, Customer and its licensors will retain all right, title, and interest in and to all Intellectual Property Rights in Customer Data and Customer Technology. Customer hereby grants to Continuity a royalty-free, fully-paid, non-exclusive, non-transferrable (except as set forth in Section 12.1 (Assignment)), worldwide, right to use Customer Data and Customer Technology solely to provide and support the Continuity Products.
- 4.3 **FEEDBACK.** Continuity encourages Customer to provide suggestions, proposals, ideas, recommendations, or other feedback regarding improvements to the Continuity Products (collectively, "Feedback"). If Customer provides such Feedback, Customer grants to Continuity a royalty-free, fully paid, sublicensable, transferable (notwithstanding Section 12.1 (Assignment)), non-exclusive, irrevocable, perpetual, worldwide right and license to use, license, and commercialize Feedback (including by incorporation of such Feedback into Continuity Core Technology) without restriction.
- 4.4 **PROFESSIONAL SERVICES.** Subject to this Section 4.4, Continuity Core Technology, including any Newly Created IP, shall remain the exclusive property of Continuity. To the extent that any Continuity Core Technology, including Newly Created IP, is incorporated into a Deliverable and upon payment in full by Customer for the Professional Services under which the Newly Created IP was created, Continuity hereby grants to Customer a non-exclusive, royalty-free, non-transferable (except as set forth in Section 12.1 (Assignment)), non-sublicensable worldwide license to use the Continuity Core Technology and Newly Created IP incorporated into the Deliverable in connection with the Subscription Service as contemplated under this Agreement during the applicable Subscription Term. Nothing in this Agreement shall be deemed to restrict or limit Continuity's right to perform similar Professional Services for any other party or to assign any employees or subcontractors to perform similar Professional Services for any other party or to use any information incidentally retained in the unaided memories of its employees providing Professional Services.

#### **5 WARRANTIES; DISCLAIMER OF WARRANTIES**

- 5.1 **LIMITED SUBSCRIPTION SERVICE WARRANTY.** Continuity warrants that, during the Subscription Term, Customer's production instance of the Subscription Service will materially conform to the Product Overview. To submit a warranty claim under this Section 5.1, Customer will submit a support request to resolve the non-conformity in accordance with the terms and conditions set in the Order Form or SOW. If the non-conformity persists without relief more than 30 days after notice of a warranty claim provided to Continuity under this Section 5.1, then Customer may terminate the affected Subscription Service, and submit to Continuity or Reseller a claim for refund to Customer for any prepaid subscription fees covering that part of the applicable Subscription Term for the affected Subscription Service remaining after the effective date of termination. Notwithstanding the foregoing, this warranty will not apply to any non-conformity due to a modification of or defect in the Subscription Service that is made or caused by any person other than Continuity or a person acting at Continuity's direction. This Section 5.1 sets forth Customer's exclusive rights and remedies (and Continuity's sole liability) in connection with this warranty.
- 5.2 **LIMITED PROFESSIONAL SERVICES WARRANTY.** Continuity warrants that the Professional Services will be performed in a competent and workmanlike manner, in accordance with accepted industry standards and practices and all material requirements set forth in the SOW or Service Description. Customer will notify Continuity of any breach within 30 days after performance of the non-conforming Professional Services. On receipt of such notice, Continuity, at its option, will either use commercially reasonable efforts to re-perform the Professional Services in conformance with these warranty requirements or will terminate the affected Professional Services, whereupon

Customer may submit to Continuity or Reseller a claim for a refund of any amounts paid for the nonconforming Professional Services. This Section 5.2 sets forth Customer's exclusive rights and remedies (and Continuity's sole liability) in connection with this warranty.

- 5.3 **DISCLAIMER OF WARRANTIES.** Except for the warranties expressly stated in this Section 5, to the maximum extent allowed by Law, Continuity disclaims all warranties of any kind (express, implied, statutory, or otherwise, oral or written, including warranties of merchantability, accuracy, title, noninfringement, or fitness for a particular purpose, and any warranties arising from usage of trade, course of dealing, or course of performance). Without limiting the foregoing, Continuity specifically does not warrant that the Continuity Products will meet the requirements of Customer or others or will be accurate or operate without interruption or error. Customer acknowledges that in entering this Agreement, it has not relied on any promise, warranty, or representation not expressly set forth in this Agreement.

## **6. CONFIDENTIAL INFORMATION**

- 6.1 **CONFIDENTIALITY OBLIGATIONS.** The recipient of Confidential Information will: (a) at all times protect it from unauthorized disclosure with the same degree of care that it uses to protect its own confidential information, and in no event use less than reasonable care; and (b) not use it except to the extent necessary to exercise rights or fulfill obligations under this Agreement. Each party will limit the disclosure of the other party's Confidential Information to those of its employees and contractors and the employees and contractors of its Affiliates with a need to access such Confidential Information for a party's exercise of its rights and obligations under this Agreement, and then only to employees and contractors subject to binding disclosure and use restrictions at least as protective as those in this Agreement. Each party's obligations under this Section 6 will remain in effect during, and for three years after termination of, this Agreement. Receiving party will, at disclosing party's request, return all originals, copies, reproductions, and summaries of Confidential Information and other tangible materials and devices provided to receiving party as Confidential Information, or at disclosing party's option, certified destruction of the same. Provisions for return of Customer Data are set forth in Section 11.2 (Return of Customer Data).
- 6.2 **THIRD PARTY REQUESTS.** This Agreement will not be construed to prevent receiving party from disclosing the disclosing party's Confidential Information to a court, or governmental body pursuant to a valid court order, Law, subpoena, or regulation, provided that the receiving party: (a) gives prompt notice (or the maximum notice permitted under Law) before making the disclosure, unless prohibited by Law; (b) provides reasonable assistance to disclosing party in any lawful efforts by disclosing party to resist or limit the disclosure of such Confidential Information; and (c) discloses only that portion of disclosing party's Confidential Information that is legally required to be disclosed. In addition, receiving party will cooperate and assist disclosing party, at disclosing party's cost, in relation to any such request and any response to any such communication.

## **7 INDEMNIFICATION**

### **7.1 BY CONTINUITY.**

- 7.1.1 **CONTINUITY OBLIGATION.** Subject to the limitations in this Section 7, Continuity will: (a) defend Customer, and its and their officers, directors, and employees against any Claim: (i) to the extent alleging that any Continuity Core Technology accessed or used in accordance with this Agreement infringes any third-party patent, copyright, or trademark, or misappropriates any third-party trade secret; or (ii) to the extent alleging that Continuity's personnel when onsite at Customer's premises caused death, bodily harm, or damage to tangible personal property due to their negligence or willful misconduct; and (b) pay any settlement amount or any court ordered award of damages, under the forgoing subsections (a)(i) and (ii) to the extent arising from such Claim.
- 7.1.2 **MITIGATION.** To the extent any Claim alleges any part of the Continuity Core Technology infringes any third-party patent, copyright, or trademark, or misappropriates any third-party trade secret, Continuity may: (a) contest the Claim; (b) obtain permission from the claimant for Customer's continued use of its instance of the Subscription Service or any applicable Continuity Core Technology; (c) avoid such Claim by replacing or modifying Customer's access to and use of its instance of the Subscription Service or any applicable Continuity Core Technology as long as Continuity provides a substantially similar Subscription Service; or, if Continuity determines the foregoing (a), (b), and (c) are not commercially practicable, then (d) terminate Customer's access to and use of the affected Subscription Service on 60-days' prior notice, whereupon Customer may submit to Continuity or Reseller a claim for a refund of any prepaid subscription fees covering any prepaid subscription fees covering that part of the applicable Subscription Term for such Subscription Service remaining after the effective date of termination.
- 7.1.3 **LIMITATIONS.** Notwithstanding the above, Continuity will have no obligation or liability for any Claim under Section 7.1.1(a)(i) to the extent arising in whole or in part from: (a) any access to or use of any Continuity Core Technology not expressly authorized under this Agreement, to the extent the Claim would have been avoided without such unauthorized access or use; (b) Customer Data or



Customer Technology; or (c) access to or use of the Continuity Core Technology: (i) in violation of Law; (ii) after termination under Section 7.1.2(d); (iii) as modified to Customer's specifications or by anyone other than Continuity or its contractors, if the Claim would have been avoided but for such modifications; or (iv) combined with anything not provided by Continuity, if the Claim would have been avoided but for such combination.

- 7.2 **CUSTOMER OBLIGATION.** Customer will: (a) defend Continuity and Continuity Affiliates, and its and their officers, directors, and employees against any Claim to the extent alleging that Customer Data, Customer Technology, or a modification to any Continuity Core Technology made to Customer's specifications or otherwise made by or on behalf of Customer by any person other than Continuity or a person acting at Continuity's direction (but only if the Claim would have been avoided by use of the unmodified Continuity Core Technology), infringes any patent, copyright, or trademark, misappropriates any third-party trade secret, or violates any third-party privacy rights; and (b) pay any settlement amount or any court-ordered award of damages, under the foregoing subsection (a) to the extent arising from such Claim.
- 7.3 **PROCESS.** The obligations of Continuity and Customer under Sections 7.1 and 7.2 are conditioned on the indemnified party (a) notifying the indemnifying party promptly in writing of any actual or threatened Claim, (b) the indemnified party giving the indemnifying party sole control of the defense of such Claim and of any related settlement negotiations, and (c) the indemnified party cooperating and, at the indemnifying party's reasonable request and expense, assisting in such defense. Neither party will stipulate, acknowledge, or admit fault or liability on the other's part without the other's prior, written consent. The indemnifying party will not publicize any settlement without the indemnified party's prior, written consent. To the extent the parties perform as required, this Section 7 states each party's entire liability and the other party's exclusive remedy for third-party claims and third-party actions.

## **8 LIMITED LIABILITY**

- 8.1 Continuity shall have no liability for any refund that, in accordance with the terms of this Agreement, is to be paid by Reseller. To the extent permitted by Law, each party's total, cumulative liability arising out of or related to this Agreement and the products and services provided under it, whether based on contract, tort (including negligence), or any other legal or equitable theory, will be limited to the amounts paid by Customer for use of the products or provision of the services giving rise to the claim during the 12-month period preceding the first event giving rise to liability. The existence of more than one claim will not enlarge this limit. The foregoing limitation of liability shall not apply to: (a) Customer's obligation to pay for products, services or taxes; (b) a party's obligations in Section 7 (Indemnification); and (c) infringement by a party of the other party's Intellectual Property Rights.

## **9 EXCLUDED DAMAGES**

- 9.1 TO THE EXTENT PERMITTED BY LAW, NEITHER CONTINUITY NOR CUSTOMER WILL BE LIABLE TO THE OTHER OR ANY THIRD PARTY FOR LOST PROFITS (DIRECT OR INDIRECT) OR LOSS OF USE OR DATA OR FOR ANY INCIDENTAL, OTHER CONSEQUENTIAL, PUNITIVE, SPECIAL, OR EXEMPLARY DAMAGES (INCLUDING DAMAGE TO BUSINESS, REPUTATION, OR GOODWILL), OR INDIRECT DAMAGES OF ANY TYPE HOWEVER CAUSED, WHETHER BY BREACH OF WARRANTY, BREACH OF CONTRACT, IN TORT (INCLUDING NEGLIGENCE), OR ANY OTHER LEGAL OR EQUITABLE CAUSE OF ACTION, EVEN IF SUCH PARTY HAS BEEN ADVISED OF SUCH DAMAGES IN ADVANCE OR IF SUCH DAMAGES WERE FORESEEABLE. THE FOREGOING EXCLUSIONS SHALL NOT APPLY TO: (A) PAYMENTS TO A THIRD PARTY ARISING FROM A PARTY'S OBLIGATIONS UNDER SECTION 7 (INDEMNIFICATION); AND (B) INFRINGEMENT BY A PARTY OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS.

## **10 GROSS NEGLIGENCE; WILLFUL MISCONDUCT**

- 10.1 AS PROVIDED BY LAW, NOTHING HEREIN SHALL BE INTENDED TO LIMIT A PARTY'S LIABILITY IN AN ACTION IN TORT, SEPARATE AND DISTINCT FROM A CAUSE OF ACTION FOR BREACH OF THIS AGREEMENT, FOR THE PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

## **11 TERM AND TERMINATION**

- 11.1 **TERMINATION.** This Agreement begins on the Effective Date and continues until terminated under its terms. Each party may terminate this Agreement in its entirety: (a) on 30 days' prior notice to the other, if at the time of notice there are no Use Authorizations in effect; (b) immediately on notice if the other party becomes the subject of a petition in bankruptcy or any proceeding related to its insolvency, receivership, or liquidation, in any jurisdiction, that is not dismissed within 60 days of its commencement or an assignment for the benefit of creditors; or (c) immediately on notice if the other party materially breaches this Agreement and does not cure such breach within 30 days after the other party's receipt of notice of the breach. Either party may terminate a Use Authorization or SOW

on notice if the other party materially breaches this Agreement or the applicable Use Authorization or SOW for the affected service and does not cure the breach within 30 days after receiving notice of the breach from the non-breaching party. Professional Services are separately ordered from the Subscription Service and are not required for use of the Subscription Service. A breach by a party of its obligations with respect to Professional Services shall not by itself constitute a breach by that party of its obligations with respect to the Subscription Service even if the services are enumerated in the same Use Authorization.

- 11.1.1 EFFECT OF TERMINATION OF SUBSCRIPTION SERVICE. On termination or expiration of the Subscription Service, Customer will stop accessing and using, and Continuity will stop providing, the Subscription Service and all related rights granted to Customer in this Agreement will terminate immediately, automatically, and without notice. Customer, within 30 days after the effective date of termination by Customer for Continuity's breach, submit to Continuity or Reseller a claim for refund for any prepaid fees paid covering that part of the Subscription Term for the affected Subscription Service, if any, remaining after the effective date of termination. Within 30 days after the effective date of termination by Continuity for Customer's breach, Customer shall pay all remaining amounts for the Subscription Term applicable to the Subscription Service covering the remainder of the Subscription Term regardless of the due dates specified in an applicable ordering document between Reseller and Customer.
- 11.2 RETURN OF CUSTOMER DATA. After termination or expiration of this Agreement or the applicable Subscription Service, upon Customer's written request, Continuity will provide any Customer Data in the Subscription Service to Customer in Continuity's standard database export format at no additional charge. Customer must submit such request to Continuity within 45 days after termination or expiration of this Agreement or the Subscription Service. Continuity is not obligated to maintain or provide any Customer Data after such 45-day period and will, unless legally prohibited, delete all Customer Data in its systems or otherwise in its possession or under its control, and delete Customer's instances of the Subscription Service.
- 11.3 SURVIVAL. Sections 2.2 (Restrictions), 4 (Intellectual Property), 5 (Warranties; Disclaimer of Warranties) (solely in accordance with its terms), 6 (Confidential Information) through 10 (Gross Negligence; Willful Misconduct), 11 (Term and Termination) (solely in accordance with its terms), and 12 (General Provisions), together with any other terms required for their construction or enforcement, will survive termination or expiration of this Agreement.

## 12 GENERAL PROVISIONS

- 12.1 ASSIGNMENT. Neither party may assign or novate its rights or obligations under this Agreement, by operation of law or otherwise (any of the foregoing, "Assign"), without the other party's prior written consent. Notwithstanding the foregoing, on notice and without the other's consent: (a) either party may in connection with a merger, reorganization, or sale of all or substantially all of such party's assets or equity, Assign this Agreement in its entirety to such party's successor; and (b) Continuity may Assign this Agreement in its entirety to any Continuity Affiliate. Any attempted or purported Assignment in violation of this Section 12.1 will be null and void. Subject to the foregoing, this Agreement will bind and inure to the benefit of the parties, their respective successors, and permitted assigns.
- 12.2 COMPLIANCE WITH LAWS. Continuity will comply with all Laws applicable to its provision under the Agreement of the Continuity Products, including those applicable to privacy and security of personal information (including mandatory trans-border data transfers and mandatory data breach notification requirements), but excluding Laws specifically applicable to Customer and its industry not generally applicable to information technology service providers regardless of industry. Customer will comply with all Laws applicable to its use of the Continuity Products, including those applicable to collection and processing of Customer Data in Continuity systems through the Subscription Service. Customer agrees to provide any required disclosures to and obtain any required consents for the transfer of Customer Data to Continuity.
- 12.3 EXPORT COMPLIANCE. Each party will comply with local and foreign export control Laws, including U.S. export control Laws. Customer acknowledges that the Continuity Products are subject to U.S. Export Administration Regulations ("EAR") and that Customer will comply with EAR. Without limiting the foregoing, Customer represents and warrants that: (a) it is not located in, and will not use any Continuity Products from, any country subject to U.S. export restrictions (currently including Cuba, Iran, North Korea, Sudan, Syria, and Crimea Region); (b) Customer will not use the Continuity Products in the design, development, or production of nuclear, chemical, or biological weapons, or rocket systems, space launch vehicles, sounding rockets, or unmanned air vehicle systems; and (c) Customer is not prohibited from participating in U.S. export transactions by any federal agency of the U.S. government. In addition, Customer is responsible for complying with any local Laws that may impact Customer's right to import, export, or use Continuity Products or any of them.
- 12.4 US GOVERNMENT RIGHTS. Continuity software is commercial computer software (as defined in Federal Acquisition Regulation ("FAR") 2.101 for civilian agency purchases and Department of Defense ("DOD") FAR Supplement ("DFARS") 252.227-7014(a)(1) for defense agency purchases) and Continuity services are commercial items. If the software is licensed or services acquired by or on behalf of a civilian agency, Continuity provides the

software, its documentation, and any other technical data subject to this Agreement consistent with FAR 12.212 (Computer Software) and FAR 12.211 (Technical Data). If software is licensed or services acquired by or on behalf of any DOD agency, Continuity provides the software, its documentation, and any other technical data subject to this Agreement consistent with DFARS 227.7202-3. If this is a DOD prime contract or DOD subcontract, the DOD agency Customer may acquire additional rights in technical data under DFARS 252.227-7015(b). This U.S. Government Rights clause is in lieu of, and supersedes, any other FAR, DFARS, or other clause or provision that addresses government rights in computer software or technical data.

- 12.5 **NOTICE.** Except as otherwise provided in this Agreement, all notices will be in writing and deemed given on: (a) personal delivery; (b) when received by the addressee if sent by a recognized overnight courier (receipt requested); (c) the third business day after mailing; or (d) the first business day after sending by email with confirmation of receipt, except that email will not be sufficient for notices regarding a Claim or alleged breach. Notices will be sent as set forth on the first page of this Agreement or as subsequently updated in writing.
- 12.6 **FORCE MAJEURE.** Continuity is not, and may not be construed to be, in breach of this Agreement for any failure or delay in fulfilling or performing the Subscription Service or any Professional Services, when and to the extent such failure or delay is caused by or results from acts beyond Continuity's reasonable control, including: strikes, lock-outs, or other industrial disputes; trespass, sabotage, theft or other criminal acts export bans, sanctions, war, terrorism, riot, civil unrest, or government action; failure of Internet connectivity or backbone or other telecommunications failures, in each case outside of Continuity's local network; breakdown of plant or machinery; nuclear, chemical, or biological contamination; fire, flood, natural disaster, extreme adverse weather, or other acts of God (each a "Force Majeure Event"). Continuity will use reasonable efforts to mitigate the effects of such Force Majeure Event.
- 12.7 **HIGH RISK ACTIVITY.** The Continuity Products are not designed for any purpose requiring fail-safe performance, including stock trading, financial transaction processing, operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, weapons systems, or other management or operation of hazardous facilities or applications for which failure could result in death, personal injury, or severe physical, property, or environmental damage (each, a "High Risk Activity"). Continuity, its licensors, and suppliers expressly disclaim all warranties of fitness for any such use.
- 12.8 **EXECUTION.** This Agreement may be executed in counterparts, by electronic means to accurately send images, such as via email, or by electronic signature service. Neither party will contest the Agreement's validity solely because a signature was faxed or sent through other permitted electronic means. Each party will deliver to the other an original executed copy of the Agreement promptly after execution.
- 12.9 **WAIVER AND AMENDMENT.** Failure by a party to enforce any part of this Agreement will not be deemed a waiver of future enforcement of that or any other provision. A waiver of any right is effective only if in a writing signed by an authorized representative of the waiving party. Any modification of this Agreement must be in writing and signed by authorized representatives of both parties.
- 12.10 **SEVERABILITY.** If any term of this Agreement is held invalid, unenforceable, or void by a court of competent jurisdiction, such term will be enforced to the maximum extent permissible, such holding will not affect the remaining terms, and the invalid, unenforceable, or void term will be deemed amended or replaced by a valid, legal, and enforceable term that matches the intent of the original language as closely as possible.
- 12.11 **RELATIONSHIP.** The parties are independent contractors. Nothing in this Agreement will be construed to create a partnership, joint venture, agency, or other relationship. Neither party has any right or authority to assume or create any obligation of any kind, express or implied, in the other party's name or on its behalf. No third-party is a third-party beneficiary of, or liable under, this Agreement, and no third-party is responsible for any obligations or liability arising out of Customer's use of the Continuity Core Technology.
- 12.12 **GOVERNING LAW AND JURISDICTION.** This Agreement shall be governed by and construed in accordance with the laws of the State of New York, USA, without reference to its conflict of laws principles and the competent courts of New York, NY shall have exclusive jurisdiction over any dispute arising herein.
- 12.13 **EQUITABLE REMEDIES.** The receiving party's disclosure of Confidential Information except as provided in this Agreement, or a party's infringement or misappropriation of the other party's Intellectual Property Rights may result in irreparable injury for which a remedy in money damages may be inadequate. In the event of such actual or threatened disclosure, infringement or misappropriation, disclosing party may be entitled to seek an injunction to prevent the breach or threatened breach without the necessity of proving irreparable injury or the inadequacy of money damages, in addition to remedies otherwise available to disclosing party at law or in equity.
- 12.14 **CONSTRUCTION.** Continuity is obligated to provide Continuity Products only in the English language, unless otherwise agreed in writing. The parties have expressly requested that this Agreement and all related documents be drafted in English. Section headings are for convenience only and are not to be used in interpreting this Agreement. This Agreement has been negotiated by the parties and their respective counsel and will be interpreted fairly in accordance with its terms and without any strict construction in favor of or against either party. Lists of examples following "including", "e.g.", "such as", or "for example" are interpreted to include "without limitation", unless qualified by words such as "only" or "solely." Unless stated or context requires otherwise: (a) all internal references



are to this Agreement, its parties, and its Exhibits; (b) “days” means calendar days; (c) “may” means that the applicable party has a right, but not a concomitant duty; (d) all monetary amounts are expressed and, in U.S. dollars or Euros; (e) “current” or “currently” means “as of the Effective Date” but “then-current” means the present time when the applicable right is exercised or performance rendered or measured; (f) the word “or” will be deemed to be an inclusive “or”; (g) URLs are understood to also refer to successor URLs, URLs for localized content, and information or resources linked from within the websites at such URLs; (h) a writing is “signed” when it has been hand-signed (i.e., with a pen) or electronically signed using an electronic signature service by duly authorized representatives of both parties; (i) a party’s choices, elections, and determinations under this Agreement are in its sole discretion; (j) the singular includes the plural and vice versa; (k) a reference to a document includes any amendment, replacement, or novation of it; and (m) a reference to a thing includes a part of that thing (i.e., is interpreted to include “in whole or in part”).

12.15 **ENTIRETY.** This Agreement (together with the Use Authorizations, Product Overviews, SOWs, and Service Descriptions, all of which are also deemed incorporated by this reference) is the parties’ entire agreement regarding its subject matter and supersedes all prior or contemporaneous oral or written agreements, representations, understandings, undertakings, negotiations, letters of intent, and proposals, with respect to such subjects. The terms of this Agreement apply to the exclusion of any other terms Customer seeks to impose or incorporate, or that may be implied by trade, custom, practice, or course of dealing. Customer acknowledges it has not relied on any statement, promise, or representation made or given by or on behalf of Continuity that is not expressly stated in this Agreement. Customer’s orders are not contingent, and Customer has not relied, on the delivery of any future functionality regardless of any verbal or written communication about Continuity’s possible future plans.