
MASTER SERVICES AGREEMENT

This Master Services Agreement (the “**Agreement**”) is made and entered into this ___ day of ___, 201__ (the “**Effective Date**”) by and between Virtustream Ireland Limited (“**Virtustream**”), with offices located at Ovens Co., Cork, Ireland and _____ with offices located at _____ (“**Customer**”).

1. DEFINITIONS

For the purpose of this Agreement, the following terms shall have the corresponding definition:

“**μVM**” (pronounced “micro VM”) means Virtustream’s unit of measurement designed to measure the actual consumption of the Cloud Platform as set out in an SOW, based on CPU, memory, storage input/output operations per second (IOPS), and associated local network bandwidth with the usage of each μVM resource component measured at five minute intervals— one unit each for 200MHz of CPU, 768MiB of memory, 40 storage IOPS, and 2Mbps of local network bandwidth – and the highest of the four is averaged per hour and the hour values averaged across the month to determine the overall μVM usage for each month.

“**Affiliate**” means an entity that Controls, is Controlled by or is under common Control with a party;

“**Application Managed Services**” means the management of the applications identified in an SOW, as further described in the Cloud Services Descriptions.

“**AUP**” means Virtustream’s acceptable use policy for the Cloud Services located at <http://www.virtustream.com/use-policy>.

“**Cloud Platform**” means the infrastructure as a service offering, including all of the products and components thereof identified in an SOW.

“**Cloud Services**” means the Cloud Platform and Application Management Services that are identified in an SOW.

“**Cloud Services Descriptions**” means the then current descriptions of the Cloud Services.

“**Confidential Information**” shall have the meaning set forth in Section 10, below.

“**Control**” means the ownership of more than fifty percent (50%) of an entity’s stock or other voting interest sufficient to exercise day to day management control of such entity.

“**Customer Data**” means information, including EU Data, as applicable, that is submitted, stored and/or utilized by or on behalf of Customer in the Customer Zone.

“**Customer Marks**” means Customer’s trade name, trademarks and logos.

“**Customer Material**” means hardware, software, applications, Customer Data and any other materials and information of Customer or any other third party that are submitted, stored and/or utilized in the Cloud Platform by Customer or used by Customer in connection with the Cloud Services.

“**Customer Zone**” means Customer’s tenant space on the Cloud Platform in which Customer accesses the Cloud Platform and stores Customer Data to submit to the Cloud Platform.

“**Data Controller**” means an entity which, alone or jointly with others, determines the purposes and means of the Processing of the Personal Data.

“**Data Privacy Laws**” means all applicable laws, regulations, regulatory guidance and rules concerning the use or processing of personal identifiable information of an individual, including from 25 May 2018, the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the Processing of Personal Data (“GDPR”).

“**Data Processor**” means an entity which processes the Personal Data on behalf of the Data Controller.

“Data Protection Schedule” or “DPS” means the Data Protection schedule set out in Exhibit 1.

“Disengagement Assistance SOW” means the statement of work entered into by and between the parties that describes the Disengagement Services to be provided by Virtustream.

“Disengagement Services” means the services that may be performed following termination of an SOW to assist Customer with the transitioning of the Cloud Services to Customer or to a third party service provider as further set out in this Agreement and a Disengagement Assistance SOW.

“End Users” mean Customer’s employees, contractors, agents or other third parties who utilize or access the Cloud Platform on behalf of Customer.

“EU Data” means any Personal Data which originates from a member state of the European Economic Area.

“Model Clauses” means the Standard Contractual Clauses (controller to processor) approved by the EU Commission for transfers of Personal Data to countries outside the European Economic Area (“EEA”) that do not provide an adequate level of data protection.

“Personal Data” means personally identifiable information of an individual, including: (1) any information that can be used to distinguish or trace an individual's identity, such as name, social security number (or similar government issued document), date and place of birth, mother's maiden name, or biometric records; (2) driver's license number; and (3) any other personal information that is linked or linkable to an individual, such as medical, educational, financial (credit card, bank account, debit card) and employment information.

“Processing” means any operation or set of operations which is performed on Personal Data or on sets of Personal Data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

“Professional Services” means onboarding and consulting services to be provided by Virtustream, as defined in an SOW.

“Security Incident” means any unauthorized or unlawful access to Customer Data in the Cloud Platform.

“Services” means the Cloud Services and the Professional Services.

“Services Term” means the initial services term and any subsequent renewal term.

“SLA” means the service level agreement for the Cloud Services set forth in an SOW.

“SOW” means a statement of work executed by the parties that describes the Services to be provided to Customer by Virtustream.

“Subprocessor” means a third party engaged by Virtustream (including without limitation an Affiliate and/or subcontractor of Virtustream) in connection with the processing of the Personal Data in relation to the provision of the Services.

“Taxes” means all sales, use, excise, value added, goods and services, import duties and other similar or related taxes or withholdings that are imposed on the Services; provided, however, Taxes shall exclude any taxes based on Virtustream’s net income.

“Territory” means the territory identified in the SOW where Virtustream’s data centers providing the Cloud Services are located and from where Customer may store and submit Customer Material to the Cloud Platform.

“VM” means a virtual machine.

“Warranty Period” means the thirty (30) day period following the performance of applicable Professional Services.

2. SERVICES

Virtustream grants Customer a non-exclusive, non-transferable right to access and use the Services during the Services Term, subject to the terms of this Agreement and each SOW. Virtustream will provide the Cloud Services to Customer in accordance with the SLA. Except for the right to use or receive the Services as set out herein, this Agreement does not grant Customer any right to the Services or any product or tool used in delivery of the Services, including to any intellectual property or any other rights or licenses therein, and Virtustream and its third party providers reserve all rights not granted herein. Each SOW entered into by the parties that reference this Agreement shall be incorporated herein and shall be subject to this Agreement; provide, however, that each SOW shall be deemed a separate and distinct contract and a breach under one SOW shall not be deemed a breach under any other SOW.

3. PAYMENT

3.1 Fees

Customer shall pay to Virtustream the fees set forth in each SOW. Customer shall reimburse Virtustream for all travel related expenses incurred by Virtustream in the performance of the Services as provided in an SOW. Except as otherwise stated in an SOW, the fees due hereunder shall be invoiced as follows and shall be due thirty (30) days following date of invoice ("**Due Date**"): (A) the one-time charges shall be invoiced upon the execution of the SOW; (B) the fees for any Professional Services and the minimum monthly recurring charges ("**MRCs**") shall be invoiced monthly in arrears in the month following the performance of such Services; and (C) the fees resulting from any increase in μ VMs consumed or an increase in any other applicable quantity set out in an SOW in any month shall be invoiced monthly in arrears in the month following such increased usage. Any amount not received by the Due Date shall be subject to interest at the lesser of 1% per month or the highest rate permitted by applicable law.

3.2 Taxes

The fees are exclusive of any Taxes. Customer shall pay or reimburse Virtustream for all Taxes imposed on the Services, which Taxes shall be invoiced with the fees set out in Section 3.1, above. Unless otherwise stated in an SOW, the location of the Services shall be Customer's offices at the address identified in this Agreement. In addition to the foregoing:

- A. Unless Customer provides Virtustream with a valid exemption certificate, Customer shall be responsible for all applicable Taxes. If Customer provides Virtustream with an exemption certificate that is deemed to be invalid by the applicable taxing authority, Customer shall be responsible for any applicable Taxes, penalties and interest related to such invalid exemption certificate.
- B. Virtustream shall timely collect and remit such Taxes that are required by law to the appropriate taxing jurisdiction. Customer shall not be liable for any penalties, interest, fees, or other expenses, if any, incurred by Virtustream as the result of Virtustream's failure to remit Taxes collected from Customer. In the event of a subsequent assessment of Taxes by the applicable taxing authority, Customer shall pay or reimburse Virtustream for such assessed Taxes.
- C. If Customer is required by law to make any deduction or withholding, the fees payable by Customer upon which the deduction or withholding is based shall be increased to the extent necessary to ensure that after such deduction or withholding Virtustream receives an amount equal to the amount Virtustream would have received in the absence of such deduction or withholding. Customer shall promptly report and effect payment thereof to the applicable tax authorities. Customer shall also promptly provide Virtustream with official tax receipts or other evidence issued by the applicable tax authorities sufficient to establish that the Taxes have been paid.
- D. The Taxes due under this Agreement may be audited by an applicable taxing authority and the parties shall reasonably cooperate with any such audit.

3.3 Legal Costs

Any and all reasonable legal costs and fees incurred by Virtustream in the performance of its obligations by virtue of its role as the provider of the Services, including compliance with subpoenas, court orders, discovery requests and disputes related to Customer Materials, arising solely between Customer and any third party (e.g. disputes concerning a release of Customer Material or Confidential Information) shall, unless otherwise agreed to in writing by the parties, be paid by Customer.

3.4 Payment Dispute

If Customer disputes in good faith any fees for Services identified in an invoice, Customer shall inform Virtustream of the nature of the dispute by the Due Date and shall identify in reasonable detail the nature of such dispute. Customer may withhold payment of the amount validly in dispute, provided, however, Customer shall continue to pay undisputed amounts in accordance with this Agreement. The parties shall work in good faith to promptly resolve such good faith dispute. Upon resolution of the dispute, Customer shall pay Virtustream the applicable fees. If the dispute remains outstanding for thirty (30) days past the Due Date, Virtustream may seek any and all remedies it may have in law or in equity or otherwise under this Agreement

4. CUSTOMER OBLIGATIONS

4.1 *Use of Services*

Except as otherwise provided in an SOW, the Cloud Services shall only be used for the internal use and benefit of Customer. Any use of the Cloud Services by Customer, including its End Users, shall, in all circumstances, be in accordance with this Agreement and any and all SOWs and shall comply with the AUP. Prior to permitting any third party End Users to access and use the Cloud Services, Customer shall require such third party End Users to agree in writing to only use the Cloud Services on behalf of Customer in accordance with this Agreement and any applicable SOW and to maintain all Virtustream Confidential Information in strict confidence on terms no less restrictive than those agreed between Virtustream and Customer. Customer shall be liable to Virtustream and its Affiliates for any and all breaches of this Agreement, the AUP or any SOW by End Users.

4.2 *Open Source*

Customer will not use and will not authorize any End User to use any open source software in connection with the Services in any manner that requires, pursuant to the license applicable to such open source software, that any Virtustream Confidential Information or the Services be (A) disclosed or distributed in source code form, (B) made available free of charge to recipients, or (C) modifiable without restriction by recipients.

4.3 *Customer Materials*

Customer represents and warrants that it: (A) owns or has the right to use all Customer Materials and to submit and store such Customer Materials to the Cloud Platform; and (B) has all necessary licenses and permissions for usage of any third party software or other information or material supplied or provided by Customer to Virtustream in an SOW or otherwise used in connection with the Services. Customer hereby grants to Virtustream the right to use all Customer Materials, including any third party software solely for the purposes of this Agreement, including any SOW, and the performance of Virtustream's obligations hereunder and any SOW. Customer shall encrypt, in motion and in rest, all Customer Data that is submitted to and stored in the Cloud Platform.

4.4 *Customer Zone; Network Connections*

Customer shall be responsible for implementing, maintaining and securing any applicable networking necessary to support a site-to-site VPN tunnel, MPLS connection or other dedicated connection between Virtustream and Customer facilities, as required for Customer to access the Cloud Platform. In addition, except as otherwise stated in an SOW, Customer shall be solely responsible for all Customer Materials stored or submitted to the Cloud Platform and deploying, implementing, maintaining and measuring security in the Customer Zone as well as compliance with all security and privacy laws, rules and regulations in any applicable regions or countries applicable to Customer and in respect of all Customer Materials.

5. DATA PROTECTION

Each party shall comply with the requirements of the Data Protection Schedule to the extent such requirements are applicable to a party and the Services.

6. TERM AND TERMINATION

6.1 *Term of Agreement*

This Agreement commences on the Effective Date, and shall remain in effect until terminated as set forth herein.

6.2 *Services Term*

Each SOW shall set forth the initial services term and, unless otherwise provided in an SOW, such term shall automatically renew for successive twelve (12) month terms unless either party provides written notice of non-renewal to the other party no later than ninety (90) days prior to the expiration of the then-current Services Term. Upon the occurrence of each renewal of the Services Term and subject to an SOW, the fees for the Services are subject to change upon written notice to Customer by Virtustream.

6.3 Termination

Either party may terminate this Agreement or an SOW upon thirty (30) days written notice to the other party in the event of a material breach of this Agreement or such SOW by the other party if such breach is not cured within such thirty (30) day period or an additional period of time as may be agreed in writing by the parties. In addition, Virtustream may terminate this Agreement immediately upon written notice to Customer if Customer: (A) becomes or is declared insolvent or bankrupt, (B) is the subject of any proceedings relating to its liquidation or insolvency, (C) is subject to the appointment of a receiver or similar officer, (D) makes an assignment for the benefit of all or substantially all of its creditors, (E) or enters into an agreement for the dissolution or readjustment of all or substantially all of its obligations.

6.4 Suspension of Cloud Services

Notwithstanding anything to the contrary set out herein, Virtustream may, in its sole option and in lieu of termination of this Agreement or an SOW, suspend performance of the Cloud Services if Customer is unable to resolve any material breach of this Agreement or an SOW within thirty (30) days of notice of such material breach. Virtustream shall, to the extent applicable, suspend performance of the Cloud Services on the most limited basis as Virtustream determines is reasonably practicable under the circumstances to address the underlying material breach. Virtustream shall use commercially reasonable efforts to notify Customer prior to suspending the Cloud Services, provided, however, that, Virtustream may suspend service without notice if Virtustream becomes aware of a violation of any applicable law or regulation or other activity, in each case, that may expose Virtustream to criminal or civil liability or that may expose other Virtustream customers, the Virtustream infrastructure, network or services to harm.

6.5 Effect of Termination; Survival

Upon termination of this Agreement, each SOW shall immediately terminate, Virtustream shall cease performance of the Services and Customer shall cease use of the Cloud Services. Unless otherwise provided in a SOW for Disengagement Services, Virtustream may, and Customer hereby authorizes Virtustream to, delete the Customer Materials stored in the Cloud Platform at any time following the date that is thirty (30) days following expiration or termination of this Agreement or an applicable SOW. Customer shall also promptly return or destroy any Confidential Information of Virtustream in its possession. In addition, upon termination, Customer shall pay for Services performed prior to the effective date of termination or if Virtustream terminates this Agreement for cause Customer shall pay any fees and expenses owing through the end of the then current Services Term. The following Sections shall survive termination of the Agreement indefinitely or to the extent set out therein: Sections 3-10 and 12.

6.6 Disengagement Services

Following termination of this Agreement or an SOW, Customer may engage Virtustream to provide Disengagement Services, subject to the terms set forth in a Disengagement Assistance SOW. The Disengagement Services may include any or all of the Cloud Services previously provided by Virtustream for the term of the Disengagement Assistance SOW; provided, however, any tools utilized in the performance of the Cloud Services (such as Virtustream or third party software) shall at all times be subject to applicable licensing requirements (which may require Customer to secure licenses to use software independent of the Cloud Services). The Disengagement Services shall not include any requirement that Virtustream: (A) incur or perform any uncompensated expenses or services, (B) instruct Customer (or any Customer retained third party) how to perform services in the same manner as the Cloud Services, or (C) permit Customer (or any Customer retained third party) to use Virtustream's intellectual property. If Virtustream terminates the Agreement for cause, Virtustream may, as a condition of performing the Disengagement Services, require the prepayment of fees for such Disengagement Services.

7. WARRANTIES

7.1 General

Virtustream represents and warrants that all Professional Services shall be provided in a professional and workmanlike manner in accordance with generally accepted industry standards.

7.2 Obligations

If the Professional Services fail to comply with the warranty set out in Section 7.1 above, during the Warranty Period Customer shall notify Virtustream in writing of the allegedly non-conforming Professional Service, setting out with reasonable specificity the alleged non-conformity and reasonable requirements for compliance based on the terms of the SOW. Upon such notice, Virtustream shall promptly re-perform such Professional Services or correct the non-conforming components of the Professional Services in accordance with this Agreement and the SOW. If, during the Warranty Period, Virtustream is unable to successfully re-perform the Professional Services within thirty (30) days following notice from Customer, or an additional time as agreed to by the parties, Virtustream shall, as Customer's sole and exclusive remedy, refund to Customer the portion of the fees paid for the non-compliant Professional Services.

7.3 Disclaimer of Warranties

EXCEPT FOR THE WARRANTIES SET OUT HEREIN ALL SERVICES ARE PROVIDED "AS IS" AND VIRTUSTREAM EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, COURSE OF DEALING OR COURSE OF PERFORMANCE. VIRTUSTREAM DOES NOT WARRANT THAT THE CLOUD SERVICES WILL BE FREE FROM LOSS OR LIABILITY INCLUDING ARISING OUT OF ANY THIRD PARTY TECHNOLOGY, THIRD PARTY ACTION, SUCH AS UNAUTHORIZED ACCESS BY ANY THIRD PARTY, OR ANY ACT OR OMISSION OF CUSTOMER, INCLUDING CUSTOMER'S FAILURE TO ENCRYPT. VIRTUSTREAM EXPRESSLY DISCLAIMS ANY WARRANTY OR LIABILITY WITH RESPECT TO COMPLIANCE WITH LAWS, RULES OR REGULATIONS APPLICABLE TO CUSTOMER, WHICH SHALL BE THE SOLE RESPONSIBILITY OF CUSTOMER. VIRTUSTREAM DOES NOT WARRANT THE ACCURACY OR COMPLETENESS OF CUSTOMER MATERIALS OR ANY ADVICE, REPORT, DATA OR DELIVERABLES OBTAINED BY CUSTOMER FROM THE CUSTOMER MATERIALS SUBMITTED TO THE CLOUD PLATFORM, SUCH ADVICE, REPORTS, DATA OR DELIVERABLES ARE PROVIDED "AS IS" AND VIRTUSTREAM SHALL NOT BE LIABLE FOR ANY INACCURACY THEREOF. VIRTUSTREAM SHALL NOT BE RESPONSIBLE OR LIABLE FOR: (A) ANY DAMAGES IF, AND TO THE EXTENT, CAUSED BY CUSTOMER'S FAILURE TO PERFORM ITS OBLIGATIONS, AS SET FORTH IN THIS AGREEMENT OR AN SOW; (B) ANY CORRUPTION, DAMAGE, LOSS OR MIS-TRANSMISSION OF CUSTOMER MATERIALS, UNLESS SUCH TRANSMISSION IS THE RESPONSIBILITY OF VIRTUSTREAM; (C) DAMAGES OR LOSSES ARISING FROM ANY FAILURE OF CUSTOMER TO ENCRYPT CUSTOMER MATERIALS; OR (D) THE SECURITY OF CUSTOMER MATERIALS DURING TRANSMISSION FROM CUSTOMER'S FACILITIES TO THE CLOUD PLATFORM.

8. LIMITATION OF LIABILITY

EXCEPT FOR INDEMNIFICATION CLAIMS UNDER SECTION 9 AND CLAIMS ARISING FROM A BREACH OF A PARTY'S CONFIDENTIALITY OBLIGATIONS UNDER SECTION 10, NEITHER PARTY, NOR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR OTHER REPRESENTATIVES OR AGENTS, SHALL BE LIABLE UNDER THIS AGREEMENT FOR INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES IN CONNECTION WITH THIS AGREEMENT, WHETHER OR NOT THE POSSIBILITY OF SUCH DAMAGES WAS DISCLOSED OR COULD HAVE BEEN REASONABLY FORESEEN. EXCEPT FOR INDEMNIFICATION CLAIMS UNDER SECTION 9, NEITHER PARTY'S AGGREGATE LIABILITY TO THE OTHER PARTY UNDER THIS AGREEMENT OR ANY SOW SHALL EXCEED THE FEES ACTUALLY PAID BY CUSTOMER TO VIRTUSTREAM UNDER THE IMPACTED SOW DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT WHICH IS THE SUBJECT OF THE CLAIM. THIS LIMITATION OF LIABILITY APPLIES REGARDLESS OF WHETHER LIABILITY IS BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, BREACH OF WARRANTIES, FAILURE OF ESSENTIAL PURPOSE OF THIS AGREEMENT OR OTHERWISE, OR ANY OTHER LEGAL THEORY.

9. INDEMNIFICATION

9.1 General

Each party (the "**Indemnifying Party**") shall indemnify, defend and hold the other party (the "**Indemnified Party**") harmless from all losses, damages, costs and expenses incurred by the Indemnified Party resulting from third party claims arising from or related to the Indemnifying Party's gross negligence or willful misconduct and bodily injury, including death, or damage to tangible property caused by the Indemnifying Party's negligence.

9.2 Customer

Customer shall at its own expense defend Virtustream from and against, any and all claim by a third party that the Customer Materials infringe any patent or trademark in the Territory or infringe or misappropriate any trade secret or copyright and pay the resulting costs and damages finally awarded against Virtustream by a court of competent jurisdiction to the extent that such are the result of the third party claim, or pay the amounts stated in a written settlement negotiated and approved by Customer. In addition, Customer shall indemnify, defend and hold Virtustream harmless from all losses, liabilities, costs or damages resulting from Customer's, including its End Users', unauthorized use of the Services, including any violation of the AUP and any products or services provided by Customer to third parties.

9.3 *Infringement*

Virtustream shall, at its own expense, defend Customer against any claim by a third party that the Services infringe any patent or trademark in the Territory or infringe or misappropriate any trade secret or copyright and pay the resulting costs and damages finally awarded against Customer by a court of competent jurisdiction to the extent that such are the result of the third party claim, or pay the amounts stated in a written settlement negotiated and approved by Virtustream. If the Services are subject to a claim of infringement or in Virtustream's opinion are likely to become, the subject of such a claim, Virtustream shall, at Virtustream's option and expense: (A) procure for Customer the right to continue to use the Service; (B) replace or modify such Service so that it becomes non-infringing while retaining substantially equivalent functionality; or (C) if Virtustream determines that none of the foregoing are commercially reasonable, terminate this Agreement and the applicable SOW and refund to Customer the fees paid for the allegedly infringing Services by Customer in the immediately preceding six (6) month period. Virtustream shall have no liability if the alleged infringement is based on: (1) combination of the Services with any products, services, items, or technology not provided by Virtustream, or any non-Virtustream products or services; (2) use of Service (i) for a purpose or in a manner that is not permitted by the Agreement, or applicable SOW, or (ii) after Virtustream notifies Customer to cease such use due to a possible or pending claim of infringement; (3) any modification to the Services not made by Virtustream; (4) any modifications made by Virtustream pursuant to Customer's or an end-user's specific instructions; (5) any intellectual property right owned or licensed by Customer (or any End User), including any Customer Materials that Customer or a third party provides, stores in the Customer Platform, or utilizes in connection with Customer's use of the Services and/or Virtustream's provision of the Services; or (6) violation by Customer or an End User of the AUP. This section states Customer's sole and exclusive remedy and Virtustream's entire liability for infringement claims related to the Services.

9.4 *Process*

The Indemnified Party shall promptly notify the Indemnifying Party of any claim. The Indemnifying Party shall have sole control over the defense of any such claim, including the settlement of such claim. The Indemnified Party shall reasonably cooperate with the Indemnifying Party at the Indemnifying Party's request and at the Indemnifying Party's cost.

10. *CONFIDENTIALITY AND PUBLICITY*

10.1 *Definition*

"Confidential Information" means all confidential and proprietary information of either party (the **"Disclosing Party"**) that is disclosed to the other party (the **"Receiving Party"**), including but not limited to: (A) pricing proposals, financial and other business information, data processes and plans; (B) research and development information, analytical methods and procedures, hardware design, technology Customer Materials (other than Customer Data which shall be governed by the Data Protection Schedule); (C) business practices, know-how, marketing or business plans; (D) this Agreement, SOWs, Cloud Service Descriptions, and related documentation or materials; and (E) any other information identified in writing as confidential or information that the Receiving Party knew or reasonably should have known was confidential. For avoidance of doubt Customer Data shall not be "Confidential Information" for purposes of this Agreement, but the treatment of such shall be governed by the Data Protection Schedule.

10.2 *Obligation*

During the term of this Agreement, each party may have access to Confidential Information of the other party. Confidential Information shall be used solely for each party's performance under this Agreement and the exercise of its rights hereunder. Neither party shall, without the prior written consent of the other party, use or disclose the Confidential Information of the other party during the Services Term, and for five (5) years following the expiration or termination hereof. Each party will take all reasonable precautions to protect the other party's Confidential Information, using at least the same standard of care as it uses to maintain the confidentiality of its own Confidential Information but in no event less than reasonable care. Notwithstanding the foregoing, a party may disclose Confidential Information: (A) to any consultants, contractors and counsel who have a need to know in connection with this Agreement and have executed a reasonably protective non-disclosure agreement with the Receiving Party

that is at least protective of Confidential Information as this Agreement; or (B) pursuant to legal process; provided that, the Receiving Party shall, unless legally prohibited, provide the Disclosing Party with reasonable prior written notice sufficient to permit it an opportunity to contest such disclosure. Confidential Information shall not include information which the Receiving Party can prove: (1) is or becomes public knowledge through no breach of this Agreement by the Receiving Party; (2) is received by Receiving Party from a third party not under a duty of confidence; or (3) is already known or is independently developed by the Receiving Party without use of the Confidential Information.

10.3 *Feedback*

Virtustream shall own any ideas, suggestions or other feedback that the Customer may provide to Virtustream with respect to the Services and Customer hereby assigns all right, title and interest to such feedback to Virtustream.

10.4 *Injunctive Relief*

In the event of a breach of this Section 10, the parties agree that the Disclosing Party may be irreparably damaged and Disclosing Party may not have an adequate remedy in the event of a breach by Receiving Party of its obligations hereunder. The parties agree, therefore, that Disclosing Party is entitled to seek, in addition to other available remedies, an injunction restraining any actual, threatened or further breaches of the Receiving Party's obligations under this Section or any other appropriate equitable order or decree. In addition, if a party believes that injunctive relief is necessary to preserve the status quo or prevent further harm under this Agreement, then a party may pursue such relief.

11. *MARKETING*

Neither party shall authorize or assist another to, originate, produce, issue or release any written publicity, news release, marketing collateral or other publication or public announcement, relating in any way to this Agreement, without the prior written approval of the other party, which approval shall not be unreasonably withheld. Notwithstanding the foregoing, Virtustream may identify Customer as a user of the Services. Customer hereby grants to Virtustream, the non-exclusive right and license to use Customer's Marks solely for the purpose of referencing Customer as a client of Virtustream. Such usage shall be limited to use on Virtustream's website and in its marketing collateral, case studies and other marketing materials. Virtustream must use the Customer Marks only in the form in which Customer makes them available to Virtustream and not in any manner that disparages Customer or its Affiliates, or that otherwise dilutes any of the Customer Marks. Other than Virtustream's limited right to use Customer's Marks as provided in this Agreement, Customer retains all right, title, and interest in and to the Customer Marks. Virtustream will follow Customer's trademark guidelines as provided in writing to Virtustream, including any updated guidelines provide to Virtustream in writing from time to time. Virtustream must immediately discontinue use of any Customer Mark as specified by Customer at any time in writing. Notwithstanding anything else to the contrary, Virtustream may issue a press release indicating that Customer has become a Customer of Virtustream as well as a general description of the services and products to be provided by Virtustream to Customer; provided that Virtustream will in no event disclose any Confidential Information of Customer in connection with the foregoing usage, without the prior, written consent of Customer. On request of Virtustream, Customer shall provide a minimum of two (2) reference calls per year to potential customers of Virtustream that are in advanced stages of evaluating the procurement of services from Virtustream that are similar to the Services.

12. *CHOICE OF LAW*

This Agreement shall be governed and construed in accordance with the laws of England and Wales, excluding its choice of law rules. The United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transactions Act shall not apply to this Agreement. Any dispute arising under this Agreement shall be brought in the courts located in London. Neither party shall be entitled to bring any claim under this Agreement more than twenty-four (24) months after the cause of action upon which the claim is based arose.

13. *MISCELLANEOUS*

13.1 *Notices*

All legal notices required to be given hereunder shall be in writing and deemed given if sent to the address set forth above: (A) by prepaid registered or certified international mail, return receipt requested, three days after such mailing; or (B) by international overnight courier service, the next business day. All other notices (e.g., notice reminder of non-payment) may be sent via facsimile or email and will be deemed given on the day such notice is delivered. A copy of all legal notices provided to Virtustream shall also

be sent to the attention of the Virtustream Legal Department, 117 South Street, Hopkinton, MA 01748 and Office of the General Counsel, Dell, Inc., One Dell Way, Austin, Texas 78682.

13.2 Assignment

Customer shall not assign all or any part of this Agreement without the prior written consent of Virtustream, which consent will not be unreasonably withheld or delayed. Virtustream may assign this Agreement to an Affiliate or to a third party that directly or indirectly acquires all or substantially all of its assets or voting securities.

13.3 Waiver

No waiver of any breach of any provision of this Agreement by either party or the failure of either party to insist on the exact performance of any provision of this Agreement will constitute a waiver of any prior, concurrent or subsequent breach of performance of the same or any other provisions hereof, and no waiver will be effective unless made in writing.

13.4 Severability

If any provision is adjudged by a court of competent jurisdiction to be unenforceable, invalid or otherwise contrary to law, such provision shall be interpreted so as to best accomplish its intended objectives and the remaining provisions shall remain in full force and effect.

13.5 Independent Contractors

The parties hereto are and shall remain independent contractors and nothing herein shall be deemed to create any agency, partnership, or joint venture relationship between the parties. Neither party shall be deemed to be an employee or legal representative of the other nor shall either party have any right or authority to create any obligation on behalf of the other party.

13.6 Force Majeure

Neither party shall be liable for failing or delaying performance of its obligations (except for the payment of money) resulting from any condition beyond its reasonable control; provided that such excusal from performance shall last only so long as such condition exists or so long as the excused party has had a reasonable opportunity to mitigate and/or eliminate the effect of such condition, whichever period is shorter.

13.7 Order of Precedence

Except as otherwise agreed to by the parties, any conflict or inconsistency between any provisions of the applicable documents shall be resolved in accordance with the following order of precedence, with each item in the list taking precedence over those that follow it: (A) SOW; (B) Agreement; (C) Cloud Services Descriptions; and (D) AUP. Notwithstanding the foregoing, any conflict or inconsistency between any provisions of the applicable documents shall be resolved in accordance with the following order of precedence: (a) Sections 5, 7, 8, 9 and 10 of this Agreement shall take precedence over any conflicting term in this SOW unless the parties expressly agreed in writing to modify such provisions in an SOW.

13.8 General

This Agreement (A) shall be binding on and inure to the benefit of each of the parties and their respective permitted successors and assigns; (B) may be executed in counterparts, each of which will be deemed an original and all of which when taken together will constitute one and the same instrument; and (C) shall be construed as if both parties jointly wrote it. Any amendments or modifications to this Agreement must be in writing, refer to this Agreement and be executed by an authorized representative of each party. The various section headings are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any section thereof. This Agreement is not intended to benefit, nor shall it be deemed to give rise to, any rights in any third party.

13.9 Entire Agreement

This Agreement and any SOW, hereunder constitute the entire agreement between the parties with respect to the subject matter hereof, and supersede any and all prior or contemporaneous written or oral communications between the parties; provided,

however, that any agreement whose principal purpose is to provide for confidentiality of information that has been entered into between the parties prior to the date hereof shall survive to the extent that it is not inconsistent with the terms and conditions of this Agreement. Variance from or additions to the terms and conditions of this Agreement in any purchase order or other written notification or documentation, from Customer or otherwise, will be of no effect. Except as set forth herein, no other prior or contemporaneous covenants, promises, representations or warranties of any kind, whether written or oral, have been made or can be relied on by either party as an inducement to enter into this Agreement, whether relating to the tools, resources, practices or otherwise of any party hereto. Customer will not rely on any reports, studies, specifications or similar documents which are not expressly made a part of this Agreement for any purpose including in connection with any warranty claim or to otherwise impose any obligation on Virtustream not expressly contained within this Agreement. Each party acknowledges that it does not rely on, and neither party shall have any right or remedy in respect of, any statement or representation other than as expressly set out in this Agreement. Neither this Agreement nor any SOW will be construed against the party that has prepared such Agreement or SOW, but instead will be construed as if both parties prepared the Agreement or SOW.

Agreed to and Accepted:

VIRTUSTREAM IRELAND LIMITED

By: _____

Name: _____

Title: _____

Date: _____

By: _____

Name: _____

Title: _____

Date: _____

Exhibit 1

DATA PROTECTION SCHEDULE

This DPS sets forth Virtustream's and Customer's obligations regarding the security and confidentiality of Customer Data. In the event of a conflict between this DPS and the Agreement with respect to Customer Data, this DPS shall control.

1. COMPLIANCE WITH LAW AND DPS

Each party shall comply with all Data Privacy Laws. Virtustream has implemented and maintains a written information security program, and the Cloud Services will comply with such program and with all applicable Data Privacy Laws; provided that Customer notifies Virtustream in writing of the type of data stored on the Cloud Platform and any necessary or required compliance controls. Virtustream shall not be responsible for providing any security or compliance controls unless agreed to in an SOW.

2. DATA PROCESSING AND CONTROL

2.1 *Customer Data; Virtustream Personnel*

Other than as expressly set forth in the Agreement or this DPS, Customer shall retain all right, title and interest (including all intellectual property and proprietary rights in and to all Customer Data. Virtustream shall: (A) take reasonable steps to keep Customer Data confidential; (B) not access any Customer Data for any purpose other than as reasonably necessary to provide the Services, to exercise any right granted to it under the Agreement or as agreed to in writing by Customer and Virtustream; and (C) require all personnel to comply with obligations consistent with the terms of this DPS. Virtustream shall be responsible for any breach of this DPS by any of its personnel. Specifically with respect to any EU Data, Virtustream shall not disclose, transfer to, or access such EU Data from a jurisdiction which is outside of the European Economic Area, unless in accordance with this DPS, this Agreement or with Customer's prior express authorization; provided that Virtustream may, in the normal course of business, make worldwide transfers of EU Data to its Affiliates and Subprocessors for purposes of managing the Services (e.g. Application Managed Services). When making such transfers, Virtustream shall ensure appropriate protections are in place to safeguard EU Data transferred under or in connection with this Agreement. Where the provision of Services involves the transfer of Personal Data from the EEA to countries outside the EEA (which are not subject to an adequacy decision under Privacy Laws) such transfer shall be subject to the following requirements: (a) Virtustream has in place intra-group agreements with any Affiliates which may have access to the Personal Data, which agreements shall incorporate the Model Clauses; and (b) Virtustream has in place agreements with its Subprocessors that incorporate the Model Clauses as appropriate.

2.2 *Virtustream Data Processor Obligations*

2.2.1 Instructions and details of Processing: Customer instructs and authorises Virtustream to Process Personal Data to provide the Services and comply with Virtustream's rights and obligations under the Agreement. The parties acknowledge that Virtustream's Processing of Customer Data shall be limited to hosting of such data on the Cloud Platform. This DPS, the Agreement, and any applicable SOWs, comprise Customer's complete instructions to Virtustream regarding the Processing of Personal Data. Any additional or alternate instructions must be agreed between the parties in writing. Customer agrees that it will not require Virtustream to undertake or engage in any activity that would require, or result in, Virtustream acting in the capacity of a Data Controller. Virtustream is not responsible for determining if Customer's instructions are compliant with applicable Data Privacy Law. However, if Virtustream is of the opinion that a Customer instruction infringes applicable Data Privacy Laws, Virtustream shall notify Customer as soon as reasonably practicable and shall not be required to comply with such infringing instruction. Virtustream shall not be liable for any claim brought by Customer or any third party arising from any action or omission by Virtustream to the extent such action or omission resulted from compliance with Customer's instructions. Customer shall indemnify, defend and hold harmless Virtustream in the event of any such claim arising. Details of the subject matter of the Processing, its duration, nature and purpose, and the type of Personal Data and data subjects are as specified in the Agreement and the applicable SOW. Except as otherwise expressly stated, Customer is the Data Controller and Virtustream is the Data Processor of the Personal Data processed under the applicable SOW.

2.2.2 Confidentiality: To the extent the Personal Data are confidential (pursuant to applicable law), Virtustream shall take reasonable steps to maintain the confidentiality of Personal Data in accordance with the DPS and shall ensure Virtustream employees or representatives authorized to process the Personal Data (including its Subprocessors) have committed to materially similar obligations of confidentiality.

- 2.2.3 **Data Subject:** Virtustream will notify the Customer (within five business days) if it receives a request, whether orally or in writing, from a Data Subject to have access to their Personal Data or a complaint or request relating to the Data Processor obligations under GDPR. Customer shall be solely responsible for responding to any such request, provided that Virtustream shall provide Customer with reasonable cooperation and assistance in relation to any such complaint or request.
- 2.2.4 **Legal Proceeding:** If Virtustream receives a request from a third party in connection with any government or court investigation or proceeding that Virtustream believes would require it to produce any Customer Data, Virtustream shall, prior to producing or disclosing any such Personal Data (if such notice is permissible according to applicable law), notify Customer of such request, and reasonably cooperate with Customer if Customer wishes to limit, challenge, or protect against such disclosure, to the extent permitted by applicable law or regulation.
- 2.2.5 **Subprocessors:** Customer agrees that Virtustream may appoint and use Subprocessors to process the Personal Data in connection with the Services provided that: (a) Virtustream puts in place a contract in writing with each Subprocessor that imposes obligations that are (i) relevant to the services to be provided by the Subprocessor and (ii) materially similar to the rights and/or obligations granted or imposed on Virtustream under this DPS; and (b) where a Subprocessor fails to fulfil its data protection obligations as specified above, Virtustream shall be liable to the Customer for the performance of the Subprocessor's obligations.

3. DATA SECURITY / SECURITY INCIDENTS

3.1 Cloud Platform

Taking into account industry standards, the costs of implementation, the nature, scope, context and purposes of the processing and any other relevant circumstances relating to the processing of the Customer Data, Virtustream has implemented and maintained commercially reasonable appropriate technical and organizational measures for the Virtustream controlled data centers, servers, networking equipment and software system xStream Portal for the security, confidentiality, integrity, availability and resilience of processing systems and services involved in the processing of the Customer Data. The parties agree that the security measures described in Annex 1 (Information Security Measures) provide an appropriate level of security for the protection of Customer Data to meet the requirements of this clause. Virtustream will periodically (i) test and monitor the effectiveness of its safeguards, controls, systems and procedures and (ii) identify reasonably foreseeable internal and external risks to the security, confidentiality and integrity of the Customer Data, and ensure these risks are addressed. Virtustream shall have implemented and documented appropriate business continuity and disaster recovery plans to enable it continue or resume providing Services (including restoring access to the Customer Data where applicable) in a timely manner after a disruptive event. Virtustream will periodically test and monitor the effectiveness of its business continuity and disaster recovered plans. Customer shall be responsible for implementing and maintaining all security and safeguards with respect to Customer Materials and in the Customer Zone including the security of guest operating systems, applications hosted on the service, data in transit and at rest, customer's service log-in credentials and permissions policies for customer personnel using the service. Such safeguards shall include, without limitation, encryption of all Customer Data in motion and at rest.

3.2 Security Incident

If Virtustream becomes aware of a Security Incident, Virtustream shall promptly notify Customer of the Security Incident and shall, subject to applicable laws, regulations, or a governmental request, provide Customer with reasonable details to the extent available about the Security Incident. In the event of a Security Incident, Virtustream and Customer shall cooperate in good faith to resolve any privacy or data security issues involving Customer Data, and to make any legally required notifications to individuals affected by the Security Incident. Except as otherwise required by applicable law or regulation, Virtustream shall not inform any unaffiliated third party (other than a Subprocessor potentially processing relevant information, or experts or consultants utilized by Virtustream) that a Security Incident has impacted the Customer without first obtaining Customer's prior written consent, other than to inform a complainant that the matter has been forwarded to Customer. Nothing in this clause shall prevent Virtustream from notifying other customers whose personal data may be affected by the Security Incident. In the event Customer intends to issue a notification regarding the Security Incident to a data protection supervisory authority, other regulator or law enforcement agency, Customer shall (unless prohibited by law) allow Virtustream to review the notification and Customer shall give proper and good faith consideration to any reasonable comments or amendments proposed by Virtustream. Notwithstanding anything to the contrary,

Virtustream shall have no liability for any Security Incident to the extent the applicable Customer Data was not encrypted or such Security Incident did not solely result from a breach by Virtustream of its obligations under this DPS.

4. DATA PROTECTION TRAINING.

Virtustream shall require personnel who have access to Customer Data to complete privacy and data security training on a periodic basis in accordance with its standard employment policies.

5. DATA SECURITY INSPECTIONS AND AUDITS.

Virtustream shall provide Customer with information as may be reasonably requested by Customer from time to time regarding Virtustream's compliance with its data security obligations under this DPS, including Virtustream's then current SSAE18 attestation, provided that disclosure of any such information would not violate Virtustream's reasonable privacy or data security policies, or confidentiality obligations with any third party. Virtustream will maintain support of the applicable certifications and standards listed at <http://www.virtustream.com/cloud/virtustream-enterprise-cloud/security-compliance>, as updated by Virtustream from time to time.

Virtustream shall provide reasonable cooperation and assistance to Customer, to the extent applicable in relation to Virtustream's Processing of the Personal Data and within the scope of the agreed Services, in connection with any data protection impact assessment(s) which the Customer may carry out in relation to the Processing of Personal Data to be undertaken by Virtustream, including any required prior consultation(s) with supervisory authorities. Virtustream reserves the right to charge Customer a reasonable fee for the provision of such cooperation and assistance.

6. TERMINATION / RETURN OR DESTRUCTION OF CUSTOMER DATA.

This DPS shall terminate when the Agreement terminates or expires. Upon such termination, Customer shall be responsible for removing or deleting Customer Data from the Cloud Platform; provided, however, at Customer's sole cost and expense and subject to a Disengagement SOW, Virtustream may assist Customer with the removal of the Customer Data and provide certification or proof of removal. Following termination, Virtustream shall have no liability for the Customer Data.

Virtustream takes information security seriously. This information security overview applies to Virtustream's corporate controls for safeguarding personal data which is processed and transferred amongst Virtustream group companies. Virtustream's information security program enables the workforce to understand their responsibilities. Some customer solutions may have alternate safeguards outlined in the SOW as agreed with each customer.

Security Practices

Virtustream has implemented corporate information security practices and standards that are designed to safeguard the Virtustream's corporate environment and to address: (1) information security; (2) system and asset management; (3) development; and (4) governance. These practices and standards are approved by the Virtustream CIO and undergo a formal review on an annual basis.

Organizational Security

It is the responsibility of the individuals across the organization to comply with these practices and standards. To facilitate the corporate adherence to these practices and standards, the function of information security provides:

1. Strategy and compliance with policies/standards and regulations, awareness and education, risk assessments and management, contract security requirements management, application and infrastructure consulting, assurance testing and drives the security direction of the company.
2. Security testing, design and implementation of security solutions to enable security controls adoption across the environment.
3. Security operations of implemented security solutions, the environment and assets, and manage incident response.
4. Forensic investigations with security operations, legal, data protection and human resources for investigations including eDiscovery and eForensics.

Asset Classification and Control

Virtustream's practice is to track and manage physical and logical assets. Examples of the assets that Virtustream IT might track include:

- Information Assets, such as identified databases, disaster recovery plans, business continuity plans, data classification, archived information.
- Software Assets, such as identified applications and system software.
- Physical Assets, such as identified servers, desktops/laptops, backup/archival tapes, printers and communications equipment.

The assets are classified based on business criticality to determine confidentiality requirements. Industry guidance for handling personal data provides the framework for technical, organizational and physical

safeguards. These may include controls such as access management, encryption, logging and monitoring, and data destruction.

Personnel Security

As part of the employment process, employees undergo a screening process applicable per regional law. Virtustream's annual compliance training includes a requirement for employees to complete an online course and pass an assessment covering information security and data privacy. The security awareness program may also provide materials specific to certain job functions.

Physical and Environmental Security

Virtustream uses a number of technological and operational approaches in its physical security program in regards to risk mitigation. The security team works closely with each site to determine appropriate measures are in place and continually monitor any changes to the physical infrastructure, business, and known threats. It also monitors best practice measures used by others in the industry and carefully selects approaches that meet both uniqueness's in business practice and expectations of Virtustream as a whole. Virtustream balances its approach towards security by considering elements of control that include architecture, operations, and systems. Virtustream is primarily responsible for providing power, security and access to the data centers. There may be additional services that are separately agreed upon with the customers in a SOW.

Communications and Operations Management

The IT organization manages changes to the corporate infrastructure, systems and applications through a centralized change management program, which may include, testing, and business impact analysis and management approval, where appropriate.

Incident response procedures exist for security and data protection incidents, which may include incident analysis, containment, response, remediation, reporting and the return to normal operations.

To protect against malicious use of assets and malicious software, additional controls may be implemented, based on risk. Such controls may include, but are not limited to, information security practices and standards; restricted access; designated development and test environments; virus detection on servers, desktops and notebooks; virus email attachment scanning; system compliance scans; intrusion prevention monitoring and response; logging and alerting on key events; information handling procedures based on data type, e-commerce application and network security; and system and application vulnerability scanning. The security and controls of Virtustream's solutions are managed by Virtustream. Customers may purchase additional security tools and services from Virtustream to address the customer's environment and data hosted at Virtustream.

Access Controls

Access to corporate systems is restricted, based on procedures to ensure appropriate approvals. To reduce the risk of misuse, intentional or otherwise, access is provided based on segregation of duties and least privileges.

Remote access and wireless computing capabilities are restricted and require that both user and system safeguards are in place. Two factor authentication is required for Virtustream users

Specific event logs from key devices and systems are centrally collected and reported on an exceptions basis to enable incident response and forensic investigations.

Compliance

The information security, legal, privacy and compliance departments work to identify regional laws and regulations applicable to our customers in the use of Virtustream's services. These requirements cover areas such as intellectual property of the company and our customers, software licenses, data protection and data handling procedures, trans-border data transmission, financial and operational procedures, regulatory export controls around technology, and forensic requirements.

Mechanisms such as the information security program, the executive privacy council, internal and external audits/assessments, internal and external legal counsel consultation, internal controls assessment, internal penetration testing and vulnerability assessments, contract management, security awareness, security consulting, policy exception reviews and risk management combine to drive compliance with these requirements.

Customers should review the security and compliance reports made available by Virtustream for the technology solutions consumed by our customers. Virtustream has industry-specific environments where compliance is specific to the expected industry (federal cloud).

Our data centers and IaaS offering have achieved several important government and industry certifications, including but not limited to SSAE18/ISAE3402/SOC2, PCI-DSS 3.2, FedRAMP, ISO 27001:2013, ISO 9001:2015, ISO 22301:2012, HIPAA/HITECH/HITRUST. Customers are responsible for ensuring the solutions they're using are covered by appropriate compliance certifications completed by Virtustream.