

COHESITY, INC. – HELIOS TERMS OF SERVICE

COHESITY, INC. (TOGETHER WITH ITS AFFILIATES, “**COHESITY**”) AGREES TO SUPPLY ACCESS TO CERTAIN HOSTED ENHANCED SERVICES (“**HELIOS**”) IN CONNECTION WITH YOUR EXISTING COHESITY PRODUCTS AND SOFTWARE TO YOUR BUSINESS OR ORGANIZATION (“**CUSTOMER**”) ONLY IF (A) YOU REPRESENT AND WARRANT THAT YOU HAVE THE AUTHORITY TO LEGALLY BIND CUSTOMER AND (B) YOU ACCEPT AND AGREE ON BEHALF OF CUSTOMER TO BE BOUND BY ALL OF THE TERMS AND CONDITIONS IN THIS COHESITY TERMS OF SERVICE (THIS “**AGREEMENT**”, INCLUDING ALL DOCUMENTS INCORPORATED HEREIN BY REFERENCE), WHICH SHALL BE DEFINITELY EVIDENCED BY ANY ONE OF THE FOLLOWING MEANS: YOUR CLICKING THE “ACCEPT”, “CONTINUE” OR A SIMILAR BUTTON, AS APPLICABLE; YOUR SIGNATURE ON A TANGIBLE COPY OF THIS AGREEMENT; YOUR INSTALLATION OR USE OF THE SERVICES OR BY SUCH OTHER CONTRACT FORMATION MECHANISM AS MAY BE RECOGNIZED UNDER APPLICABLE LAW. IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS IN THIS AGREEMENT, DO NOT INSTALL OR USE THE SERVICE(S).

THIS AGREEMENT MAY ONLY BE SUPERSEDED BY A SEPARATE, SIGNED WRITTEN AGREEMENT WITH COHESITY THAT EXPRESSLY PURPORTS TO SUPERSEDE THIS AGREEMENT.

1. SERVICE AND RESTRICTIONS

- a) **Services.** Beginning on or after March 2019, Helios features and functionality shall be categorized as either “Premium Helios” or “Standard Helios”. It is currently contemplated that Premium Helios shall be offered as a paid service. Cohesity reserves the right to make changes to its service offering (and/or add or remove features) upon advance notice to you, beginning in March 2019. Collectively, Helios as described herein shall be referred to as the “Services.”
- b) **Access.** Subject to Customer’s compliance with this Agreement, Customer may access and use the Services for Customer’s business purposes only. Customer acknowledges that the Services are made available by Cohesity, and no software code for the Services will be provided to Customer.
- c) **Restrictions.** Customer will not (and will not allow any third party to): (i) reverse engineer, decompile, disassemble, or otherwise attempt to discover the underlying structure, ideas, or algorithms of the Services or any software used to provide or make the Services available except where such prohibition violates applicable law; (ii) remove or otherwise alter any proprietary notices or labels from the Services or any portion thereof; or (iii) access or use the Services to develop, promote, distribute, sell or support any product or service competitive with the Services or (iv) disclose any details about benchmarking results or technical specifications of any Services. Customer will use the Service only in accordance with applicable laws, including without limitation laws related to privacy (whether laws of the United States, European Union, or otherwise) and intellectual property. Customer shall not make representations, warranties, or guarantees to any person or entity with respect to the Services that purport to be by or on behalf of Cohesity or its suppliers.
- d) **Customer Content.** Customer retains all right, title and interest in and to its content (“**Customer Content**”), but Cohesity is hereby expressly granted the right to use Customer Content to provide the Services during the Term. Customer Content shall not be deemed part of any Cohesity Services by virtue of being located on or processed through the Services. Customer is solely responsible for the operation, maintenance, development and use of Customer Content.
- e) **Customer Metadata.** Customer understands and consents to Cohesity’s collection, processing, storage and deletion of Customer metadata for purposes of operating the Service.
- f) **Customer’s Users.** Customer is responsible for all use of Customer Content by persons Customer authorizes to use the Services (“**Users**”). Customer shall procure Users’ compliance with this Agreement and is responsible for breach of this Agreement by a User.
- g) **Ownership.** Cohesity retains all rights, title, and interest in and to the Services, and any and all software, products, works or other intellectual property created, used, provided or made available by Cohesity under this Agreement.
- h) **Suspension of Service.** Cohesity may suspend Customer’s access to or use of Services if Cohesity reasonably believes: (i) Customer has become insolvent, ceased to operate in the ordinary course, made an assignment for the benefit of creditors, or become the subject of any proceeding in any jurisdiction related thereto; (ii) Customer’s use of the Service poses a security risk to the Service or any third party, or may adversely impact the Service; or (iii) Customer is in material breach of this Agreement and has not cured such breach, if curable, prior to the expiration of a 7 day written notice from Cohesity.

2. TERM AND TERMINATION

- a) **Term.** The term of this Agreement shall commence on the date it is accepted by Customer (the “**Effective Date**”) and will continue until terminated (the “**Term**”). Either party may, upon notice, terminate this Agreement with 30 days’ notice.
- b) **Effects of Termination.** All terms of this Agreement which must survive in order to fulfil their essential purpose shall survive termination or expiration of this Agreement. For clarity, all rights granted Customer

hereunder terminate immediately upon termination of this Agreement, and Customer will make no further use of the Services.

3. CONFIDENTIALITY

All materials and information provided by a disclosing party and identified at the time of disclosure as “Confidential” or bearing a similar legend, or which the receiving party reasonably should have known was the confidential information of the disclosing party, shall be considered “**Confidential Information**”, including for avoidance of doubt (i) non-public information relating to the Services; (ii) Customer Content, and (iii) all economic terms between the parties. The receiving party shall maintain the confidentiality of the Confidential Information and will not disclose such information without the prior written consent of the disclosing party. The receiving party will only use the Confidential Information internally for the purposes contemplated hereunder. The obligations in this Section shall not apply to any information that: (a) is made generally available to the public without breach of this Agreement; (b) is developed by the receiving party independently from and without reference to the Confidential Information; (c) is disclosed to the receiving party by a third party without restriction, or (d) was in the receiving party’s lawful possession prior to the disclosure and was not obtained by the receiving party either directly or indirectly from the disclosing party. The receiving party may disclose Confidential Information as required by law or court order provided that the receiving party promptly notifies the disclosing party thereof and uses best efforts to limit disclosure. At any time, upon the disclosing party’s written request, the receiving party shall return to the disclosing party all disclosing party’s Confidential Information in its possession, including, without limitation, all copies and extracts.

4. INDEMNIFICATION

- a) **Indemnification by Customer.** Customer will defend, indemnify, and hold Cohesity, its affiliates, suppliers and licensors, and each of their respective officers, directors, employees and representatives, harmless from and against any claims, damages, losses, liabilities, costs, and expenses (including reasonable attorneys’ fees) (“**Losses**”) arising out of or relating to any third party claim with respect to breach of this Agreement or violation of applicable law by Customer or Users.
- b) **Indemnification by Cohesity.** Cohesity will defend, indemnify, and hold Customer harmless from and against any Losses arising from claims by a third party (a) with respect to Cohesity’s breach of this Agreement or violation of applicable law; or (b) that Customer’s use of the Service infringes or misappropriates a third party’s intellectual property rights (an “**Infringement Claim**”). Should any portion of the Service become, or in Cohesity’s opinion be likely to become, the subject of an Infringement Claim, Customer will permit Cohesity, at Cohesity’s option and expense, (i) to procure for Customer the right to continue using the Service; (ii) to replace or modify the Service or portion thereof to be non-infringing, or (iii) to take any other action reasonably deemed advisable by Cohesity related to such Infringement Claim. In the event none of these remedies is available and/or practical, Cohesity may, in its sole discretion, terminate the right to use the Service and return to Customer the fees paid with respect to the infringing Service, reduced on a prorated basis for each month the Service is used by Customer. Notwithstanding any other provision in this Agreement, Cohesity shall have no obligation to indemnify or reimburse Customer with respect to any Infringement Claim to the extent arising from: (a) the combination of any Customer Content with the Service; or (b) the combination of any products or services, other than those provided by Cohesity to Customer under this Agreement, with the Service.
- c) **Notice of Claim and Indemnity Procedure.** In the event of a claim for which a party seeks indemnity or reimbursement under this Section 4 (each an “**Indemnified Party**”) and as a condition of the indemnity, the Indemnified Party shall:
 - i. notify the indemnifying party in writing as soon as practicable, but in no event later than 30 days after receipt of such claim, together with such further information as is necessary for the indemnifying party to evaluate such claim to the extent that the Indemnified Party is in possession or has knowledge of such information, provided that any delay in giving such notice shall not preclude the Indemnified Party from seeking indemnification or reimbursement hereunder if: (i) such delay has not materially prejudiced the indemnifying party’s ability to defend the claim and (ii) such delay does not materially affect the amount of any damages awarded for or paid in settlement of such claim; and
 - ii. allow the indemnifying party to assume full control of the defense of the claim, including retaining counsel of its own choosing. Upon the assumption by the indemnifying party of the defense of a claim with counsel of its choosing, the indemnifying party will not be liable for the fees and expenses of additional counsel retained by any Indemnified Party. The Indemnified Party shall cooperate with the indemnifying party in the defense of any such claim.
- d) Notwithstanding the foregoing provisions, the indemnifying party shall have no obligation to indemnify or reimburse for any losses, damages, costs, disbursements, expenses, settlement liability of a claim or other sums paid by any Indemnified Party voluntarily, and without the indemnifying party’s prior written consent, to settle a claim. Subject to the maximum liability set forth in Section 6, the provisions of this Section 4 constitute the entire understanding of the parties regarding each party’s respective liability under this Section 4, including without limitation Infringement Claims (and related claims for breach of warranty) and each party’s sole obligation to indemnify and reimburse any Indemnified Party.

5. WARRANTY AND SUPPORT

- a) TO THE MAXIMUM EXTENT PERMISSIBLE UNDER APPLICABLE LAW, THE SERVICES HEREUNDER ARE PROVIDED ON AN "AS IS" BASIS. COHESITY HEREBY DISCLAIMS ALL EXPRESS OR IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, SECURITY, ACCURACY, QUALITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. COHESITY ALSO EXPRESSLY DISCLAIMS AND MAKES NO WARRANTY REGARDING ERROR-FREE USE, NON-INTERRUPTION OF USE OR FREEDOM FROM BUGS.
- b) Customer is entitled to receive only the support and maintenance services specified for the applicable support level and term that Customer has ordered and paid for (in accordance with Cohesity's standard Support and Maintenance Terms (the "**Support Terms**") found at www.cohesity.com/agreements (incorporated herein by reference). Cohesity will use reasonable commercial efforts to provide the support and maintenance services for the Services as, and to the extent described in, the Support Terms.

6. LIMITATIONS OF LIABILITY

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY LOST DATA, LOST PROFITS, BUSINESS INTERRUPTION, REPLACEMENT SERVICES OR OTHER SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR INDIRECT DAMAGES, HOWEVER CAUSED AND REGARDLESS OF THEORY OF LIABILITY. EXCEPT FOR EACH PARTY'S CONFIDENTIALITY OBLIGATIONS UNDER SECTION 3 AND INDEMNITY OBLIGATIONS UNDER SECTION 4, EACH PARTY'S LIABILITY FOR ALL CLAIMS ARISING UNDER THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR OTHERWISE, SHALL NOT EXCEED \$100,000.

7. COMPLIANCE WITH LAW

- a) **Compliance with Laws - Generally.** Each party shall obey all applicable laws and regulations in its use of Services and its performance under this Agreement.
- b) **Compliance with Laws – Export/Import.** Customer acknowledges that the Services may contain technical data or elements, the export or re-export of which may be restricted to certain destinations and end users as a result of license restrictions, laws, rules and regulations. Customer agrees not to engage in (and not to cause) export or re-export of Service(s) or any part thereof without first satisfying all legal requirements, including without limitation all necessary United States and foreign government import/export licenses, approvals or registrations. Upon request, Cohesity shall make available its documentation related to obtained export licenses and/or license exceptions. The Services may not be distributed, or otherwise exported or re-exported (i) into, or to a national or resident of, any country to which the U.S. has embargoed goods or trade restrictions; or (ii) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Denied Persons, Denied Entities, and Unverified List. Customer may not operate any Services for, or on behalf of, any person or entity barred by the foregoing sentence. Customer shall indemnify Cohesity from and against any liabilities, costs, fines, penalties, and other expenses (including reasonable attorneys' fees) incurred by Cohesity as a result of Customer's or a User's breach of the foregoing obligations.
- c) **Compliance with Laws - Antibribery.** Customer represents and warrants that (a) it is aware of, understands, and will comply with, the provisions of the U.S. Foreign Corrupt Practices Act (the "**FCPA**") and the U.K. Bribery Act, as applicable (collectively the "**Acts**"); (b) it will not take any action that might be a violation of the Acts or other applicable anti-corruption laws that prohibit the same type of conduct (including without limitation the making of corrupt payments); (c) it has, and will have, policies in place sufficient to ensure compliance with the provisions of the Acts, as applicable; and (d) all amounts paid to Customer by Cohesity in connection with this Agreement, including without limitation any discounts or credits furnished by Cohesity (if any) shall not be paid or given to any other person, firm, corporation or other entity, except in payment for a bona fide business purpose authorized by this Agreement and incurred in connection with performance hereunder in accordance with applicable law.
- d) **Compliance with Laws – Privacy.** Each party will handle all personal data received from the other party in connection with the Services in compliance with applicable laws and rules relating to privacy and data protection, including, to the extent applicable, the General Data Protection Regulation (collectively "**Data Protection Rules**"). Without limiting the foregoing, each party represents and warrants that it shall (i) have in place appropriate technical and organizational measures designed to ensure the security, confidentiality and integrity of all personal data received by it under this Agreement; (ii) process personal data that has been collected hereunder for the sole purposes of performance under this Agreement and the other party's lawful instructions hereunder and (iii) provide all reasonably necessary assistance the other party may require to comply with Data Protection Rules. It is Customer's responsibility to ascertain whether, due to its location or other factors, additional contractual provisions are required to satisfy Data Protection Rules.

7. MISCELLANEOUS

- a) **Assignment.** Customer may not delegate, assign or transfer this Agreement or any of Customer's rights or duties hereunder without Cohesity's express prior written consent, and any attempt to do so shall be null and void. Cohesity may freely assign this Agreement, and its rights and/or obligations hereunder, in whole or part.

- b) **Force Majeure.** Neither party shall be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder (except for the payment of money) on account of strikes, shortages, riots, insurrection, internet failure, fires, floods, storms, explosions, acts of God, war, governmental action, labor conditions, earthquakes, material shortages or any other cause which is beyond the reasonable control of such party.
- c) **Governing Law.** This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of California as applied to contracts made (and to be performed) in California, without applying conflict of laws rules. The United Nations Convention on Contracts for the International Sale of Goods (1980) is hereby excluded in its entirety from application to this Agreement.
- d) **Dispute Resolution.** Any dispute arising from or relating to the subject matter of this Agreement that cannot be resolved within a period of thirty (30) days after written notice of same has been given by one party hereunder to the other (the "**Arbitration Date**") shall be finally settled by arbitration in San Jose, California, using the English language, in accordance with the Arbitration Rules and Procedures of JAMS ("**JAMS**") then in effect, by an arbitrator with substantial experience in resolving complex technology contract disputes, who will be chosen from the appropriate list of JAMS arbitrators. If the parties cannot agree upon the identity of an arbitrator within fifteen (15) days following the Arbitration Date, then an arbitrator shall be selected on an expedited basis in accordance with the Arbitration Rules and Procedures of JAMS. The arbitrator shall have the authority to grant specific performance and to allocate between the parties the costs of arbitration (including without limitation service fees, arbitrator fees and all other fees related to the arbitration) in such equitable manner as the arbitrator may determine. The prevailing party in the arbitration shall be entitled to receive reimbursement of its reasonable expenses (including reasonable attorneys' fees, expert witness fees and all other expenses) incurred in connection therewith. Judgment upon the award so rendered may be entered in a court having jurisdiction, or application may be made to such court for judicial acceptance of any award and an order of enforcement, as the case may be. Notwithstanding the foregoing, each party shall have the right to institute an action in a court of proper jurisdiction for preliminary injunctive relief pending a final decision by the arbitrator, provided that a permanent injunction and damages shall only be awarded by the arbitrator. The parties consent to exclusive jurisdiction and venue in the United States Federal Courts located in the Northern District of California.
- e) **No Waiver.** Cohesity's performance is expressly conditioned on Customer's assent to this Agreement. A waiver of any default hereunder, or of any provision of this Agreement, shall not be deemed to be a continuing waiver or a waiver of any other default or of any other provision, but shall apply solely to the instance to which such waiver is directed.
- f) **Severability.** In the event any provision of this Agreement is found to be invalid, illegal or unenforceable, a modified provision shall be substituted which carries out as nearly as possible the original intent of the Parties, and the validity, legality and enforceability of any of the remaining provisions shall not in any way be affected or impaired thereby.
- g) **Entire Agreement.** This Agreement shall constitute the complete and exclusive statement of the terms of agreement between Cohesity and Customer regarding its subject matter. Only the terms expressly stated on a binding and valid Cohesity sales quotation or a written instrument signed by a valid Cohesity signatory may modify or supplement the terms hereof. THE TERMS OF ANY PURCHASE ORDER, CONFIRMATION OR SIMILAR DOCUMENT WILL HAVE NO EFFECT AND WILL NOT BE CONSIDERED AGREED TO BY COHESITY. IF THE TERMS AND CONDITIONS IN THIS AGREEMENT ARE CONSIDERED AN OFFER, ACCEPTANCE IS EXPRESSLY LIMITED TO SUCH TERMS AND CONDITIONS.