



ColoServe Terms of Service

Posted/Revised: October 31, 2008

READ THIS AGREEMENT CAREFULLY BEFORE USING ANY COLOSERVE SERVICE. THIS IS A LEGALLY BINDING AGREEMENT BETWEEN COLOSERVE AND YOU, INCLUDING ANY COLOSERVE CUSTOMER, USER, OR WEBSITE VISITOR, (collectively referred to herein as “**Customer**”).

Terms of Service

These Terms of Service form part of an agreement (this/the “**Agreement**”) between ServePath, LLC, a Delaware limited liability company doing business under the name ColoServe, (“**ColoServe**”) and Customer. This Agreement governs provision of ColoServe’s services (the “**Service**”) and is effective as of the moment Customer indicates agreement at the ColoServe website, as of the moment the two parties sign a paper version, or as of the moment Customer uses any ColoServe website or element of the Service (whichever comes first).

In addition to these Terms of Service, this Agreement consists of the following, each of which is incorporated into this Agreement by this reference: ColoServe’s service level agreement, posted at <http://www.coloserve.com/sla.html>, (the “**SLA**”); ColoServe’s acceptable use policy, posted at <http://www.coloserve.com/aup.html> (the “**AUP**”); and ColoServe’s privacy policy, posted at <http://www.coloserve.com/privacy.html> (the “**Privacy Policy**”).

1. The Service.

- (a) ColoServe will provide the Service pursuant to this Agreement.
- (b) Customer agrees that the Service is for business use and not for consumers. Customer hereby affirms: (i) that it will use the Service for business purposes and not for personal, family, or household purposes; and (ii) that it is not an individual less than 18 years old.
- (c) If agreed between the parties, the Service may include professional services, including services provided with the support or assistance of a ColoServe contractor (“**In-House Consulting**”). ColoServe may also refer Customer to a third party professional services provider (“**Third Party Consulting**”).
 - (i) In-House Consulting is subject to the same terms and conditions as other elements of the Service, including without limitation the disclaimers and limitations of liability in Section 8 below. In-House Consulting is also subject to the terms and conditions of any statement of work executed by authorized representatives of both parties. Fees for In-House Consulting are in addition to Service fees required pursuant to Subsection 2(a) below. Customer will pay for In-House Consulting at ColoServe’s

then-standard rates, unless the relevant statement of work specifically provides for a different payment structure.

(ii) Third Party Consulting is not part of the Service, and ColoServe will have no responsibility or liability for Third Party Consulting, even if ColoServe recommends the Third Party Consulting provider and/or the Third Party Consulting is related to the Service or to Customer's ability to receive or exploit the Service. In the event that ColoServe is held responsible or liable for Third Party Consulting, despite the provisions of this Subsection 1(c)(ii), such responsibility or liability will be subject to the disclaimers and limitations of liability in Section 8 below.

2. Payment Plans & Terms.

(a) Customer will pay for the Service pursuant to one of the following payment plans, as reflected in any ColoServe quote accepted by Customer and any other ordering records maintained by ColoServe (collectively, Customer's "**Signup**"):

(i) *Monthly Payment Plan*: Customer pays monthly.

(ii) *Prepayment Plan*: Customer pays annually or on such other periodic basis, longer than one month, as is defined in Customer's Signup (Customer's "**Prepayment Period**"). Customer may switch to a monthly payment plan or change the duration of its Prepayment Period by giving ColoServe written notice of such intent 30 or more days before the end of the current Prepayment Period. Absent such notice, Customer's Prepayment Period will renew automatically for a period of the same duration, and ColoServe may charge Customer for the new Prepayment Period upon completion of the old one. Subject to the requirements of any Commitment Period (as defined in Subsection 2(b) below), in the event that Customer terminates this Agreement before the end of its Prepayment Period, Customer will receive a refund for the remainder of the Prepayment Period, minus an adjustment equal to: (A) the difference between the amount Customer has paid and the amount it would have paid pursuant to a Monthly Plan, plus (B) any set-up fees Customer would have paid pursuant to a Monthly Plan. (For purposes of such calculations, Monthly Plan prices are set at ColoServe's then-standard prices.)

(b) If Customer's Signup designates an annual or other commitment period (a "**Commitment Period**"), termination of this Agreement will not relieve Customer of its obligation to pay all fees due for such Commitment Period, and no such fees will be refundable pursuant to Subsection 2(a)(ii) above. All fees for a Commitment Period will fall due 5 business days after termination of this Agreement for any reason. Upon completion, each Commitment Period will renew automatically for a period of the same duration, unless either party notifies the other of its intent not to renew 30 or more days before the end of such Commitment Period.

(c) Customer will pay ColoServe's standard fees for the Service, as they may be revised from time to time. However, if Customer and ColoServe agree in Customer's Signup to alternate fees, such alternate fees will apply until the end-date specifically listed in the

Signup, or if no end-date is listed, until the end of Customer's Commitment Period or Prepayment Period, whichever comes later, in effect as of the start of alternate fees. Thereafter, alternate fees will revert to ColoServe's then-standard fees. Customer will pay for the Service in advance and will make all payments in U.S. dollars. ColoServe is not required to issue refunds or credits except as specified in this Agreement.

(d) ColoServe may issue invoices through the ColoServe customer portal, my.ColoServe.com (the "**Customer Portal**"). At Customer's request, ColoServe may issue invoices through another method, and may charge an extra fee for such method. Customer will maintain awareness of its usage levels and the fees it owes ColoServe and will pay them on or before their due-dates. Customer will notify ColoServe of any billing dispute, providing details regarding the nature of the dispute and the amount, within 15 days of the date on the invoice in question, or waive such dispute. Any payment not received when due will, at ColoServe's option, bear interest at a rate of 1.5% per month from the date due until paid, to compensate ColoServe for the time-value of the unpaid fees. In addition, ColoServe may charge a late fee of \$19.99 per week, as liquidated damages, starting on the first day after any payment is due. Such liquidated damages compensate ColoServe for administrative expenses related to unpaid fees.

(e) If Customer exceeds its transfer allotment, bandwidth commitment, or other pre-paid Service allotment listed in Customer's Signup, as solely measured by ColoServe, ColoServe may: (i) charge Customer for such overage immediately via credit card and will notify Customer in writing of such charge; or (ii) issue a one-time invoice for such overage, with payment due by wire transfer or direct deposit in 7 days. If ColoServe concludes, in its sole discretion, that Customer's account reflects a pattern of repeated overage, ColoServe may require prepayment for such overage, and Customer will make such payment on its regular payment date or on a monthly basis. The provisions of this Subsection 2(e) apply regardless of the cause of overage, even if caused by hacker activity or other third party actions.

(f) ColoServe may require that Customer maintain a valid credit card on file at all times. In such case: (i) ColoServe may charge such card for Service fees or other fees on the first business day prior to any payment due-date; and (ii) Customer will update credit card information as necessary in the Customer Portal. If any charge attempt is denied, ColoServe may interrupt Service without advanced notice but will make reasonable efforts to provide such notice.

(g) A Returned check will constitute a material breach of this Agreement, and Customer will incur a \$50.00 returned check charge, as liquidated damages. Such liquidated damages compensate ColoServe for administrative expenses related to returned checks. If ColoServe concludes, in its sole discretion, that Customer's account reflects a pattern of repeated late, bounced, or incomplete payments, ColoServe may require payment via wire transfer or direct deposit.

3. Term and Termination.

(a) This Agreement will continue until terminated by either party pursuant to the procedures set forth in this Section 3.

(b) Customer may terminate this Agreement on 30 days' advanced written notice: (i) for convenience, unless Customer is subject to a Commitment Period pursuant to Subsection 2(b) above; or (ii) for material breach, provided the notice of termination specifies the nature of the breach and provided termination will not be effective if ColoServe cures the breach during the 30-day notice period. Customer will provide notice of termination through the online cancellation form in the Customer Portal. If Customer is terminating pursuant to the SLA (as authorized in Part I.B thereof): (1) such notice will state: "termination per SLA"; and (2) notwithstanding the foregoing, such notice need not be given in advance or provide opportunity to cure. ColoServe is not required to refund any payments in the event of termination by Customer except as specifically stated in Subsection 2(a)(ii) above.

(c) ColoServe may terminate this Agreement for convenience as of the end of Customer's Commitment Period, or at any time in the absence of a Commitment Period. ColoServe will provide 30 days' advanced written notice of any termination for convenience. Upon such termination, ColoServe will refund any amounts paid pursuant to a Prepayment Plan for Service not yet provided.

(d) In the event of any material breach of this Agreement, including without limitation any breach of the provisions of the AUP or of the payment obligations set forth in Section 2, ColoServe may terminate the Service, any portion thereof, or this Agreement, without advanced notice. ColoServe is not required to refund any fees paid or prepaid after such termination.

4. Acceptable Use.

(a) Customer represents that it has read the AUP, and Customer will adhere to its requirements.

(i) Without limiting the generality of the foregoing, Customer will not allow the Service or ColoServe equipment to be used for activities prohibited by the AUP. Third party violations of the AUP using Customer's Service, including any IP addresses, points of access to the Internet, systems, software, or equipment assigned to or belonging to Customer, will be considered violations by Customer.

(ii) Notwithstanding any provision to the contrary in this Agreement, and without limiting any of ColoServe's rights or remedies, ColoServe may suspend Service in whole or in part in the event that ColoServe reasonably suspects an AUP violation. Reasonable suspicion pursuant to the preceding sentence includes, without limitation, a third party notice or claim that Customer's use of the Service infringes on third party rights. ColoServe will make reasonable efforts to notify Customer before any such suspension, unless the AUP violation calls for immediate action to prevent injury or liability, in ColoServe's opinion and at its sole discretion. Suspension pursuant to

this Subsection 4(a)(ii) may continue so long as ColoServe reasonably suspects an AUP violation. ColoServe is not liable for any Service suspension authorized by this Subsection 4(a)(ii), or for any related loss, even if the suspected AUP violation did not occur.

(b) ColoServe has no obligation to monitor the Service for AUP violations or for other illegal or improper conduct but may do so and may disclose information regarding use of the Service for any reason, including: to satisfy laws, regulations, or governmental, legal, or law-enforcement requests; to operate the Service properly; and to protect itself and its customers. ColoServe may grant law enforcement agencies access to its equipment, including equipment used to provide the Service to Customer, and to both the Space (as defined in Subsection 11(a) below) and Customer's equipment.

5. Service Levels & Remedies.

(a) ColoServe will not be liable for Service interruptions or any other Service failures except as specifically set forth in the SLA and in this Section 5. In the event that Customer is dissatisfied with the Service, Customer's sole remedies are those listed in the SLA and in this Section 5, or termination of this Agreement if authorized pursuant to Section 3 above. Remedies listed in the SLA do not apply to any Service interruption authorized pursuant to Section 6 or any other provision of this Agreement, and ColoServe will not be liable for any such interruption.

(b) The SLA does not apply to any feature of the Service not specifically identified in the SLA, or to any feature ColoServe identifies as "beta." All Service features, whether or not addressed in the SLA, are provided pursuant to the provisions of Section 8 below and the other terms and conditions of this Agreement.

6. Maintenance & Security.

(a) ColoServe may interrupt Service to perform maintenance on ColoServe equipment or to address and/or mitigate the effects of security breaches, virus attacks, denial of service attacks, and other intentional interferences by third parties. ColoServe will exercise reasonable efforts to inform Customer before interrupting Service and to repair the Service promptly.

(b) Customer will promptly report any Service failure to ColoServe via the online ticketing system in the Customer Portal.

(c) Customer is responsible for maintaining security and for maintaining patches and disaster recovery systems, except to the extent ColoServe specifically accepts such responsibility by listing such service features in Customer's Signup (subject to the limitations of liability in Section 8 and elsewhere in this Agreement). Whether or not Customer's Signup calls on ColoServe to maintain back-ups, Customer will keep a back-up copy of all data hosted by ColoServe. ColoServe is not responsible for providing physical access to or copies of software, data, or content stored on ColoServe's equipment under any circumstances and is not required to provide network access (i) after any termination or suspension of Customer's Service or (ii) in the event of hardware

failure, abuse by hackers or other third parties, improper administration by Customer, or other interruption of network access.

(d) ColoServe is not required to reimburse any expenses Customer incurs for technology diagnosis or repair, including without limitation expenses for outside consultants.

7. Private and Confidential Information.

(a) ColoServe will adhere to the provisions of the Privacy Policy. ColoServe is not responsible for use or misuse of data by any third party, including without limitation the operator of any website linked to ColoServe's website, or any ColoServe customer, even if ColoServe hosts such customer's Website. Customer understands that the Privacy Policy applies only to the Service and to ColoServe's website. ColoServe may notify Customer of leaks or exposure of private data, but except to the extent required by law, ColoServe is not required to provide such notification.

(b) Customer will employ reasonable security precautions in its use of the Service, including without limitation encryption of social security numbers, medical records, and information of similar sensitivity belonging to Customer or to its customers or users.

(c) Customer will not use Confidential Information (as defined below) for any purpose other than to facilitate the Service. Except as specifically authorized in writing in advance by ColoServe, Customer will not disclose Confidential Information to any third party, and will prevent any such disclosure of Confidential Information in Customer's possession or control. Without limiting the generality of the foregoing, Customer will take reasonable precautions to protect Confidential Information and will not disclose Confidential Information to any of its employees or contractors who do not need to know. Notwithstanding the foregoing, Customer may disclose Confidential Information as required by applicable law or by proper legal or governmental authority; provided Customer gives ColoServe advanced notice reasonably sufficient to allow ColoServe to seek a protective order or otherwise to contest such required disclosure, and reasonably cooperates in such effort. Customer will promptly notify ColoServe in writing of any misuse or misappropriation of Confidential Information that comes to Customer's attention and will cooperate with ColoServe in investigating any such misappropriation and in mitigating any damages caused. Upon termination of this Agreement or upon ColoServe's written request, Customer will return all Confidential Information to ColoServe and certify, in writing, the destruction of any copies thereof.

(i) **"Confidential Information"** refers to any information ColoServe provides to Customer in any form and marks "Confidential," and any information ColoServe discloses orally and identifies as "Confidential" on or before disclosure. However, Confidential Information does not include information that: (A) is in Customer's possession at the time of original disclosure by ColoServe; (B) is independently developed by Customer without use of or reference to information provided by ColoServe; or (C) becomes known publicly, before or after disclosure, other than as a result of Customer's improper action or inaction.

(ii) Customer agrees that breach of the provisions of this Subsection 7(c) might cause ColoServe irreparable injury for which monetary relief would not provide adequate compensation, and that in addition to any other remedies available, ColoServe will be entitled to preliminary, temporary, and/or permanent injunctive relief against such breach or threatened breach, without the necessity of proving actual damages.

8. Warranties, Disclaimers, & Limitations of Liability.

(a) COLOSERVE MAKES NO EXPRESS OR IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION WARRANTIES OF TITLE, NONINFRINGEMENT, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE. ColoServe does not warrant that the Service will be uninterrupted, error-free, or free from viruses or other harmful components. The Service is provided with no warranties regarding security, reliability, protection from attacks, or data integrity. Except to the extent specifically provided in the SLA, THE SERVICE IS PROVIDED ON AN “AS IS” AND “AS AVAILABLE” BASIS. No communication between Customer and ColoServe will create a warranty or in any way alter or restrict any disclaimer of warranty or limitation of liability set forth in this Section 8 or elsewhere in this Agreement. As used in the previous sentence, “communications” include, without limitation, marketing materials and representations of salespeople, advice provided by ColoServe or any of its representatives, quotes, Customer’s Signup, and any work order or other ordering document.

(b) COLOSERVE WILL NOT BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, PUNITIVE, OR MULTIPLE DAMAGES, EVEN IF ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH DAMAGES. COLOSERVE’S MAXIMUM LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED THE TOTAL AMOUNT OF FEES PAID BY CUSTOMER DURING THE 12 MONTHS PRECEDING THE INJURY GIVING RISE TO THE CLAIM.

(c) Except to the extent specifically provided in Section 5 above, and except to the extent that applicable law specifically forbids such limitation of liability, COLOSERVE WILL HAVE NO LIABILITY WHATSOEVER FOR ANY CLAIMS, LOSSES, ACTIONS, DAMAGES, SUITS, OR PROCEEDINGS RESULTING FROM ANY OF THE FOLLOWING OR FROM ANY COLOSERVE EFFORTS TO ADDRESS OR MITIGATE ANY OF THE FOLLOWING: (i) SECURITY BREACHES, INCLUDING WITHOUT LIMITATION EAVESDROPPING, THIRD PARTY ACCESS TO CUSTOMER DATA OR TO ASSIGNED COMPUTERS, THIRD PARTY ACCESS TO OR MISUSE OF PASSWORDS PROVIDED TO COLOSERVE, AND INTERCEPTION OF TRAFFIC SENT OR RECEIVED USING THE SERVICE; (ii) RELEASE OR EXPOSURE, FOR ANY OTHER REASON, OF PERSONALLY IDENTIFIABLE INFORMATION OR OTHER PRIVATE DATA, INCLUDING DATA BELONGING TO CUSTOMER’S OWN CUSTOMERS AND OTHER USERS; (iii) DENIAL OF SERVICE ATTACKS, VIRUSES, WORMS, AND OTHER INTENTIONAL

INTERFERENCE BY THIRD PARTIES, INCLUDING WITHOUT LIMITATION BY OTHER COLOSERVE CUSTOMERS; (iv) LOSS OF DATA OR LOSS OF ACCESS TO DATA; (v) ACTIONS OF THIRD PARTIES, INCLUDING WITHOUT LIMITATION OTHER COLOSERVE CUSTOMERS AND THIRD PARTY CONSULTING PROVIDERS; (vi) ACTIONS OF COLOSERVE EMPLOYEES, AGENTS, OR CONTRACTORS ACTING OUTSIDE THE SCOPE OF THEIR DUTIES; (vii) MISTAKES, OMISSIONS, INTERRUPTIONS, DELETIONS OF FILES, ERRORS, DEFECTS, DELAYS IN OPERATION, OR OTHER FAILURES OF PERFORMANCE OF THE SERVICE, INCLUDING WITHOUT LIMITATION ACCIDENTAL DISCONNECTION AND TERMINATION OF SERVICE; AND (viii) THE ACCURACY, COMPLETENESS, AND USEFULNESS OF THE SERVICE. THE PROVISIONS OF THIS SUBSECTION 8(c) APPLY, WITHOUT LIMITATION, EVEN IF CUSTOMER PURCHASES SERVICE FEATURES ADDRESSING SECURITY, DATA INTEGRITY, DATA BACKUP, ATTACK PROTECTION, VIRUSES, SPAM, MONITORING, OR SYSTEM INTEGRITY. ColoServe does not control and has not thoroughly reviewed all the websites run by ColoServe's customers or linked to ColoServe's website. With the exception of its own website, ColoServe is not responsible or liable for the content or practices of any website, including without limitation websites linked to ColoServe's website and websites hosted by ColoServe but run by its customers.

(d) THE LIABILITIES LIMITED BY THIS SECTION 8 INCLUDE, WITHOUT LIMITATION, LIABILITY FOR NEGLIGENCE. ColoServe's limitations and exclusions of liability and disclaimers of warranty, set forth in this Section 8 and elsewhere in this Agreement, (collectively, the "**Limitations**") apply equally to ColoServe's officers, employees, agents, contractors, representatives, suppliers, subsidiaries, parents, and affiliated companies. Customer acknowledges and agrees that ColoServe has set its prices and entered into this Agreement in reliance upon the Limitations, and that the Limitations form an essential basis of the bargain between ColoServe and Customer. The Limitations survive and apply even if Customer's remedies provided in this Agreement are found to have failed of their essential purpose.

9. Indemnity.

Customer will defend and indemnify ColoServe (including its officers, employees, agents, contractors, representatives, suppliers, subsidiaries, parents, and affiliated companies) from a claim by any of Customer's customers or users, or any other third party, arising out of or related to Customer's use of, misuse of, or failure to use the Service, including without limitation: (a) alleged Customer conduct that would breach this Agreement, including alleged infringement of intellectual property or privacy rights and other AUP violations; (b) security breaches or other alleged faults in the Service, including without limitation faults listed in the SLA and faults leading to the release or exposure of personally identifiable information or other private data (whether such data belongs to Customer, to one of Customer's customers, or to other third parties); and (c) any action taken by ColoServe as part of an investigation into a suspected violation of

this Agreement or as a result of its conclusion that a violation has occurred. Such Customer obligation includes payment of losses, expenses, damages, and costs, including without limitation attorneys' fees.

10. Miscellaneous.

(a) Title and intellectual property rights to the Service and all components thereof are owned by ColoServe and its licensors and suppliers. All hardware and Internet protocol addresses provided by ColoServe are licensed to Customer temporarily and remain ColoServe's sole and exclusive property. This Agreement does not grant Customer a license to any software used to provide the Service or associated with the Service (collectively, "**Software**"), or to any other software, by implication, by estoppel, or otherwise. Without limiting the generality of the foregoing, Customer will not reproduce, reverse engineer, decompile, or disassemble the Software. The logos, service marks, and trademarks (collectively, "**Trademarks**") displayed on ColoServe's website and through the Service, whether or not registered, belong to ColoServe and its licensors and suppliers. Neither this Agreement nor any ColoServe website grants a license to any Trademark, by implication, by estoppel, or otherwise. Nothing in this Agreement transfers to ColoServe any copyright in, trademark on, or other ownership interest in any data or content of Customer. However, ColoServe may include Customer's name in any list of customers used for marketing or other purposes.

(b) Customer is responsible for maintaining the confidentiality of its usernames and passwords, and Customer will not transfer or sell to any third party such usernames or passwords, or Customer's access to the Service.

(c) ColoServe is not obligated to sell Customer any Service feature not listed in Customer's Signup, or to provide more Service than required by such Signup.

(d) During the term of this Agreement and for 180 days thereafter, Customer will not encourage or solicit any ColoServe employee or independent contractor to leave ColoServe's employ, or otherwise interfere with ColoServe's employment relationships.

(e) The parties agree that the fees listed as liquidated damages in Subsections 2(d), 2(g), and elsewhere in this Agreement do not constitute penalties and are reasonable in light of the harm that will be caused by breach, the difficulties of proof of loss, and the inconvenience and infeasibility of otherwise obtaining an adequate remedy. No remedy of ColoServe provided in this Agreement for late payment, declined credit card charges, or other breaches will limit any other right or remedy of ColoServe at law or in equity.

(f) All written communications to Customer will be deemed delivered if sent to the contact points provided to ColoServe at the time of order, or to such other contact points as Customer provides in writing. Customer will include a valid e-mail address with such contact points. All written communications to ColoServe and all fees will be mailed to 360 Spear St., Suite 200, San Francisco, CA 94105, unless ColoServe notifies Customer in writing of alternate contact information, except to the extent that this Agreement provides that such communication will be made through the Customer Portal.

(g) ColoServe may revise this Agreement, including the AUP, the SLA, and the Privacy Policy, from time to time by posting a new version on the ColoServe Website. Revised terms will become effective at the start of Customer's next Commitment Period or Prepayment Period (whichever comes first), or in the absence of either, 30 days after posting thereof; provided that if Customer orders or accepts revised, renewed, or new Service before such date, revised terms will become effective upon such order or acceptance. (The date of the revised terms' effectiveness pursuant to the preceding sentence is referred to herein as Customer's "**Renewal Date.**") Customer waives any right to notice of revised terms other than through the ColoServe Website, and such waiver will remain in force even if ColoServe does provide notice by e-mail or another medium. (Customer's continued use of the Service after any Renewal Date will confirm acceptance of revised terms.) Notwithstanding the foregoing, revisions to the AUP, SLA, or Privacy Policy will become effective upon posting thereof. This Agreement may not be revised or amended in any other way, except through a written contract executed by authorized representatives of both parties. ColoServe may provide notices via e-mail, but no e-mail exchange will amend this Agreement, even if such messages purport to do so.

(h) This Agreement is to be construed in accordance with and governed by the internal laws of the State of California without giving effect to any choice of law rule that would cause the application of the laws of any other jurisdiction other than the internal laws of the State of California to the rights and duties of the parties. The parties hereby consent to the personal and exclusive jurisdiction and venue of the federal and state courts of San Francisco, California.

(i) Pursuant to 47 U.S.C. Section 230(d), ColoServe hereby notifies Customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors, and information regarding providers of such protections may be found on the Internet by searching "parental control protection" or similar terms. If Customer is a consumer (despite the prohibition in Subsection 1(b) above), ColoServe hereby provides Customer with the following notice, pursuant to California Civil Code Section 1789.3: (i) to resolve any complaint regarding the Service or receive any further information regarding the Service, Customer should contact ColoServe at the contact points provided on ColoServe's website under "Contact Us"; and (ii) California consumers may be entitled to pursue complaints regarding the Service by contacting the Complaint Assistance Unit of the Division of Consumer Services of the California Department of Consumer Affairs at 1625 North Market Blvd., Suite N-112, Sacramento, CA 95834, or by phone at 800-952-5210.

(j) Customer will not use the Service in any way that violates applicable laws or regulations, including without limitation U.S. Export Administration Regulations. Customer represents and warrants that it is not on the United States Treasury Department's list of Specially Designated National and Blocked Persons and is not otherwise a person or entity subject to a legal rule that would prohibit ColoServe from providing the Service.

(k) No delay, failure, or waiver of either party's exercise or partial exercise of any right or remedy under this Agreement will operate to limit, impair, preclude, cancel, waive, or otherwise affect such right or remedy. To the extent caused by force majeure, no delay, failure, or default will constitute a breach of this Agreement.

(l) In the event of any conflict between these Terms of Service and any other element of this Agreement, or any ordering document or statement of work, these Terms of Service will govern.

(m) Customer may not assign this Agreement or any of its rights or obligations hereunder without ColoServe's express written consent. Except to the extent forbidden in the previous sentence, this Agreement will be binding upon and inure to the benefit of the respective successors and assigns of the parties.

(n) If any provision of this Agreement is held invalid, illegal, or unenforceable, including without limitation as a result of unconscionability or inconsistency with public policy, such provision will be construed so as to come as close as possible to its intended meaning, and the validity, legality, or enforceability of the remaining provisions will in no way be impaired.

(o) This Agreement, including those documents incorporated by reference, embodies the final, full, and exclusive statement of the agreement between the parties, and supersedes all prior agreements, negotiations, representations, and proposals, written or oral, relating to its subject-matter.

11. The Space, the Facility, and Customer Equipment.

(a) The Service includes access to such cabinet, rack, or cage space as ColoServe designates (the "**Space**"), as well as to such cables, computers, or other equipment as ColoServe designates, all at ColoServe's facility at 360 Spear Street, San Francisco, California, or at an additional or replacement facility chosen by ColoServe (the "**Facility**"). This Agreement is a contract for services and not a lease of real property or a sale of goods. Customer has no leasehold right or other real estate interest in the Space or the Facility, and other than the rights specifically granted by this Agreement, Customer has no rights to any cable, computer, or other equipment, or to the Space, the Facility, or any cabinet, rack, cage, cross-connect, or other space therein. In the event that, contrary to the foregoing, Customer is held to have a leasehold interest in any real property arising out of or related to this Agreement, such interest will be subordinate to any lease between ColoServe and its landlord and will terminate on or before termination of ColoServe's lease with such landlord.

(b) THE SPACE AND THE FACILITY ARE PROVIDED WITHOUT ANY WARRANTIES OF ANY KIND. EXCEPT TO THE EXTENT THE SLA PROVIDES TO THE CONTRARY, THE SPACE AND THE FACILITY ARE PROVIDED "AS IS." COLOSERVE WILL HAVE NO LIABILITY WHATSOEVER FOR ANY CLAIMS, LOSSES, ACTIONS, DAMAGES, SUITS, OR PROCEEDINGS RESULTING FROM LOSS OF OR INJURY TO CUSTOMER EQUIPMENT, OR ANY EFFORTS TO

MITIGATE SUCH LOSS OR INJURY. THE PROVISIONS OF THIS SUBSECTION 11(b) APPLY, WITHOUT LIMITATION, TO LIABILITY FOR NEGLIGENCE, AND APPLY EVEN IF CUSTOMER PURCHASES SERVICE FEATURES ADDRESSING SECURITY, DATA INTEGRITY, DATA BACKUP, ATTACK PROTECTION, VIRUSES, SPAM, MONITORING, OR SYSTEM INTEGRITY. (As used in this Section 11, Customer “equipment” refers to any computers, software, or other property Customer sends or delivers to the Facility.)

(c) Customer will label all its equipment with its name, telephone number, and e-mail address, and ColoServe will not be responsible or liable for the loss of any equipment not so labeled. Customer will not: (1) send or deliver to the Facility any equipment that exceeds ColoServe’s standard size limits; (2) send or deliver to the Facility equipment that has not been certified by Underwriters Laboratories, Inc.; or (3) configure or run any equipment in a way that does not comply with manufacturer specifications, including without limitation specifications for power outlet, power consumption, cooling, and clearance.

(i) In the event that Customer sends or delivers equipment in violation of the provisions of this Subsection 11(c), in addition to such other remedies as ColoServe may have: (A) Customer will remove such equipment promptly after ColoServe’s request, pursuant to such procedures as ColoServe designates, and ColoServe may charge for storage in the interim; and (B) ColoServe may ship such equipment to Customer. ColoServe may also ship to Customer any equipment it considers unreasonably large for storage prior to installation, in ColoServe’s sole discretion.

(ii) ColoServe will make reasonable efforts to notify Customer of any Customer violation of the provisions of this 11(c) prior to any shipment of equipment.

(d) ColoServe may, in its reasonable discretion, restrict the time for any installation, removal, maintenance, or modification of equipment, and Customer will honor such restrictions. In addition, Customer will honor all ColoServe rules and regulations for use of the Facility and Space. Customer will not sublicense the Space to any third party. Customer will be responsible for obtaining and maintaining all permits and approvals necessary for its use of the Space and of its equipment.

(e) Customer will not alter the Space or any cabinet, rack, cage, equipment, or fixture in the Facility, including without limitation ColoServe cabling and power supply, without prior written permission from ColoServe. Customer will not install or use any power strip or other power supply equipment that is not provided by ColoServe or approved in writing by ColoServe. Customer will not access or tamper with any equipment in the Facility other than its own. Customer will keep its Space clean and clear of debris, including without limitation equipment packaging.

(f) Customer will provide ColoServe with a list of all its personnel authorized to enter the Facility (“**Representatives**”), and ColoServe will have no obligation to grant admittance to anyone not so designated. Customer will provide such additional information

regarding Representatives as ColoServe reasonably requests, including without limitation photo identification and criminal history.

(i) ColoServe may refuse access to the Facility to any Representative who: (A) violates Facility rules or otherwise behaves inappropriately; or (B) creates a hazard of any kind in ColoServe's opinion, including without limitation as a result of criminal history or other background. Customer recognizes and agrees that its Representatives will be required to leave a valid photo identification at ColoServe's front desk while in the Facility.

(ii) Customer represents and warrants that it and its Representatives will conduct any operations in the Facility in a safe and workmanlike manner, in accordance with industry standards for such activities. Customer and its Representatives will remain in the Facility only so long as necessary to attend to Customer's equipment and will park in the Facility's building only while attending to business in the Facility.

(g) Customer will inform ColoServe immediately of any emergency or other situation threatening injury to persons or property, including data ("**Emergency**"). In the event of an Emergency, Customer will immediately cooperate with and assist ColoServe as requested, including without limiting by modifying or suspending Customer's own activities. Without limiting the generality of the foregoing, in the event that ColoServe suspects a pending or current Emergency, ColoServe may, without limitation, rearrange, cut off from electricity, or remove Customer equipment. Customer will monitor equipment for audible alarms, promptly address any and all such alarms, including upon notification from ColoServe, and proactively maintain equipment so as to minimize audible alarms.

(h) After termination of this Agreement for any reason, Customer will remove any and all equipment Customer has placed in the Space or elsewhere in the Facility, promptly after ColoServe so directs, and in any case within 3 business days of termination. In the event that ColoServe does not provide access to the Facility, Customer will make itself available at the entrance to the Facility or such other place as ColoServe reasonably designates, at such time as ColoServe requests, to receive such equipment. In the event that Customer fails to remove or receive such equipment, ColoServe may, as it sees fit, in its sole discretion, and without limiting its other rights or remedies: (i) store the equipment; (ii) dispose of the equipment, including without limitation by selling, donating, or destroying it; or (iii) ship the equipment to Customer.

(i) In the event that Customer fails to pay any amount due under this Agreement, ColoServe may, without limitation: (A) deny Customer further access to the equipment, the Space, and/or the Facility; (B) hold the equipment until Customer makes full payment; (C) ship the equipment to Customer; or, (D) 90 or more days after the due date of the overdue payment, liquidate the equipment and apply the funds generated to the amounts overdue.

(i) Customer hereby grants ColoServe a security interest in Customer's equipment to secure Customer's payment and performance of its obligations under this Agreement.

Customer recognizes that such security interest is perfected by ColoServe's possession of such equipment.

(ii) Customer will defend and indemnify ColoServe (including its officers, employees, agents, contractors, representatives, suppliers, subsidiaries, parents, and affiliated companies), and hold ColoServe harmless, from any third party claim arising out of or related to storage, shipment, disposal, sale, donation, destruction of, or damage to either Customer's equipment or any data stored therein or connected therewith, or any other ColoServe action taken in furtherance of its rights pursuant to this Section 11. Such Customer obligation includes payment of losses, expenses, damages, and costs, including without limitation attorneys' fees.

(j) ColoServe may charge for storage, not to exceed \$1,000 per day, of any equipment stored at the Facility pursuant to Subsections 11(c)(i), 11(h)(i) through 11(h)(iii), or 11(i). Customer recognizes that ColoServe is not in the storage business and so may charge storage fees in excess of commercial rates as compensation for the burdens and inconveniences connected to storage of such equipment (and Customer recognizes and agrees that such fees are not penalties). In addition, ColoServe may require reimbursement for any costs arising out of or related to disposition of equipment pursuant to Subsection 11(c)(i), 11(h)(i) through 11(h)(iii), or 11(i), including without limitation costs of shipment or liquidation. ColoServe will have no liability for damage to or total loss of such equipment or any data stored thereon.