BMC INNOVATION SUITE AND APPLICATIONS AGREEMENT

THIS BMC INNOVATION SUITE AND APPLICATIONS AGREEMENT ("**AGREEMENT**") GOVERNS YOUR PURCHASE AND ONGOING USE OF THE BMC APPLICATION SERVICES AND THE PLATFORM SERVICES ("**SERVICES**").

BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING YOUR ACCEPTANCE OR BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT USE THE SERVICES.

You may not access the Services if you are BMC's direct competitor, except with BMC's prior written consent. In addition, you may not access the Services for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes.

This Agreement was last updated on August 1, 2017. This Agreement is between the entity or individual entering into this Agreement ("**Customer**") and the BMC Contracting Entity for the applicable region as described in Section 18 ("**BMC**"). It is effective between Customer and BMC as of the date of your acceptance of this Agreement ("**Effective Date**").

1. **SCOPE.** Subject to the terms of this Agreement, BMC will provide Customer with access to the Service named in the applicable Order. Customer may only use the Services to store, retrieve, query, serve, and process Customer Data that is owned, licensed or lawfully obtained by Customer. As part of Customer's subscription to the Platform Services, Customer may be allowed to run certain Applications on the Platform Services that are either (i) sold by BMC, (ii) sold by a Third Party Publisher, or (iii) owned or licensed by Customer. Each Order is deemed to be a discrete contract, separate from each other Order, unless expressly stated otherwise therein, and in the event of a direct conflict between any Order and the terms of this Agreement, the terms of the order will control only if the Order is executed by an authorized representative of each party. Orders may be entered under this Agreement by and between (a) BMC or an Affiliate of BMC; and (b) Customer or an Affiliate of Customer. With respect to an Order, the terms "BMC" and "Customer" as used in this Agreement will be deemed to refer to the entities that execute that Order, the Order will be considered a two party agreement between such entities, and BMC will separately invoice the Customer named in the Order for the associated fees. Orders may also be placed via a BMC authorized reseller of the Services.

2. **DEFINITIONS.**

   2.1 "**Affiliate**" is an entity that controls, is controlled by or shares common control with BMC or Customer, where such control arises from either (a) a direct or indirect ownership interest of more than 50% or (b) the power to direct or cause the direction of the management and policies, whether through the ownership of voting stock by contract, or otherwise, equal to that provided by a direct or indirect ownership of more than 50%.

   2.2 "**Application**" is the object code, its definitional structures, and data created to fulfill a particular purpose, which runs on the Platform Services. An Application may also include its documentation and User Guide.

   2.3 "**BMC Application Services**" means an Application that is licensed by BMC to customers, including all items delivered by BMC to Customer under Support related to such Application.

   2.4 "**Capacity**" means the amount of access to the Services purchased as specified in an Order, which is counted in accordance with the Unit of Measure described in the Order.

   2.5 "**Customer Applications**" means Applications that are owned or licensed by Customer, not including any Third Party Applications, and which run on the Platform Services.

   2.6 "**Customer Data**" means all information uploaded or entered by Customer to the Services, excluding Customer Applications.

   2.6 "**Data Processing Agreement**" means the applicable Data Processing Agreement attached to each Order.

   2.7 "**Order**" means (i) the agreed ordering document for the purchase of the Services (including the applicable Data Processing Agreement), (ii) that is subject to this Agreement, and (iii) that identifies the particulars of the purchase, Service being ordered and fees to be paid.

   2.8 "**Platform Services**" means the BMC Innovation Suite and its capabilities to run Applications. The specific Platform Services being purchased by Customer will be identified in the Order.

   2.9 "**Third Party Applications**" means Applications that are owned by a Third Party Publisher with a valid independent software vendor agreement in place with BMC, and are licensed by said Third Party Publisher to customers.

   2.10 "**Third Party Publisher**" means a party other than BMC or a BMC Affiliate that is the owner and licensor of a Third Party Application, and has a valid independent software vendor agreement in place with BMC. For the sake of clarity, Customer is informed that Third Party Publishers are not BMC Subcontractors.

   2.11 "**User Guide**" means the online documentation for the Service, which includes functional guides and technical specifications, as updated by BMC from time to time.

3. BMC SERVICES.

3.1 **Access Rights.** Subject to the terms of this Agreement, BMC hereby grants to Customer a worldwide, non-exclusive, non-transferable, non-sublicenseable, limited license to access and use the Service (i) up to the Capacity, (ii) for Customer's and its Affiliates' internal business operations, and (iii) in accordance with the User Guide and the applicable Order.

3.2 **BMC Services Support.** BMC will provide support to Customer for the Services as described on http://www.bmc.com/support ("**Support**"), which may be changed by BMC at any time. BMC will provide Support only for Platform Services and BMC Application Services. Customer is responsible for its own support for Customer Applications and Third Party Applications.

3.3 **Notifications to Customer**. Any general notifications from BMC Operations to Customer will be sent to the Customer contact stated in the Customer Information (ship to) section of the Order. The Customer contact in the Order has been assigned by Customer as the Customer contact for operational issues that may arise. Customer shall notify BMC of any change to the Customer contact details in writing, which may include via e-mail.

3.4 **Customer Data Back-up and Recovery.** BMC provides daily incremental and weekly full system backups of the production environment in a secure off-site facility within the same country as the primary facility, using a 90 day retention window for data recovery purposes.

3.5 **Use of Subcontractors**. Customer acknowledges and agrees that BMC uses subcontractors to provide portions of the Services. BMC will provide a list of its current subcontractors upon Customer's written request. BMC is responsible for the performance of all subcontractors providing any of the Services. For the sake of clarity, Customer is informed that Third Party Publishers are not BMC Subcontractors.

3.6 **Customer Responsibilities.**

(a) Customer will maintain the confidentiality of all authentications and passwords for the Services and immediately notify BMC if it becomes aware that an unauthorized party has gained access to the Services. Customer will be responsible for use of the Services by its employees, consultants, contractors, agents, and Affiliates (all, "**Users**") in compliance with this Agreement. Customer will (i) use reasonable efforts to prevent unauthorized access to, or use of, the Services, and notify BMC promptly of any such unauthorized access or use, and (ii) comply with all applicable laws in using the Services. Customer is responsible for the creation and implementation of a privacy policy and end user license agreement, if applicable, which will set forth the guidelines of how Customer uses and protects the data and personal information of its Users, and how said Users may utilize the Services.

(b) *Customer may not* (i) modify, copy or create derivative works based on the Services; (ii) create Internet "links" to or reproduce any content forming part of the Services, other than for its own internal business purposes; (iii) disassemble, reverse engineer, or decompile the Services or part thereof, or access it in order to copy any ideas, features, content, functions or graphics of the Services; (iv) distribute, rent, lease, sublicense or provide the Services to any third party or use it in a service bureau, outsourcing environment, or for the processing third party data; (v) interfere with or disrupt the integrity or performance of the Services (e.g., load, performance, or stress testing); (vi) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material, or send or store material in violation of any third party's privacy rights via the Services; (vii) send or store viruses or malicious code via the Services; (viii) attempt to gain unauthorized access to the Services or its related software, systems, platforms or networks including any form of security and/or penetration testing; (ix) use any components provided with the Services separately from the Services; (x) transfer an Application outside of the Platform Services; or (xi) tamper with or circumvent any controls or make unauthorized copies of an Application.

4. CUSTOMER APPLICATIONS AND THIRD PARTY APPLICATIONS.

4.1 Any Third Party Applications or Customer Applications that run on the Platform Services are hereby excluded from the defined terms "Services", "BMC Application Services" and "Platform Services". Such Third Party Applications are governed by the terms provided with the Third Party Applications, and are by and between Customer and the applicable Third Party Publisher. Customer acknowledges and agrees that this Agreement does not govern Customer's subscription, use and access of any Third Party Applications or Customer Applications, and said Third Party Applications and Customer Applications are specifically excluded from this Agreement.

4.2 Customer may utilize the BMC Innovation Suite for Developers to create an Application to run on the Platform Services. Customer's use of the BMC Innovation Suite for Developers is exclusively governed by the BMC Developer Program Agreement, a copy of which may be viewed at http://media.cms.bmc.com/documents/DVA.pdf, and such use is not governed by the terms of this Agreement. Customer's development of an Application must meet the best practices development guidelines set forth in the User Guide. Each Customer Application shall at all times materially conform to policies and best practices set forth in the User Guide. Prior to the deployment of any Customer Applications in a production or non-production environment of the Platform Services, Customer must conduct security and functional tests of each Customer Application and submit the results of such tests to BMC for review. BMC reserves the right to reject

Customer's deployment request of a Customer Application based on the results of Customer's security and functional tests. Additionally, BMC reserves the right, during the term of this Agreement, to request Customer conduct additional security and functional tests and provide the results of said tests to BMC for review. Notwithstanding the foregoing, Customer must ensure that at all times Customer Applications are secure.

4.3   **License to Customer Applications.** Subject to the terms and conditions of this Agreement, Customer hereby grants BMC a worldwide, limited, nonexclusive license during the term of the applicable Order for the Platform Services to host, copy, transmit, adapt and display Customer Applications solely for the purpose of fulfilling BMC's obligations under this Agreement.

4.4   **Functionality of Customer Applications.** Customer is solely responsible for the operation of Customer Applications, including but not limited to any information stored in or transmitted by Customer Applications. Customer is responsible for monitoring the usage of each Customer Application. Customer is responsible for the configuration, functionality, performance, compliance with applicable data protection laws and security of all Customer Applications, including any interfaces used to connect to Customer Applications.

4.5   **Use of Customer Applications.** Customer has sole responsibility for the accuracy, quality, integrity, legality, reliability, and appropriateness of Customer Applications and all Customer Data entered therein by Customer, its Users or on Customer's behalf, the means by which Customer acquired such Customer Data, and the use of such Customer Data. Without limiting Customer's obligations under the terms of this Agreement, Customer must (i) provide any necessary notice to, and obtain any necessary consent from, Users for the collection, use, transfer, and storage of Customer Data (including by BMC), and (b) collect, use, transfer, and store Customer Data in accordance with any privacy notice you provide, and all applicable laws.

4.6   **Use of Third Party Applications.** Customer is responsible for monitoring its usage of each Third Party Application, and such Third Party Publisher's usage and license compliance is governed by the terms of the agreement entered into between Customer and the Third Party Publisher. Customer is responsible for all applicable fees associated with Customer's use of Third Party Applications. Please note, Customer's usage of such Third Party Applications may incur additional license fees between Customer and the applicable Third Party Publisher, as well as additional Platform Services fees.

4.7   Customer will provide information or other materials related to a Customer Applications as reasonably requested by BMC to verify Customer's compliance with the Agreement and the User Guide. BMC may monitor Customer Applications and Third Party Applications running on the Platform Services to verify Customer's compliance with the Agreement. Customer will not block or interfere with BMC's monitoring. Customer will cooperate with BMC to identify the source of any problem with the Services that BMC reasonably believes may be attributable to Customer Applications or Third Party Applications, or any Customer Data.

4.8   If BMC reasonably believes any Customer Data, Customer Applications or Third Party Applications violates the law, infringes or misappropriates the rights of any third party or otherwise violates a material term of the Agreement (including the User Guide) ("**Prohibited Content**"), BMC will notify Customer of the Prohibited Content and may request that such content be removed from the Services or access to it be disabled. If Customer does not remove or disable access to the Prohibited Content within two (2) business days of BMC's notice, BMC may remove or disable access to the Prohibited Content or suspend the Services to the extent BMC is not able to remove or disable access to the Prohibited Content. Notwithstanding the foregoing, BMC may remove or disable access to any Prohibited Content without prior notice in connection with illegal content, where the content may disrupt or threaten the Services, pursuant to the Digital Millennium Copyright Act or as required to comply with law or any judicial, regulatory or other governmental order or request. In the event that BMC removes content without prior notice, BMC will provide prompt notice to Customer unless prohibited by law.

4.9   Customer's use of the Platform Services, BMC Application Services, Customer Applications and/or Third Party Applications may be immediately suspended and/or terminated due to (i) reasonable security threats regarding the Services, Customer Applications or Third Party Applications, (ii) Customer Applications or Third Party Applications interfering with, disrupting or threatening the integrity or performance of the Services, or (iii) a third party's claim that Customer Applications or Third Party Applications may violate applicable law or third party rights. In the event of (i) or (ii) above apply to Customer Applications, Customer is required to remediate any such issue to BMC's commercially reasonable satisfaction before use of Customer Applications can resume.

4.10   Customer's access to Third Party Applications may be immediately suspended and/or terminated by BMC at the direction of the Third Party Publisher. Customer acknowledges and understands that access to Customer Applications and/or Third Party Applications used in connection with the Platform Services may be suspended due to Customer's non-payment to BMC for use and access to the Platform Services or other breach of this Agreement. In no case will any such suspension or termination under the terms of this Agreement give rise to any BMC liability to Customer for a refund or other compensation.

4.11   BMC may conduct periodic security evaluations of all Customer Applications, which may include security review, a qualitative assessment involving review of a completed questionnaire, and an interview with appropriate Customer personnel. BMC conducts such security evaluations for its own benefit and Customer may not rely on the successful results of such evaluation. BMC may conduct such testing itself or, subject to the confidentiality obligations set forth in Section 9 (Mutual Confidentiality), through a third party. BMC will provide reasonable notice to Customer before starting

such testing. BMC will also cooperate reasonably with Customer to minimize the effects of such testing on Customer's business and operations. Customer agrees to cooperate reasonably with such testing. Despite the foregoing, such testing may in rare cases cause downtime or other adverse effects on Customer Applications or other Services used by Customer. Any nonpublic information to which BMC obtains access in the course of such security testing will be considered Customer's Confidential Information.

4.12 **Customer Responsibilities.** Customer will maintain the confidentiality of all authentications and passwords for the Platform Services, Customer Applications and Third Party Applications, and immediately notify BMC if it becomes aware that an unauthorized party has gained access to such Platform Services, Customer Applications and Third Party Applications. Customer will (i) use reasonable efforts to prevent unauthorized access to, or use of, Customer Applications and Third Party Applications, and notify BMC promptly of any such unauthorized access or use, and (ii) comply with all applicable laws in using the Customer Applications and Third Party Applications. Customer is responsible for the creation and implementation of a privacy policy and end user license agreement, if applicable, which will set forth the guidelines of how said Users may utilize the Customer Applications.

5. WARRANTIES.

5.1 BMC warrants to Customer that:

(a) the online availability of the Services will be maintained in accordance with the service levels set forth in the applicable Exhibit A (the "**Service Level Agreement**" or "**SLA**"). Customer's exclusive remedy and BMC's sole obligation for breach of the warranty in this Section 5.1(a) is described in the Service Level Agreement; and

(b) the Services (i) will perform in substantial accordance with the then-current on-line User Guide available via the Services and (ii) will be performed in a manner consistent with industry standards reasonably applicable to the provision thereof. Customer's exclusive remedy and BMC's sole obligation for breach of the warranty in this Section 5.1(b) will be BMC's use of commercially reasonable efforts to have the Services perform in substantial accordance with the User Guide, or replace the non-conforming portion of the Services within a reasonable period of time, or if BMC cannot have the Services perform in substantial accordance with the User Guide or replace the Services within such time period, then BMC will refund the amount paid by Customer for the Services, pro-rated from the date of the notice of the claim. Customer's rights and BMC's obligations in this Section 5.1(b) are conditioned upon Customer's providing BMC with written notice of the claim, a complete description of the alleged defects and a specific reference to the User Guide to which such alleged defects are contrary.

5.2 Customer warrants to BMC that: (a) each Customer Application will perform materially in accordance with the User Guide; (b) Customer owns all right, title, and interest in and to Customer Data, including but not limited to any Customer Data uploaded or entered into Customer Applications or Third Party Applications; (c) Customer has the necessary rights to use and access any Customer Applications and Third Party Applications deployed in a production or non-production environment of the Platform Services; (d) Customer has all rights in the Customer Data and Customer Applications necessary to grant the rights contemplated by this Agreement; (e) none of the Customer Data or Customer Applications or Users' use of Customer Data or Customer Applications will violate the Agreement and the User Guide; (f) Customer's security and functional tests of Customer Applications was conducted in a commercially reasonable manner and the results of said tests provided to BMC for review are correct and valid; and (g) none of the Third Party Applications or Users' use of Third Party Applications will violate the Agreement or the User Guide.

5.3 **Disclaimer.** CUSTOMER ACKNOWLEDGES THAT, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, BMC, ITS AFFILIATES AND LICENSORS MAKE NO WARRANTY, EXPRESS, IMPLIED OR STATUTORY WITH RESPECT TO THE SERVICES OR USE THEREOF. BMC, ITS AFFILIATES AND LICENSORS HEREBY EXPRESSLY DISCLAIM ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR WITHOUT DELAY, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE, NON-INFRINGEMENT AND INFORMATION CONTENT.

6. FEES AND PAYMENT.
The fees payable for the Services will be set forth in the Order. The fees will be invoiced in accordance with the relevant Order and are due upon receipt of invoice. Customer will pay or reimburse BMC or, when required by law, the appropriate governmental agency, for taxes of any kind, including sales, use, VAT, excise, customs duties, withholding, property, and other similar taxes (other than taxes based on BMC's net income or arising from the employment relationship between BMC and its personnel) imposed in connection with the fees paid for the Services, which are exclusive of these taxes.

7. TERM AND TERMINATION.

7.1 **Term.**

(a) **Agreement.** This Agreement begins on the Effective Date and will remain in effect unless terminated pursuant to Section 7.2 below.

(b) **Order(s).** Each Order begins on the start date specified in the relevant Order and continues for the term specified therein.

7.2 **Termination.**

(a) **Termination for Convenience.** Upon 30 days advance written notice, either party may terminate this Agreement for its convenience; however, such termination will have no effect on Orders executed by the parties prior to its effective date, including but not limited to payment obligations contained therein, and such Orders will remain in full force and effect under the terms of this Agreement for the term specified therein. Orders may not be terminated for convenience unless otherwise specified therein.

(b) **Termination for Cause.** Either party may terminate this Agreement for cause: (i) upon 30 days written notice of a breach to the other party if such breach remains uncured at the expiration of such period; or (ii) immediately upon material breach by the other party; or (iii) immediately if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

7.3 **Effects of Termination for Cause.** Subject to Section 7.2(a), upon termination or expiration, all Orders terminate and the Services purchased pursuant to such Orders terminate and Customer will make no further use of the Services. No termination will relieve the Customer of the obligation to pay any fees accrued or payable to BMC.

7.4 **Termination Assistance.** Upon written request by Customer made within 30 days after the effective date of termination, BMC will make available to Customer the Customer Data stored in the Services in database backup format. After such 30 day period, BMC shall have no obligation to maintain or provide any Customer Data and will thereafter, unless legally prohibited, delete Customer Data from the Services.

8. PROPRIETARY RIGHTS.

8.1 **Reservation of Rights.** BMC, its Affiliates or licensors retain all right, title and interest to the Services and all related software, programming, documentation, templates, questionnaires, methodologies, models, charts, specifications, reports, and any other intellectual property or items used to deliver the Services or made available to Customer as a result of the Services ("**Service Items**"). The Services and Service Items are protected by applicable copyright, trade secret, industrial and other intellectual property laws and rights under such laws ("**IPRs**"). As between Customer and BMC, BMC owns all rights, title, and interest in all Services, Service Items, and IPRs, and Customer's access and use of Services, Service Items, and IPRs shall be governed by the terms of this Agreement. BMC reserves any rights not expressly granted to Customer. Customer shall not access the Services in order to build a competitive product or service or copy any ideas, features, functions or graphics of the Services.

8.2 **Customer Data.** As between BMC and Customer, (i) Customer owns all right, title and interest in and to the Customer Data; and (ii) Customer is responsible for all content, accuracy, quality and legality of Customer Data. BMC will use the Customer Data only as necessary to provide the Services in accordance with this Agreement. At any time during the term of the Services, Customer may request copies of all Customer Data from the Services. Customer is responsible for loading and/or transferring Customer Data into the Services and for ensuring that such transfer is completed.

9. MUTUAL CONFIDENTIALITY.

9.1 "**Confidential Information**" means all proprietary or confidential information that is disclosed to the recipient ("**Recipient**") by the discloser ("**Discloser**"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure, and specifically includes Customer Data, Customer Applications, the Services, Service Items and any and all information relating to products or services provided by a Discloser, its customer-related and financial information, software code, flow charts, techniques, specifications, development and marketing plans, strategies, and forecasts. Confidential Information does not include information that Recipient can show: (a) was rightfully in Recipient's possession without any obligation of confidentiality before receipt from the Discloser; (b) is or becomes a matter of public knowledge through no fault of Recipient; (c) is rightfully received by Recipient from a third party without violation of a duty of confidentiality; or (d) is or was independently developed by or for Recipient without reference to Discloser's Confidential Information.

9.2 **Confidentiality Obligation.** Recipient may not disclose Confidential Information of Discloser to any third party or use the Confidential Information in violation of this Agreement. Recipient (i) will exercise the same degree of care and protection with respect to the Confidential Information of the Discloser that it exercises with respect to its own Confidential Information (but in no event less than reasonable care) and (ii) will not, either directly or indirectly, disclose, copy, distribute, republish, or allow any third party to have access to any Confidential Information of the Discloser. Notwithstanding the foregoing, Recipient may disclose Discloser's Confidential Information to Recipient's employees, contractors and agents who have the need to know provided that such employees and agents have legal obligations of confidentiality substantially the same (and in no case less protective) as the provisions of this Agreement.

9.3 **Disclosure Required by Law.** Recipient may disclose Confidential Information to the extent required by law or court order, but must provide Discloser with advance notice to allow Discloser to seek a protective order. Recipient may only disclose the limited Confidential Information required to be disclosed by law or the court order.

9.4 **Customer Reference.** BMC may refer to Customer as a customer of BMC internally and only in externally published media if agreed to by Customer.

9.5 **Suggestions.** Customer agrees that BMC shall have a royalty-free, worldwide, transferable, sublicenseable, irrevocable, perpetual license to use or incorporate into any BMC products or services any suggestions, enhancement requests, recommendations or other feedback provided by Customer or Users relating to the Services or Service Items, excluding Customer Data.

10. INDEMNIFICATIONS.

    10.1   **Indemnification by BMC.** If a third party asserts a claim against Customer asserting that Customer's use of the Services in accordance with this Agreement violates that third-party's patent, trade secret or copyright rights ("**Infringement Claim**"), then BMC will, at its own expense: (a) defend or settle the Infringement Claim; and (b) indemnify Customer for any damages finally awarded against Customer based on infringement by the Services. If BMC believes the Services may violate a right, then BMC will, at its expense: (i) modify the Services, or (ii) procure the right to continue using the Services, and if (i) or (ii) are not commercially reasonable, terminate Customer's right to use the Services and issue a pro-rata refund for the unexpired pre-paid portion of such Services.

    10.2   **Indemnification by Customer.** Subject to the terms of this Agreement, if a third party asserts a claim against BMC asserting that (i) Customer Applications, (ii) the Customer Data, or (iii) Customer's use of the Services in violation of this Agreement violates that third-party's patent, trade secret or copyright rights, or otherwise harms the third party ("**Claims**"), Customer will, at its own expense: (a) defend or settle the Claim; and (b) indemnify BMC for any damages finally awarded against BMC based on the Claim.

    10.3   **Indemnity Process.** Neither party's obligations under this Section will apply if: (a) the indemnifying party's legal department does not receive prompt, detailed written notice of the Infringement Claim/Claim from the party being indemnified, (b) the indemnifying party is not able to retain sole control of the defense of the Infringement Claim/Claim and all negotiations for its settlement or compromise, (c) the indemnifying party does not receive all reasonable assistance from the party being indemnified. Neither party will bind the indemnified party to a monetary obligation in a settlement or compromise, or make an admission on behalf of the indemnified party, without obtaining that party's prior consent.

THIS SECTION CONTAINS EACH PARTY'S EXCLUSIVE REMEDIES AND THE INDEMNIFYING PARTY'S SOLE LIABILITY FOR INFRINGEMENT CLAIMS/CLAIMS.

11. LIMITATION OF LIABILITY

    11.1   **DISCLAIMER OF DAMAGES.** EXCEPT FOR A BREACH OF SECTION 3.6, CUSTOMER'S RESPONSIBILITIES IN SECTION 4.12 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 10, NEITHER PARTY OR ITS AFFILIATES ARE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES RELATING TO OR ARISING OUT OF THIS AGREEMENT OR THE SERVICES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST COMPUTER USAGE TIME, AND DAMAGE TO, OR LOSS OF USE OF, DATA), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND IRRESPECTIVE OF ANY NEGLIGENCE OF A PARTY OR WHETHER SUCH DAMAGES RESULT FROM A CLAIM ARISING UNDER TORT OR CONTRACT LAW.

    11.2   **LIMITS ON LIABILITY.** EXCEPT FOR A BREACH OF SECTION 3.6, CUSTOMER'S RESPONSIBILITIES IN SECTION 4.12 AND EACH PARTY'S RESPONSIBILITIES IN SECTION 10, NEITHER PARTY OR ITS AFFILIATES SHALL HAVE AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE SERVICES, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEEDING THE AMOUNTS ACTUALLY PAID BY AND DUE FROM CUSTOMER PURSUANT TO THE ORDER(S) GIVING RISE TO LIABILITY.

12. EXPORT CONTROLS. Customer represents and warrants that it: a) will comply with the United States Export Administration Regulations and other U.S. or foreign export regulations; b) no individual accessing or using the Services is a citizen of or from an embargoed country (currently Iran, Syria, Sudan, Cuba and North Korea); c) is not prohibited from receiving the Services under such regulations; d) will not acquire the Services for a person who is restricted under such regulations; e) will not use the Services in contradiction to such regulations; and f) will not use the Services for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For Services exported from Ireland, EC No. 428/2009 sets up a Community regime for control of exports of dual-use items and technology, and it is declared that this Services is intended for civil purposes only. Therefore, Customer agrees to comply with both the U.S. regulations and those E.U. regulations and will not export in violation of the regulations and without all proper licenses. Any failure to comply with these regulations will result in Customer forfeiting all rights to the Services.

13. SECURITY AND DATA PROTECTION.

    13.1   BMC obtains annual third party security audits of the BMC Subscriptions Services ("**Security Audit**") and will provide a copy of its most then-recent Security Audit upon Customer's request, subject to confidentiality requirements.

    13.2   BMC will not access Customer Data except as required to provide the Services or at Customer's specific request. BMC has implemented and will maintain procedures to logically segregate Customer Data. BMC uses industry standard security measures to protect Customer Data.

    13.3   Customer is responsible for complying with all legal requirements, including applicable privacy laws and regulations, relating to the collection, use, processing and transfer of Customer Data. BMC and Customer specifically agree that with regard to European Economic Area data protection laws (if applicable), Customer is the 'data controller', and BMC is the 'data processor'. Customer and Third Party Publishers shall agree upon their respective obligations with respect to the processing of personal data by Third Party Publishers as per section 4.1. Each party shall fulfill its respective legal obligations, including but not limited to any approval and/or notification obligations towards national data protection authorities.

13.4 BMC will process Customer Data for the purpose of providing the Services subscribed under this Agreement, in accordance with Customer's lawful and explicit instructions and with BMC Controller and Processor Binding Corporate Rules Policy found at http://media.cms.bmc.com/documents/External+Privacy+Binding+Coporate+Rules+Policy+-+Aug+04.pdf (the "**BCR**") with respect to compliance with data protection laws and/or regulations. The details of the BCR approval of BMC Software, Inc. are available at http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/bcr_cooperation/index_en.htm. The BCR policy is incorporated into a BMC corporate wide policy, requiring all BMC entities, employees and third party providers to comply with and respect the BCR policy which is governing the collection, use, access, storage and transfer of Personal Data among BMC entities and third-party sub-processors. In the course of normal business, BMC may collect and process personal information related to Customer (mainly contact and related information) in order to perform its obligations under this Agreement, such information being referred to hereinafter as "**Customer Contact Information**". Where the Customer Contact Information is to be processed by BMC, BMC will comply with its BCR.

13.5 BMC takes no responsibility with regard to Customer Data content (i) processed on behalf of Customer and/or handling as per Customer's instructions and/or (ii) processed by Third Party Publishers and/or through the use by Customer of Third Party Applications. Customer shall indemnify and hold harmless BMC from any failure to comply with its obligations under this Section 13.

13.6 Customer acknowledges and consents that Services provided require Customer Data to be transferred to a country outside of Customer's country or the country where the Customer Data originated.

13.7 BMC will provide all requested information regarding the processing of Customer's Data as Customer may reasonably require to enable Customer to comply with data protection laws.

13.8 The processing of Customer Data under this Agreement is further governed by the Data Processing Agreement attached to the applicable Order.

14. VERIFICATION. Customer agrees that BMC may monitor the Services to ensure Customer's compliance with the terms of this Agreement. If such monitoring reveals that Customer has exceeded the Capacity for the Services, Customer agrees to pay the applicable fees for additional capacity. If Customer to fails to pay fees for such additional capacity, BMC may suspend Customer's access to the Services until such fees are paid in full.

15. TRIAL LICENSES. BMC may make Services available to Customer on a trial basis without an Order and free of charge under the following terms: Any Services provided as a trial are provided to Customer solely so that Customer may evaluate internally, for no more than a 30 day period, whether to acquire usage rights to such Services for a fee. Such Services (a) are provided "AS IS" without any warranty, service level agreement or support, and (b) cannot be put into productive use or included as part of Customer's business processes in any manner, unless or until it is expressly licensed and paid for under an Order. BMC may terminate all of Customer's access, rights and licenses to these Services for BMC's convenience upon notice to Customer. Upon the earlier of termination of the trial period or this Agreement, all Customer Data input into the Services during the trial period will be deleted. BMC'S ENTIRE LIABILITY FOR DIRECT DAMAGES RELATED TO ANY TRIAL OF THE SERVICES IS LIMITED TO THE GREATER OF THE AMOUNT ACTUALLY PAID BY CUSTOMER FOR SUCH TRIAL OR $100.

16. INSURANCE. Customer will provide and maintain cyber liability insurance in the amount of one million dollars ($1,000,000.00) for losses arising out of Customer's provision of a Customer Application on the Platform Services under this Agreement.

17. GOVERNING LAW AND DISPUTE RESOLUTION. A party will provide written notice to the other party of any controversy, dispute or claim arising out of or relating to this Agreement, or to the formation, interpretation, breach, termination, or validity thereof ("**Controversy**"). The parties shall engage in good faith negotiations to resolve the Controversy. Only if the Controversy is not resolved through good faith negotiations within 15 days of the sending of the written notice of Controversy, the Controversy may be submitted to litigation or binding arbitration, based on the place of incorporation of the parties, as follows:

(i) If both parties to this Agreement are entities incorporated under the law of any state in the United States, the Controversy shall be tried in either state or federal court located in Houston, Texas and the laws of the State of Texas shall govern. Both sides hereby submit to the exclusive jurisdiction of the courts in Houston, Texas and waive all defenses based on forum non conveniens.

(ii) If both parties to this Agreement are entities incorporated in countries in the Europe, Middle East, or Africa regions, the arbitration shall be held in Amsterdam, Netherlands under the then-applicable rules of the International Chamber of Commerce and the substantive laws of the Netherlands will govern.

(iii) If both parties to this Agreement are entities incorporated in countries in the Asia Pacific region, the arbitration shall be held in Singapore under the then-applicable rules of the Singapore International Arbitration Centre and the substantive laws of Singapore will govern.

(iv) In all other instances, the arbitration shall be held in New York City, New York, under the then-applicable international rules of the American Arbitration Association and the substantive laws of the State of Texas will govern.

For all arbitrations conducted hereunder: (a) the arbitration shall be conducted in English; (b) the relevant arbitral institution shall determine the number of arbitrators, but any Controversy in which the amount in dispute is greater than $10 million USD shall be decided by three arbitrators, with each party having the right to select one arbitrator; (c) the costs of such arbitration shall be borne equally, pending the arbitrator's award; (d) the arbitration award rendered shall be final and binding on the parties, shall

not be subject to appeal to any court and shall be enforceable in any court having jurisdiction over the Parties; (e) the arbitration proceedings, award and pleadings shall all be confidential, unless disclosure of particular information is required for purposes of enforcing/challenging the award or to meet local securities law requirements; and (f) the party prevailing in arbitration shall be entitled to recover its reasonable attorneys' fees and the necessary costs incurred in connection with the arbitration.

The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Nothing in this Agreement shall be deemed as preventing either party from seeking immediate injunctive relief from any court having jurisdiction over the parties and the subject matter of the dispute.

18. The following BMC contracting entities apply to this Agreement:

Region	Licensing Entity	Address of Licensing Entity
United States and Latin America South (not a specified Central or South America country below)	BMC Software, Inc.	2103 CityWest Boulevard, Houston, Texas 77042
Canada	BMC Software Canada Inc.	50 Minthorn Boulevard, Suite 200 Markham, Ontario L3T 7X8 Canada
EMEA (Europe, Middle East and Africa)	BMC Software Distribution B.V.	Boeing Avenue 245, 1119 PD Schiphol Rijk, The Netherlands
Brazil	BMC Software do Brasil Ltda.	Av. das Nações Unidas, 8.501 – 22º Andar Condomínio Eldorado Business Tower São Paulo, Brasil – 05425-070
Mexico	BMC Software Distribution de México, S.A. de C.V.	Torre Esmeralda II Blvd. Manuel Avila, Camacho #36, Piso 23 Lomas de Chapultepec, CP11000, México D.F.
Argentina	BMC Software de Argentina S.A.	Ing. Butty 220 – Piso 18, Buenos Aires, Republica Argentina, C1001AFB
S.E.A (Southeast Asia), Australia, New Zealand, Hong Kong, Taiwan	BMC Software Asia Pacific Pte Ltd	600 North Bridge Road, #20-01/10 Parkview Square, Singapore 188778
China	BMC Software (China) Limited	Room 502, Level 5, Tower W1, The Towers, Oriental Plaza, No. 1 East Chang An Ave., Dong Cheng Dist., Beijing 100738, China
Japan	BMC Software K.K.	Harmony Tower 24th Floor, 1-32-2 Honcho, Nakano-ku, Tokyo, 164-8721
Korea	BMC Software Korea Ltd	24th Fl., ASEM Tower, , 1517, Yeongdong-daero, Gangnam-gu, Seoul 135-798, Korea South

19. <u>**U.S. FEDERAL ACQUISITIONS.**</u> This Section applies only to acquisitions of the commercial Services and User Guide subject to this Agreement by or on behalf of the United States Government, or by any prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement or other activity with the United States Government. In the event the Services are delivered to the United States Government, the United States Government hereby agrees that the Services qualify as "commercial items" within the meaning of the Federal acquisition regulation(s) applicable to this procurement. The terms and conditions of this Agreement shall pertain to the United States Government's use and disclosure of the Services, and shall supersede any conflicting contractual terms and conditions. The following additional statement applies only to acquisitions governed by DFARS Subpart 227.4 (October 1988): "Restricted Rights – Use, duplication and disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 (Oct. 1988)."

20. <u>**MISCELLANEOUS TERMS.**</u> This Agreement contemplates the execution by the parties of one or more Orders, however, neither execution of this Agreement, nor anything contained herein, shall obligate either party to enter into any Orders. BMC is not liable for its failure to perform any of its obligations under this Agreement during any period in which performance is delayed by Customer or circumstances beyond BMC's reasonable control. The parties are independent contractors and this Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties. This

Agreement, including any Exhibits and Orders constitutes the entire agreement between Customer and BMC and supersedes any prior or contemporaneous negotiations or agreements, whether oral or written concerning the Services. There are no representations, promises, warranties, covenants, or undertakings between the parties other than those expressly set forth in this Agreement. There are no third party beneficiaries to this Agreement; Customer is not entering into a contractual relationship with BMC's licensors and BMC's licensors have no liability to Customer. No modification or waiver of any provision hereof will be effective unless made in a writing signed by both BMC and Customer. Customer may not assign or transfer this Agreement or the Services to a third party, whether by merger or otherwise. Should any provision of this Agreement be invalid or unenforceable, the remainder of the provisions will remain in effect. Any additional or conflicting terms of any Customer purchase order are rejected by BMC and do not apply. Any additional documents presented to a BMC representative by Customer for signature as a condition for going on a Customer's site will be governed by this Agreement and to the extent that such document presents additional terms or conflicts with this Agreement, it shall be considered null and void. The Services may contain hyperlinks to websites controlled by parties other than BMC. BMC is not responsible for and does not endorse the content or accept any responsibility for Customer's use of these websites. Customer should refer to the policies posted by other websites regarding data privacy and other topics before using them.

EXHIBIT A
Service Level Agreement

Availability

BMC will use commercially reasonable efforts to make the Services available at least 99.9% of the time, except as provided below ("**Service Commitment**"). This Service Commitment is not applicable to Customer Applications or Third Party Applications. Availability will be calculated per month, as follows:

(Service Time – Non-excluded Downtime – Excluded Downtime)/(Service Time – Excluded Downtime) x 100

Definitions

"**Service Time**" is the total minutes for a given calendar month.

"**Excluded Downtime**" is all unavailability caused by (1) scheduled or mutually agreed upon downtime to perform routine, non-emergency or emergency maintenance on the Services; (2) downtime on nonproduction systems; (3) factors outside of BMC's reasonable control, including any force majeure event, including without limitation, acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes or other labor problems (other than those involving BMC employees), or Internet service provider or power failures or delays; (4) failure of Customer's Internet access or related problems; (5) Customer's equipment, software, including but not limited to Customer Applications, or other technology and/or third party equipment, software, including but not limited to Third Party Applications, or other technology (other than third party equipment within BMC's direct control); (6) actions or inactions of Customer or any third party; or (7) service suspensions or termination of Customer's right to use the Services in accordance with the Agreement.

"**Non-excluded Downtime**" is all downtime that is not Excluded Downtime.

Service Credits

In the event BMC does not meet the Service Commitment, Customer will be eligible to receive a Service Credit as described below. Service Credits are calculated in accordance with the table below as a percentage of the total subscription charges paid by Customer for Services for the month in which BMC does not meet the Service Commitment.

Monthly Availability Percentage	Service Credit Calculation
Below 99.9%	1 minute of credit based on monthly subscription charges for every 1 minute below the Service Commitment

Service Credits will be applied against Customer's next invoice. A Service Credit will be applicable and issued only if the credit amount is greater than $1 USD. Service Credits may not be transferred or applied to any other BMC service or account. Customer's sole and exclusive remedy for any unavailability or non-performance of the Services or other failure by BMC to provide the Services is the receipt of a Service Credit (if eligible) in accordance with the terms of this Exhibit A. Upon expiration or non-renewal of this Agreement and/or the applicable Order, all Service Credits will be forfeited (for example, if the Non-excluded Downtime occurs in the last month of the Order term and Customer does not renew, then the Service Credit is forfeited).

Credit Request and Payment Procedures

BMC will provide Customer with a monthly availability report. To receive a Service Credit, Customer must submit a request by sending an e-mail message to SLArequest@bmc.com. To be eligible, the credit request must (i) include Customer's account number in the subject of the e-mail message; (ii) include, in the body of the e-mail either the BMC-provided monthly availability report, or, the dates and times of each incident of Non-excluded Downtime that Customer claims to have experienced; and (iii) be received by BMC within 30 days after the end of the month in which the Downtime occurred. If the Monthly Availability Percentage applicable to the month of such request is confirmed by BMC and is less than the Monthly Availability Percentage, then BMC will confirm the Service Credit to Customer within 15 days of receipt of the Service Credit request. Customer's failure to provide the request and other information as required above will disqualify Customer from receiving a Service Credit.