



## MARKETPLACE TERMS OF SERVICE

These Clumio Terms of Service (the “**Agreement**”) are entered into by and between Clumio, Inc., a Delaware corporation, headquartered at 4555 Great America Parkway, Suite 101, Santa Clara, CA 95054 USA (“**Clumio**”), and the entity listed in the Order (“**Customer**”). An “**Order**” is a quote, order form, offer document, or other ordering document executed by the parties or accepted by Customer by means of online acceptance by clicking “Subscribe” or “I Accept” or other, similar words of acceptance through the Marketplace. Under this Agreement and the applicable Order, Customer is purchasing a subscription to the Service through an online marketplace owned and operated by a third-party (e.g. AWS Marketplace) (“**Marketplace**”). This Agreement includes any addenda or exhibits referenced in this Agreement, including any Orders. The “**Effective Date**” of this Agreement is the earlier of (i) Customer’s initial access to the Service or (ii) the date of acceptance or execution of the applicable Order by Customer.

**By clicking to subscribe to the Service through the Marketplace you (on behalf of the entity you represent, the Customer) agree that Customer’s access and use of the Service is governed by this Agreement. The person clicking to subscribe to the Service through the Marketplace represents and warrants that it has the necessary power and authority to bind the entity that it represents. If the Customer does not agree to be bound by this Agreement, do not click to subscribe.** In consideration of the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

### 1. Customer’s Subscription.

1.1. Description of the Service and Ordering. Clumio is the owner and provider of data backup and related solutions (collectively, the “**Service**”). Customer may purchase access to the Service by entering into an Order that describes the Services to be provided by Clumio. The period that Customer may access and use the Service (“**Subscription Period**”), Customer’s subscription type, and any specific business terms related to such subscription will be stated on the applicable Order.

1.2. Users and Access Rights. Subject to the terms and conditions of this Agreement, Clumio grants Customer, including its designated employees (“**Users**”), the right to access and use the Service during the Subscription Period for Customer’s internal use only. Customer may also permit its Affiliates (and its and its Affiliates’ independent contractors and consultants) to act as Users, provided that any such use is solely for the benefit of Customer and that Customer remains responsible for compliance by such individuals with all the terms and conditions of this Agreement. To the extent use of the Service requires Customer to install and run downloadable software on Customer’s local hardware, Clumio grants Customer and its Users a non-exclusive, non-transferable, and non-sublicensable right and license to use the object code form of such software provided such software is used only in conjunction with the Service, solely during the Subscription Period, and solely in accordance with the Documentation and the applicable Order; such software will be considered part of the Service. Customer may also use, access, and, if applicable, download Clumio’s technical documentation and usage guides for the Service (“**Documentation**”), solely for the purpose of Customer using the Service in accordance with this Agreement. Customer will, and will ensure that its Users will, use the Service in accordance with the Documentation. For the purposes of this Agreement “**Affiliate**” means an entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a party. As used herein, “control” means the power to direct the management or affairs of an entity and “ownership” means the beneficial ownership of more than fifty percent (50%) of the voting securities or interests of an entity.

1.3. Subscription Types. Customer may purchase either a Commitment Subscription or a Time-Based Subscription, each as stated on the applicable Order. A “**Commitment Subscription**” is a subscription to the Service with an advance commitment to purchase a specific quantity of allowances to use the Service for a specific period based upon identified applications or file types, identified capacity limits, and/or an identified number of user seats (“**Credits**”) during the Subscription Period. A “**Time-based Subscription**” is a subscription to the Services for a specific period, but is not limited by applications or file types, identified capacity limits, and/or an identified number of user seats, unless otherwise agreed by the parties in an Order.

2. **Restrictions.** Customer will be responsible for each User’s compliance with this Agreement and for each User’s actions while using the Service. The Service is provided and licensed based on limitations identified in the Order, which may include, but are not limited to: (i) the Subscription Period, (ii) identified applications or file types, (iii) identified capacity limits, (iv) identified Credits, (v) identified hosting regions, (vi) identified feature sets, including replication or access costs, (vii) identified data retention periods (subject to Customer having an active Subscription Period for the duration of such data retention periods), and/or (viii) an identified number of user seats; Customer is responsible for complying with such limitations. Any identified data



retention periods are subject to Customer having an active Subscription Period for the duration of such data retention periods. Customer will not, directly or indirectly, and will not permit any User or third party to: (i) sell, rent, assign, sublicense, or distribute the Service, or provide the Service to any third party; (b) provide access to, or otherwise make available, the Service to any third party (except as expressly set forth in Section 1); (c) modify, copy, translate, or create derivative works of, the Service, (d) reverse engineer, decompile, disassemble, or otherwise seek to obtain or derive the source code or non-public APIs or algorithms of the Service, except to the extent expressly permitted by applicable law (and then only upon advance written notice to Clumio); (e) remove or obscure any copyright labels or proprietary or other notices contained in the Service; (f) use the Service in violation of applicable law or third-party intellectual property rights; or (g) use the Service to benchmark the Service or to build similar or competitive products or services. If Customer (including Users) is using the Service in a manner that, in Clumio's reasonable judgment, causes or is likely to cause significant harm to Clumio or the Service or otherwise threatens the security, integrity or availability of the Service then Clumio may suspend Customer's access to the Service. Clumio will use commercially reasonable efforts under the circumstances of such suspension to, (1) provide Customer with notice and an opportunity to remedy such violation or threat prior to any such suspension, (2) limit the suspension to only accounts involved in the activities in question, and (3) remove the suspension as quickly as practicable after the circumstances leading to the suspension have been resolved.

### 3. **Support.**

3.1. **Service Levels.** During the Subscription Period, Clumio will provide Customer with technical support for the Service in accordance with Clumio's Customer Support Service Level Agreement available at <https://clumio.com/customer-sla/> and incorporated herein by reference ("**Support**"). If Customer pays for a support package that includes additional support services, such support package and its cost will be stated on the Order.

3.2. **Customer's Account.** Customer is responsible for establishing a username and password (or any other means required by Clumio) for the purpose of verifying that only designated Users have access to the Service and Support. Customer is responsible for maintaining the security of Customer's account and any administrative or User passwords. Customer acknowledges and agrees that Clumio may rely on the actions and instructions of any User in the provision of Support to Customer. If Customer procured access to the Service through the Marketplace, then Customer agrees that Clumio may provide the provider of the Marketplace with information related to Customer's consumption of the Service for billing and support purposes.

### 4. **Data.**

4.1. **Customer Data.** As part of its use of the Service, Customer may provide data, information, or materials that are uploaded by or on behalf of Customer to the Service for the purpose of storage and retrieval ("**Customer Data**"). For the avoidance of doubt, Customer Data also includes all information provided by Users for the purpose of logging into the Service. Customer grants Clumio a non-exclusive, worldwide, royalty-free, paid-up, transferable right and license to store, process, transmit, display (to Users), and otherwise use the Customer Data for the sole purpose of providing the Services to Customer. Except for the limited rights granted in the forgoing sentence, as between Clumio and Customer, Customer retains all right, title, and interest in and to the Customer Data. Customer represents and warrants that Customer has all necessary rights in Customer Data to grant the rights and licenses stated above to Clumio.

4.2. **Data Processing Addendum.** Clumio will implement technical and organizational measures designed to prevent unauthorized access, use, alteration, or disclosure of Customer Data in accordance with the Clumio Security Policy, as made available by Clumio at <https://clumio.com/legal/security-policy/>, which is incorporated herein by reference ("**Security Policy**"). The parties will also comply with the data processing addendum with respect to all processing and handling of Customer Data, the current version of which is available at <https://clumio.com/legal/dpa/> ("**DPA**"). Clumio will process all Customer Data in accordance with Customer's instructions; it is solely Customer's responsibility to ensure that its instructions comply with applicable law, including those instructions to destroy any Customer Data or backups of Customer Data. Customer agrees to be liable if its instructions regarding Customer Data violate applicable law.

4.3. **BAA.** If applicable, the parties will enter into and agree to comply with the business associate agreement, the current version of which is available at <https://clumio.com/legal/baa/>.



4.4. Usage Statistics. Clumio monitors Customer's use of the Service for billing and Support purposes, as well as to improve Clumio's offerings. As Customer (including its Users) interacts with the Service, it collects data pertaining to the performance of the Service and measures of the operation of the Service ("**Usage Statistics**"). Notwithstanding anything else to the contrary herein, provided that the Usage Statistics are aggregated and anonymized, and no Customer Data, or any other personal identifying information of Customer is revealed to any third party, the parties agree that Clumio is free to use the Usage Statistics in any manner. Clumio owns all right, title, and interest in and to such Usage Statistics. For clarity, this section does not give Clumio the right to identify Customer (including its Users) as the source of any Usage Statistics.

## 5. **Payment.**

5.1. Fees. Customer will pay all fees ("**Fees**") specified in the Order provided through the Marketplace. Except as otherwise specified herein or in an Order Form, (i) payment obligations are non-cancelable and Fees paid are non-refundable, and (ii) Credits purchased cannot be decreased during the relevant Subscription Period.

5.2. Invoicing. All Fees will be paid by Customer as provided on the Marketplace.

5.3. Taxes. 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 the Services. For clarity, Clumio is solely responsible for taxes assessable based on Clumio's income, property, and employees.

5.4. Failure to Pay. Customer understands and agrees that if Customer does not pay in accordance with the applicable Order, Clumio will have the right to suspend Customer's right to use and access the Service and to terminate this Agreement upon notice to Customer. If Customer fails to pay any undisputed invoices or charges from Clumio in accordance with this Section 5 then Clumio may, provided that it gives Customer written notice of such non-payment and ten (10) days from the date of such notice to remit the overdue amounts in full: (a) suspend Customer's access to the Service pending payment of such overdue invoices; or (b) charge a finance charge of 1% per month on any outstanding balance, or the maximum permitted by law, whichever is lower. If Customer believes that Clumio has billed Customer incorrectly, Customer must contact Clumio no later than sixty (60) days after the closing date on the first billing statement in which the error or problem appeared, to receive an adjustment or credit. Once Clumio receives notice of a disputed invoice, Clumio will review such notice and provide Customer with a written decision regarding the dispute, including documentary support for such decision. If Clumio reasonably determines that the amounts charged on a disputed invoice are, in fact, due, Customer will pay such amounts within ten (10) days of Clumio notifying Customer in writing of such decision.

5.5. Overages. If Customer uses all Credits purchased under an Order prior to the expiration of the applicable Subscription Period, Customer may continue using the Service if Customer pays for such use. If Customer has not entered into a new Order to purchase additional Credits upon Customer's use of its last Credit, Customer's subscription will automatically become an "on demand" subscription at Clumio's then-current list rate and Customer will be responsible for paying for any Credits used each calendar month, which will be billed to Customer monthly in arrears. Clumio will have the right to examine Customer's use of the Service to verify compliance with the Credit limitations stated in the applicable Order. If such examination identifies usage more than the applicable Order, then Customer will promptly pay to Clumio (directly or through the Marketplace, as determined by Clumio), any additional fees that Clumio is owed hereunder.

## 6. **Term and Termination.**

6.1. Agreement Term. This Agreement will commence on the Effective Date and continue until all Orders have expired or been terminated, unless otherwise terminated as provided herein ("**Agreement Term**"). The Subscription Period for any Commitment Subscription will be the period identified in the Order. Unless otherwise renewed, the Subscription Period for a Commitment Subscription will expire one year from the commencement of the Subscription Period. For any net new Service, the start date of any Subscription Period is the later of: (i) the date that Clumio makes the Service available to Customer, or (ii) the start date specified in the applicable Order. For any renewal, the start date of any Subscription Period is the date immediately following the end date of the previous Subscription Period. Either party will have the right to terminate this Agreement upon expiration or termination of a Subscription Period upon written notice to the other party.



6.2. **Renewal.** The parties may choose to renew any Order on mutual, written agreement or as otherwise prescribed through the Marketplace. Any additional renewal terms will be stated on the Order. For Commitment Subscription Customers, upon expiration of the then current Subscription Period, any remaining Credits will immediately expire unless Customer makes alternative arrangements with Clumio in a new Order prior to expiration of the then current Subscription Period. In order for Credits from a previous Order to apply to a new Order, such new Order must be for the same subscription and Fees or an increased subscription and Fees as the Order for the immediately preceding Subscription Period. In connection with such new Order, the remaining Credits purchased for a previous Subscription Period (for a Commitment Subscription) expire 1 year following expiration of the previous Subscription Period. Unless otherwise specified in the Order, or as otherwise stated under Section 14.2, Credits expire one (1) year after issuance.

6.3. **Retrieval and Deletion of Customer Data.** Provided that this Agreement is not terminated by Clumio for Customer's material, uncured breach, then at least ten (10) days prior to the expiration of the then-current Subscription Period, Customer may elect (at its cost) to extend access to the Service for up to sixty (60) days for the sole purpose of retrieving any Customer Data remaining on the Service beyond the Subscription Period end date ("**Retrieval Period**"). Customer understands and agrees that Clumio's costs to host Customer Data are significant and as such, Clumio is unable to host or store Customer Data when Customer is not paying for its access to and use of the Service. Thus, Customer will be invoiced for its access to the Service during the Retrieval Period and will pay such invoice in accordance with this Agreement. During the Retrieval Period, Customer is prohibited from writing, uploading, or otherwise providing any new Customer Data to the Service. If Customer requires assistance with migrating Customer Data from the Service, then, depending on the nature of the request, Clumio may require a mutually agreed-upon fee for such assistance. Except as expressly set forth in this Section 6.3, Customer understands and agrees that Clumio has the right to immediately delete all Customer Data in its possession upon termination of this Agreement or any Subscription Period and Clumio has no obligation to archive or make Customer Data available after expiration or termination of this Agreement or any Subscription Period. For the avoidance of doubt, Customer Data will be immediately deleted following any Retrieval Period. This Agreement will remain in full force and effect during any Retrieval Period. Upon expiration or termination of any Subscription Period (or upon expiration of any Retrieval Period), (i) any Customer Data stored in the Service will no longer be retrievable by Customer, and (ii) Customer hereby authorizes Clumio to delete all remaining Customer Data stored in the Service. Clumio will provide a written confirmation of deletion of Customer Data upon Customer's written request.

6.4. **Termination.** This Agreement, and Customer's rights to use the Service, may be terminated by Clumio immediately on notice to Customer if: (i) the applicable Subscription Period expires without renewal; or (ii) Customer fails to make timely payments of Fees for the Service to Clumio. Either party may terminate this Agreement upon written notice to the other party if (a) a party materially breaches any provision of this Agreement and fails to cure such breach within 30 days from the date of the non-breaching party's written notice to the other party detailing the material breach, or (b) a party seeks protection under any bankruptcy or similar proceeding and such proceeding is not dismissed within one hundred twenty (120) days.

6.5. **Effect of Termination.** Upon any termination, Customer will promptly: (a) discontinue all use of the Service, and (b) pay all Fees due for the Service for the duration of the Subscription Period, provided, however, that if Customer terminates the Service for Clumio's uncured breach, then (1) Customer will pay all amounts due for the Service up to the effective date of termination, and/or (2) Customer will receive a prorated refund of unused amounts pre-paid to Clumio for Customer's use of the Service for the remainder of the Subscription Period. Credits not used during the Subscription Period will expire at the end of the Subscription Period. Sections 4.4, 5, 6, 7.3 and 8 – 13 will survive any termination of this Agreement.

## 7. **Warranty and Disclaimers.**

7.1. **Warranty.** Clumio warrants that the Service will operate in substantial compliance with the applicable Documentation. In the event of a breach of this warranty, Clumio will use commercially reasonable efforts to correct the reported non-conformity at no additional charge to Customer, or if Clumio determines such remedy to be impracticable, either party may terminate the applicable Order and Customer will receive a prorated refund of amounts pre-paid to Clumio for Customer's use of the Service for the remainder of the Subscription Period. The foregoing remedy will be Customer's sole and exclusive remedy for any breach of warranty hereunder. Both parties represent and warrant that they will comply with all laws applicable to the use of the Service and performance of its obligations under this Agreement.

7.2. **Exclusions.** The warranty in Section 7.1 will not apply unless Customer makes a claim within thirty (30) days of the date on which Customer first noticed the alleged non-conformity. The warranty also does not apply to any unavailability or suspension



of the Service: (i) caused by factors outside of Clumio's reasonable control, including any force majeure event, Customer's Internet access, or other problems beyond the demarcation point of the Service; (ii) that result from any actions or inactions of Customer or any third party not under Clumio's direct control; (iii) that result from misuse, unauthorized modification, or Customer or third party equipment, software, services, or technology not within Clumio's direct control; (iv) any unavailability, suspension or termination of any cloud service provider, or any other cloud service provider performance issues; or (v) arising from Clumio's suspension or termination of Customer's right to use the Service in accordance with this Agreement.

7.3. Warranty Disclaimer. EXCEPT AS EXPRESSLY SET FORTH IN SECTION 7, THE SERVICE IS PROVIDED "AS IS," AND CLUMIO DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. CLUMIO DOES NOT WARRANT AGAINST LOSS OR INACCURACY OF DATA OR THAT THE OPERATION OF THE SERVICE WILL BE UNINTERRUPTED OR ERROR FREE. CLUMIO WILL NOT BE LIABLE FOR PROBLEMS INHERENT IN USE OF THE INTERNET OR FOR ISSUES RELATED TO THIRD PARTY HOSTING PROVIDERS WITH WHOM CUSTOMER SEPARATELY CONTRACTS. THE SERVICE IS ONE TOOL IN CUSTOMER'S DATA PROTECTION STRATEGY AND DOES NOT REPRESENT A SHIFT IN RESPONSIBILITY FOR CUSTOMER'S BUSINESS. CUSTOMER REMAINS RESPONSIBLE FOR ENSURING THAT IT HAS APPROPRIATE DATA BACK-UP, DATA RECOVERY, AND DISASTER RECOVERY MEASURES IN PLACE.

## 8. **Indemnification.**

8.1. Clumio Indemnification. Clumio will defend Customer from and against any claim, suit, or other proceeding brought by a third party alleging that the Service infringes any intellectual property right of such third party and Clumio agrees to pay any settlements with respect to the foregoing obligations that Clumio agrees to in a writing signed by Clumio's authorized officer or final judgments awarded to the third party claimant by a court of competent jurisdiction. Notwithstanding the foregoing, Clumio will have no obligation with respect to any infringement claim based upon (a) any use of the Service that is not in accordance with this Agreement or the corresponding Documentation; (b) any use of the Service in combination with other products or services not provided by Clumio if such infringement would not have arisen but for such combination; or (c) any unauthorized use or modification of the Service.

8.2. Customer Indemnification. Customer will defend Clumio from and against any claim, suit, or other proceeding brought by a third party alleging that Clumio's use and processing of Customer Data in accordance with this Agreement violated the rights of such third-party and Clumio agrees to pay any settlements with respect to the foregoing obligations that Clumio agrees to in a writing signed by Clumio's authorized officer or final judgments awarded to the third party claimant by a court of competent jurisdiction.

8.3. Procedures. The obligations of each party in this Section 8 are conditioned on; (i) the indemnified party notifying the indemnifying party promptly in writing of such claim (provided that the indemnified party's failure to provide reasonable written notice shall only relieve the indemnifying party of its indemnification obligations hereunder to the extent such failure materially limits or prejudices the indemnifying party's ability to defend or settle such claim), (ii) granting the indemnifying party sole control of the defense of the claim (including settlement), and (iii) cooperating and assisting in such defense at the indemnified party's reasonable request and expense (including reasonable attorneys' fees). Nothing in this Section 8 prohibits the indemnified party from participating in such defense at its own expense. Notwithstanding anything else to the contrary in this Agreement, any obligation of the indemnifying party to defend, indemnify and hold the indemnified party harmless hereunder is limited to the indemnifying party's payment for the cost of defense of the third-party claim incurred by the indemnifying party and the payment of (a) any settlements agreed to by the indemnifying party in a writing signed by an officer of the indemnifying party, or (b) final judgments awarded to the third-party claimant by a court of competent jurisdiction.

8.4. Options. If Customer's use of the Service is, or in Clumio's opinion is likely to become, enjoined as a result of an infringement claim, or if Clumio determines such actions are reasonably necessary to avoid liability, Clumio may, at its option and expense, either (i) procure for Customer the right to continue using the Service; (ii) replace or modify the Service so that it becomes non-infringing and remains functionally equivalent; or (iii) if, despite its commercially reasonable efforts, Clumio is unable to do either (i) or (ii), Clumio will terminate this Agreement and provide Customer with a prorated refund of any Fees pre-paid to Clumio for the Service for the remainder of the Subscription Period.



8.5. **Sole Remedy.** NOTWITHSTANDING ANYTHING ELSE TO THE CONTRARY IN THIS AGREEMENT, THIS SECTION 8 STATES CLUMIO'S ENTIRE RESPONSIBILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS UNDER THIS AGREEMENT.

9. **Limitation of Liability.** NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, EXCEPT FOR (I) CUSTOMER'S OBLIGATIONS UNDER OR BREACH OF SECTION 2, OR (II) A PARTY'S OBLIGATIONS UNDER SECTION 8, (III) A PARTY'S VIOLATION OF THE LAWS APPLICABLE TO ITS BUSINESS OPERATIONS, OR (IV) EITHER PARTY'S GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR FRAUD, NEITHER PARTY WILL BE LIABLE WITH RESPECT TO ANY CAUSE RELATED TO OR ARISING OUT OF THIS AGREEMENT, WHETHER IN AN ACTION BASED ON A CONTRACT, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY) OR ANY OTHER LEGAL THEORY, HOWEVER ARISING, FOR (A) INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, (B) ANY DAMAGES BASED ON USE OR ACCESS, INTERRUPTION, DELAY OR INABILITY TO USE THE SERVICE, LOST REVENUES OR PROFITS, DELAYS, INTERRUPTION OR LOSS OF SERVICES, BUSINESS OR GOODWILL, LOSS OR CORRUPTION OF DATA, LOSS RESULTING FROM SYSTEM OR SYSTEM SERVICE FAILURE, MALFUNCTION OR SHUTDOWN, FAILURE TO ACCURATELY TRANSFER, READ OR TRANSMIT INFORMATION, FAILURE TO UPDATE OR PROVIDE CORRECT INFORMATION, SYSTEM INCOMPATIBILITY OR PROVISION OF INCORRECT COMPATIBILITY INFORMATION OR BREACHES IN SYSTEM SECURITY, OR (C) ANY DAMAGES THAT IN THE AGGREGATE EXCEED THE TOTAL FEES PAID OR PAYABLE BY CUSTOMER FOR THE SERVICE THAT IS THE SUBJECT OF THE CLAIM DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT WHICH GIVES RISE TO SUCH DAMAGES. THESE LIMITATIONS WILL APPLY WHETHER OR NOT A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

10. **Confidentiality.** Each party (the "**Receiving Party**") will protect the Confidential Information of the other party (the "**Disclosing Party**") using the same degree of care that it uses to protect the confidentiality of its own confidential information (but not less than reasonable care). "**Confidential Information**" means non-public information that is identified as confidential at the time of disclosure by the Disclosing Party or that should reasonably be understood by the Receiving Party to be confidential due to the nature of the information or the circumstances surrounding its disclosure. Clumio's Confidential Information includes all non-public information relating to the Service, including performance or benchmark results and any usage statistics. Confidential Information will not include information that the Receiving Party can demonstrate: (i) was rightfully in its possession or known to it prior to receipt of the Confidential Information; (ii) is or has become public knowledge through no fault of the Receiving Party; (iii) is rightfully obtained by the Receiving Party from a third party without breach of any confidentiality obligation; or (iv) is independently developed by the Receiving Party without use of the Disclosing Party's Confidential Information. The Receiving Party will (a) not use any Confidential Information of the Disclosing Party for any purpose except as necessary in performance of its obligations under this Agreement or as otherwise authorized by the Disclosing Party in writing, (b) make diligent efforts not to disclose the Confidential Information of the Disclosing Party, and (c) limit access to Confidential Information of the Disclosing Party to those of its and its Affiliates' employees and contractors who have a need to know such Confidential Information for purposes consistent with this Agreement and who have signed confidentiality agreements with the Receiving Party containing protections not materially less protective of the Confidential Information than those herein. The Receiving Party's obligations under this Section 10 will survive termination and continue for five (5) years from the date of termination of this Agreement. All Confidential Information will remain the property of the Disclosing Party. Upon termination, the Receiving Party will cease any use of the Disclosing Party's Confidential Information. Upon the Disclosing Party's written request, the Receiving Party will promptly return or destroy all documents and tangible materials containing Disclosing Party's Confidential Information and provide a signed document attesting to such return or destruction. Notwithstanding the foregoing, the Receiving Party may retain Confidential Information to comply with any applicable law, rule, regulation, or its document retention policies and is not required to erase or destroy any Confidential Information contained in back up storage made in the ordinary course of business provided that all retained Confidential Information remains subject to the restrictions of this Agreement. If Receiving Party is required by law or court order to disclose Confidential Information, then Receiving Party will, to the extent legally permitted, provide Disclosing Party with advance written notice and cooperate in any effort to obtain confidential treatment of the Confidential Information. The Receiving Party acknowledges that disclosure of Confidential Information may cause substantial harm for which damages alone may not be a sufficient remedy, and therefore that upon any such disclosure by the Receiving Party, the Disclosing Party will be entitled to seek appropriate equitable relief in addition to whatever other remedies it might have at law.

11. **Feedback.** Customer may from time to time provide suggestions, comments, or other feedback with respect to the Service ("**Feedback**"). For the avoidance of doubt, Feedback will only refer to suggestions, comments or other feedback provided to Clumio *specifically* regarding the Service and will not include Customer Data. Clumio may want to incorporate Feedback into



its Service and this clause provides Clumio with the necessary license to do so. Customer hereby grants to Clumio and Clumio's assigns a royalty-free, worldwide, perpetual, irrevocable, fully transferable and sublicensable right and license, if any, to use, disclose, reproduce, modify, create derivative works from, distribute, display, and otherwise distribute and exploit any Feedback as Clumio sees fit, entirely without obligation or restriction of any kind, except that Clumio will not identify Customer as the provider of such Feedback.

12. **Clumio's Ownership.** Clumio and its licensors retain all right, title, and interest in all intellectual property rights, including patent, trademark, trade name and copyright, whether registered or not registered, in and to the Service and underlying technology thereof, the Documentation, and any derivative works, modifications, or improvements of any of the foregoing. Clumio reserves all rights in the Service not expressly granted herein, and no other license or implied rights of any kind are granted or conveyed. In the event that certain software provided with the Service is subject to open-source licenses, nothing herein limits Customer's rights under, or grants rights that supersede, the licenses applicable to such software. "Clumio" and associated logos are the registered trademarks or trademarks of Clumio and its Affiliates. This Agreement does not permit Customer to use any Clumio trademarks.

13. **General Provisions.**

13.1. **Governing Law and Venue.** This Agreement will be governed by the laws of the State of California and the United States without regard to any conflicts of laws principles. The parties expressly consent to the personal jurisdiction and venue in the state and federal courts in Santa Clara County, California for any lawsuit filed relating to this Agreement. The U.N. Convention on Contracts for the International Sale of Goods will not apply to this Agreement.

13.2. **Changes.** Customer acknowledges that the Service is an on-line, subscription-based product, and that in order to provide improved customer experience Clumio may make changes to the Service provided, however, that Clumio will not materially decrease the core functionality of the Service. Customer agrees that Clumio may modify this Agreement from time to time upon reasonable notice to Customer (notice through the Service will suffice) to reflect changes in law or Clumio's business or Service, process improvements, or changing practices.

13.3. **Notices.** All notices required or permitted under this Agreement will be in writing and will be delivered as provided for under this Agreement, by personal delivery, certified overnight delivery, registered mail (return receipt requested), or email and will be deemed given upon receipt. Notwithstanding the foregoing, notices related to termination of this Agreement or any claims related thereto, except for notices related to non-payment, may not be given via email. Email notices to Clumio will be sent to legal@clumio.com and to Customer at the email address(es) Customer uses to login to the Service.

13.4. **Export.** The Service and related technology are subject to U.S. export laws and may be subject to export regulations in other countries. Customer agrees not to use or export (directly or indirectly) the Service or related technology in violation of applicable export laws or regulations. Customer represents and warrants that it is not listed on any U.S. government list of prohibited or restricted parties or located in (or a national of) a country that has been designated by the U.S. government as a "terrorist supporting" country.

13.5. **US Government End Users.** The Service and related Documentation is provided in accordance with, and use of the Service is subject to, FAR 12.212 (Software) and DFAR 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation), as applicable.

13.6. **Assignment.** This Agreement will inure to the benefit of each party's permitted successors and assigns. Except in connection with a merger, acquisition, or sale of all or substantially all of a party's assets or voting securities, neither party may assign this Agreement without the advance written consent of the other party. Any other transfer or assignment of this Agreement except as expressly authorized under this Section will be null and void.

13.7. **Force Majeure.** Neither party will be liable to the other for any delay or failure to perform any obligation under this Agreement if the delay or failure is due to any cause beyond such party's reasonable control, including acts of God, labor conditions, systemic electrical, telecommunications, or other utility failures, earthquakes, floods, fires, storms, acts of terrorism, war, or acts or orders of government.



13.8. **Entire Agreement.** This Agreement is the entire agreement between Clumio and Customer and supersedes all previous written and oral communications between the parties with respect to the subject matter hereof. No varying terms or conditions stated in a Customer purchase order or other ordering document or process (other than Orders) will form any part of this Agreement, including, without limitation, any click-through, online, or form agreements accepted by Customer or its Users when creating an account or otherwise accessing the Service, and all such terms and conditions will be null and void. If any provision of this Agreement is held to be invalid or unenforceable, that provision will be limited to the minimum extent necessary so that this Agreement will otherwise remain in effect. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

13.9. **Promotions.** If any promotion was applied to Customer's subscription, as stated on an Order, then the Promotion Terms, the current version of which can be found at <https://clumio.com/legal/promotions/>, or a successor sight provided by Clumio to Customer.

#### 14. **Trials.**

14.1. **Trials.** Clumio may make available to Customer a trial use of the Service and/or other services, software, or features that may not yet be generally available, including pre-release or beta versions of the foregoing (collectively, "Trials"). Trials will be limited to; (i) a specific number of Credits, and (ii) a maximum period during which Credits may be redeemed. Customer may access and use Trials solely for the purpose of evaluating the Service and related features. Trials may be restricted to partial functionality of the Service and may be restricted to certain countries or geographies, as determined by Clumio in its sole discretion. Clumio may terminate Customer's access to and use of any Trial at any time, without notice to Customer. For pre-release or beta Trials, Customer acknowledges that such Trials (a) may not perform at the level of generally available offerings, (b) may not operate correctly, (c) may be modified prior to being made generally available, and (d) may not be made generally available. Trials are provided "as is" without indemnification or warranty of any kind, whether express, implied, statutory, or otherwise. If Support is provided for such Trial such support will be Standard Plus Support.

14.2. **Trial Credits.** At Clumio's sole discretion, Clumio may offer Customer promotional Credits as part of a Trial. Any such Credits will be credited against Customer's Commitment Subscription, as applicable. Promotional Credits for use of the Service have no cash value, are non-transferrable and non-refundable, and unless otherwise specified in the Order expire thirty (30) days after they are issued. If Customer signed up for the Service under a free Trial, the free Trial expires upon the earlier of: (i) thirty (30) days (or such other time period specified in the Order) from the Subscription Period start date, or (ii) once Customer's Credits are exhausted. Upon expiration of the Trial, Customer may convert to a Time-based Subscription or Commitment Subscription.