QUORUMLABS, INC.

Recovery Service Agreement

PLEASE READ THIS RECOVERY SERVICE AGREEMENT (THIS "**AGREEMENT**") CAREFULLY BEFORE USING THE QUORUMLABS, INC. ("**QUORUM**") BACK-UP AND RECOVERY SERVICES (AS FURTHER DEFINED BELOW, THE "**SERVICE**"). YOU, MEANING THE LEGAL ENTITY SIGNING UP FOR THE SERVICE, WILL BE BOUND BY THIS AGREEMENT IF YOU USE OR INSTALL THE SOFTWARE ENABLING THE SERVICE, ISSUE TO QUORUM OR ITS RESELLER A PURCHASE ORDER FOR THE SERVICE, BEGIN TO USE THE SERVICE, OR CHECK OR CLICK THE "I ACCEPT" OR SIMILAR BOX OR BUTTON AT THE BEGINNING OF THE PROCESS FOR USING THE SERVICE. IF YOU DO NOT AGREE WITH ALL THE TERMS OF THIS AGREEMENT, THEN DO NOT USE THE SERVICE.

1. DEFINITIONS.

1.1. "**Affiliate**" means, as to any entity, an entity which controls, is controlled by, or under common control with, such entity. "**Control**" of an entity means a 50% or greater equity interest and/or control of a majority of the voting rights of such entity.

1.2. "**Data Center**" means a Quorum facility where Quorum operates devices that (a) communicate with your onQ HA Appliances to clone your Protected Servers and to back-up your Protected Data; and (b) can operate as virtual server clones of your Protected Servers in the event of a System Failure.

1.3. "**onDemand Recovery Node**" means a server, residing at a Data Center, that you have determined should not be pre-built or ready to run as a virtual server until (and so long as) it is built.

1.4. "**onQ HA Appliance**" means the Quorum high availability appliance hardware product(s) acquired by or provided to you and the Software installed thereon.

1.5. "**Personal Data**" means, generally, information relating to an identified or identifiable natural person, as defined by applicable privacy or data protections laws. Examples include address, credit card number, bank statements, criminal record, *etc*.

1.6. "**Protected Data**" means the applications and business data, including Personal Data, which you back up on your onQ HA Appliance and which is backed up at a Data Center.

1.7. "**Protected Servers**" means your servers which are cloned using virtualization on your onQ HA Appliance and which are backed-up at a Data Center as either a R2R Recovery Node or an onDemand Recovery Node.

1.8. "**Provided Equipment**" means any onQ HA Appliance or other hardware provided to you by Quorum or a reseller, unless purchased by you (from Quorum or a reseller) for your use with the Service.

1.9. "**Quote**" means a written quote issued to you by Quorum (a "**Quorum Quote**") or one of its resellers (a "**Reseller Quote**")setting forth the Subscription, including Service Level, and Support purchased, as well as pricing and payment terms and such other terms as the issuing party deems appropriate. A subsequent Quorum Quote or Reseller Quote setting forth changes to a Subscription as provided in **Section 3.1** is a "Quote" under this Agreement. Quorum must preapprove the scope of the Subscription (including Service Level and duration) and Support in Reseller Quotes.

1.10. "**R2R Recovery Node**" means a server residing at a Data Center that you have determined should be pre-built and "ready-to-run" as a virtual server with minimal time to make it operational.

1.11. "**Recovery Service**" means your use during a System Failure of R2R Recovery Nodes and onDemand Recovery Nodes at a Data Center, that are clones of your Protected Servers, as the principal servers processing your business operations.

1.12. "**Service**" means the service provided by Quorum to users of its onQ HA Appliances, as further described on the Site, providing for Protected Data to be backed up and for Protected Servers to be cloned at a Data Center from a user's onQ HA Appliances, including rapid access to and use of the Recovery Service in the event of a System Failure. The Service includes standard Support and access to all enhancements introduced during the Term of your Subscription, other than those that are priced and offered separately by Quorum and not included in your Subscription.

1.13. "**Service Level**" means the maximum quantity of Protected Data covered by your Subscription and any Provided Equipment.

1.14. "**Site**" means the Quorum website pertaining to the Service, the current URL for which is www.quorum.net.

1.15. "**Software**" means the Quorum proprietary software in any form and related documentation delivered to you, or downloaded by you, for use on or with the onQ HA Appliances, including any updates, upgrades or other new features, functionality or enhancements to the Software provided to you by Quorum or its resellers or agents as part of a new purchase, through Support, or otherwise.

1.16. "**Subscription**" means your right to use the Service and Provided Equipment during the Term and for the Service Level, as set forth on a Quote, for which Quorum has been paid the applicable fees.

1.17. "**Support**" means the Quorum support services available under **Section 9** below.

1.18. "**System Failure**" means a failure of your storage, systems or site that prevents you from operating your Protected Servers at your site to process your business operations on a normal basis.

1.19. "**Term**" means the period of time during which your Subscription is in effect. The Term will commence on the day you purchase the Service (as evidenced by execution of the Quote or otherwise) and will extend for one year from purchase, unless otherwise agreed by Quorum. The Term and this Agreement are subject to extension or to earlier termination as provided in this Agreement.

2. GENERAL.

2.1. Scope of Agreement. This Agreement applies to your use of the Service and the Software, whether you purchase your Subscription directly from Quorum or from an authorized reseller. You may only use the Service and the Software as expressly authorized in this Agreement.

2.2. Authority. The individual taking the action to accept this Agreement represents that he/she is an authorized representative of the legal entity signing up for the Subscription with the authority to bind such entity to this Agreement.

2.3. Quotes and Orders. The pricing terms, form of payment, timing of payment, quantity, duration, and configuration for the Subscription, Provided Equipment and Support may be contained in the Quote. If the Quote is a Quorum Quote, then this Agreement is explicitly made subject to the terms of such Quote and is deemed automatically incorporated into such Quote. To the extent the terms of a Quorum Quote specifically conflict with, modify, or add to, the terms of this Agreement, such Quorum Quote terms will control with respect to such matters. If the Quote is a Reseller Quote, then the scope of the Subscription (including Service Level and duration) and Support shall be as specified in such Quote, but this Agreement alone shall otherwise define the rights and obligations of you and Quorum

hereunder; the other terms of such Reseller Quote, if any, will be binding only on you and the affected reseller. Subject to the foregoing, if you issue a purchase order based on a Quote, you will be deemed to have accepted the terms of this Agreement and the relevant terms of the Quote. Any additional or different terms or conditions in any order or other communication from you are hereby rejected and will be of no effect, notwithstanding any contrary provision in such order or other communication.

3. TERMS OF SERVICE AND FEES.

3.1. Subscription. You will have the right to use the Service and the Provided Equipment during the Term, subject to receipt by Quorum of all applicable fees and your compliance with the terms of this Agreement. During the Term, Quorum will provide at Data Centers the equipment and connections necessary to provide the Service at the Service Level covered by your Subscription. Quorum shall have the right to determine which Data Centers, and which equipment in any Data Center, will be used for this purpose. You may increase the Service Level or Term of your Subscription by acceptance of a Quote setting forth the quantity of data and/or the length of time added to the Subscription and the applicable prices therefor.

3.2. Delivery and Acceptance. All Provided Equipment will be shipped FCA, origin (Incoterms 2010). Unless otherwise agreed in writing (a) the Service will automatically be deemed accepted upon you commencing use of the Service; and (b) all Provided Equipment and Software will automatically be deemed accepted upon receipt.

3.3. Recovery. If you suffer a System Failure, you may use the Recovery Service for a commercially reasonable period of time so long as you are using commercially reasonable efforts to restore your systems to working order and to transfer primary operational responsibility to your systems as soon as reasonably practicable. If you fail to use such efforts and use the Recovery Service for more than 30 days, then you agree that you will pay Quorum's then-current fees set forth on its published price lists for use of the Recovery Service.

3.4. Allocation. You expressly agree that you understand that Quorum may over-allocate users to any Data Center or to particular equipment within a Data Center to reduce costs to users. Quorum warrants that the Data Center and the Data Center equipment on which your servers are cloned and on which your data is backed-up will have at all times sufficient capacity to fully back up all of your Protected Data as specified in Quorum's policies. However, you understand that if an unusually high number of users of the Service suffer a System Failure at the same time and must use the Recovery Service at such Data Center concurrently with other users, Quorum will, if necessary, have the right to allocate resources among users in its sole discretion. Quorum will use its reasonable best efforts to allocate resources pro rata according to the relative quantity of data and to minimize any adverse impact on users through their concurrent use of the Recovery Service.

4. SOFTWARE TERMS.

4.1. License. Subject to **Section 4.5** below, Quorum grants you a nonexclusive, nontransferable (except as provided in this Agreement) right to use the Software in accordance with the related Quorum documentation solely for your own internal business operations. The Software is licensed, not sold, to you for use only under the terms of this Agreement. All references to the "purchase" or "sale" of Software mean the granting of a license to use such Software on the terms of this Agreement. Quorum

reserves all rights in the Software not expressly granted to you under this Agreement and retains ownership of all Software. You may only use (a) the Software on the onQ HA Appliance with which it was delivered or as otherwise agreed by Quorum; and (b) such onQ HA Appliance to run the related Software.

4.2. Exchange Recovery. If you require the ability to recover more than 300 Exchange mailboxes using the Software, then Quorum may obtain the licenses necessary to enable such recovery on your behalf and for an additional fee. Quorum may communicate with your computer systems to obtain the information needed to acquire such licenses.

4.3. No Right to Source Code. You acknowledge that the source code and underlying structure and algorithms of the Software are the property and proprietary trade secrets of Quorum or its licensors. Except for the open source software as provided by the open source licenses described in **Section 4.5** below, (a) no license is granted to use Quorum source code and all such use is expressly prohibited; and (b) you may not distribute, disseminate, sublicense, copy, modify, reverse engineer, decompile, translate, disassemble or create a source code equivalent of, or derivative of, the Software or allow others to do so.

4.4. Use of Coded Instructions. You acknowledge and agree that the Software may contain coded instructions which could (a) enable the Software to operate only on certain equipment or permit only specified features to operate; (b) limit the number of servers on which the Software will operate; (c) confirm payment of the applicable license fee; (d) disable some or all of the features of the Software and any related electronic documentation upon the termination of your license; (e) contain such other permissions or restrictions as may be specifically included in this Agreement or in any other binding agreement between us; and (f) specify the level of Support to which you may be entitled.

4.5. Open Source Licensing. Portions of the Software may include code covered by certain open source licenses. Certain open source licenses and the corresponding terms and conditions relating thereto are provided in the Software in the 'opt/licenses' directory.

4.6. WINPE. Some elements of the Software which support Bare Metal Disaster Recovery of Microsoft Windows Vista and Microsoft Windows 2008 Operating Systems contain and use components of the Microsoft Windows Pre-Installation Environment ("**WINPE**") with the following restrictions: (a) the WINPE components in the Software are licensed and not sold and may be used only with the onQ HA Appliance; (b) the WINPE components are provided "as is"; (c) Microsoft Corporation and its affiliates reserve all rights in the WINPE components not expressly granted; (d) your license to use the WINPE components is limited to use of the Software and the onQ HA Appliance as a recovery utility program only and not for use as a general operating system, as a thin client, or as a remote desktop client; (e) reverse engineering, decompiling or disassembly of the WINPE components is prohibited, except and only to the extent expressly permitted by applicable law, despite this limitation; (f) Quorum alone will provide support for customer issues related to the Software and its use and operation; and (g) the WINPE components are subject to U.S. export laws and regulations, including restrictions on destinations, end users and end use.

4.7. Government Users. The Software qualifies as "commercial items," as that term is defined at Federal Acquisition Regulation ("**FAR**") (48 C.F.R.) 2.101, consisting of "commercial computer software" and "commercial computer software documentation" as such terms are used in FAR 12.212. Consistent with FAR 12.212 and DoD FAR Supp. 227.7202-1 through 227.7202-4, and notwithstanding any other

FAR or other contractual clause to the contrary in any agreement into which this Agreement may be incorporated, any use, modification, reproduction, release, performance, display, or disclosure of the Software or its associated documentation by any agency, department, or entity of the United States Government (the "**Government**") will be governed solely by the terms of this Agreement and is prohibited except to the extent expressly permitted by the terms of this Agreement. Use of the Software constitutes agreement by the Government that the Software is "commercial computer software" and "commercial computer software documentation," and constitutes acceptance of the rights and restrictions herein.

5. YOUR OBLIGATIONS.

5.1. Computing Environment. You agree that while Quorum or a reseller may recommend a particular Service and Service Level configuration, you are responsible for determining the adequacy of the Service, Service Level and onQ HA Appliances actually purchased. You also understand and agree that, to the extent the information you provide to Quorum regarding your environment is inaccurate or incomplete, your computing environment changes, or you desire a higher level of performance, you may need to change your Service Level or purchase additional Service and onQ HA Appliances.

5.2. Settings. You understand and agree that it is your sole responsibility to properly set-up and maintain the settings for the Software and the Service, including selection of the servers and the data to be protected and all parameters, such as frequency, version control, duration of retention, restoration settings, data encryption, recovery node creation, and update settings, as described in the applicable documentation for the Software, Service and the onQ HA Appliances. Such options include the ability to designate the level of protection to individual Protected Servers according to their criticality to your business. Protected Servers which are cloned as R2R Recovery Nodes allow, essentially, instant recovery with a very low recovery time objective. On the other hand, Protected Servers which are designated as onDemand Recovery Nodes, will first need to be built before they can be run or tested. The duration for the build process depends on the amount of Protected Data per server and the number of servers that are being built at the same time. Additionally, once an onDemand Recovery Node is built, it is not updated through the back-up process to incorporate Protected Node changes. Quorum will have no liability for any error in your selections of such settings that results in the failure of servers or data to be backed-up, to be retained for any specific duration or to be restored to particular locations, or delays in building on Demand Recovery Nodes.

5.3. Operation of the onQ HA Appliances. Subject to any warranty or support obligations of Quorum or its resellers, it is your responsibility to ensure the correct installation, operation and maintenance of your onQ HA Appliances. It is also your responsibility to establish and maintain at your own expense all environmental, security, power and internet connections required at your facility(ies) for operation of the Service and your onQ HA Appliances. You are also responsible for monitoring the operation of the Service, including periodic testing of the backup of your Protected Data as well as periodic testing of the Recovery Service at least as frequently as recommended by Quorum. You will promptly report to Quorum, by web submission, email or telephone, any errors in the backup of your Protected Data to a Data Center or in your ability to use the Recovery Service.

5.4. User Names and Passwords. You agree that it is your sole responsibility to safeguard all usernames and passwords and other access credentials for your personnel who have access to the

Protected Data, the onQ HA Appliances, and the Service, and to limit access to the Service to your authorized personnel. If you believe that the security of such access credentials has been compromised, you agree to notify Quorum and to cooperate in the resetting of any such access credentials. If Quorum determines that a security breach relating to your account has occurred or is likely to occur, Quorum may suspend your account until such breach has been remedied.

6. DATA.

6.1. Ownership of Protected Data. You warrant that you have the right to possess and to transmit to the Data Center all Protected Data, including all Personal Data. All right, title, and interest in Protected Data will remain with you. This Agreement does not provide Quorum with title or ownership of the Protected Data, but only a right of limited use as set forth herein. You will reimburse Quorum for any expenses reasonably incurred by Quorum (including reasonable attorneys' fees) by reason of its compliance with your instructions in the event of a dispute concerning the ownership, custody or disposition of your Protected Data.

6.2. Confidentiality of Protected Data. Quorum maintains industry standard physical and technical security procedures at the Data Centers and permits access to the Service by an authorized user only through a firewall unique to that user. You are responsible for maintaining the confidentiality of your Protected Data at your site, for avoiding any lapses in power or communications or other actions that would compromise the connection or the security of the connection between your site and a Data Center. If you have opted for your Protected Data to be stored encrypted, then you must provide to Quorum the encryption keys and are responsible for safeguarding all encryption keys in your possession. You understand that Quorum personnel may require access to your Protected Data (and if it is encrypted may need to unencrypt such data) in the course of providing the Service to you or in the course of operating and maintaining the Data Centers.

6.3. Personal Data.

(a) Processing of Personal Data. You and Quorum acknowledge that the Service may be used to process information regulated by privacy or data protection laws. You hereby instruct Quorum to treat all Personal Data in the same manner as other Protected Data, unless you and Quorum expressly agree to different treatment. You also instruct Quorum to take such steps in the processing of Personal Data as are reasonably necessary for it to exercise its rights or to perform its obligations under this Agreement. Quorum agrees to log all such access. You agree that such instructions constitute your full and complete instructions as to the means by which Personal Data shall be processed by Quorum.

(b) Third Party Requests and Disputes. Quorum will forward to you any requests, pursuant to applicable privacy or data protection laws, for access to or correction of an individual's Personal Data that you have stored with Quorum. Quorum agrees to reasonably assist you, at your expense, in satisfying such requests.

6.4. Additional Obligations. Quorum agrees that it will: (a) only use Protected Data to deliver the Service per this Agreement; (b) upon termination of this Agreement, return Protected Data to you as provided in **Section 11.3**; and (c) implement security measures reasonably designed to safeguard Protected Data against unauthorized access, loss, destruction, damage or disclosure, which measures shall be the same for all Protected Data, except to the extent Quorum has agreed to additional measures to be taken at your expense.

6.5. Data Collection and Privacy. The Service is designed to communicate with Quorum servers for support and operational purposes, and cookies may be used. You agree that, unless you opt out as specified below, to improve the usefulness and market acceptance of the Service, Quorum may collect, use and transmit non-identifying, aggregate usage and volume statistical information from your use of the Service. Information gathered may include the number and size of backups made, operating system and hardware resource identification, peripheral hardware and other information that cannot be personally identified to you. Quorum reserves the right to use and publish such anonymous, aggregate summary information regarding the Service. The collection of anonymous information is "ON" by default, but can be disabled by you.

6.6. HIPAA and ITAR Compliance. You understand that if you have not elected to have your Protected Data encrypted while stored on your onQ HA Appliance and at the Data Center, then Quorum does not provide any assurance that the Service complies with the security requirements under the United States Health Insurance Portability and Accountability Act or the United States International Traffic in Arms Regulations.

6.7. Subpoena. Quorum is authorized to comply with any subpoena or similar order related to the Protected Data in its possession; provided that Quorum notifies you promptly upon receipt thereof, unless such notice is prohibited by law. You agree to pay Quorum's applicable charges as set forth in its price lists for such compliance. Quorum will, upon your request and at your expense, cooperate with your efforts to quash or limit any subpoena.

7. LIMITATIONS ON USE OF SERVICE.

7.1. Use Only in General Business Applications. You agree to only use the Service, including the onQ HA Appliances, for general business applications pertaining to your business and not in situations in which failure could lead to death, personal injury or environmental damage.

7.2. Prohibited Actions. You agree that you will not (a) willfully tamper with the security of any of the systems used in the Service, tamper with other Quorum customer accounts, or attempt to introduce any virus, worm or similar threat; (b) attempt to access data at any Data Center not belonging to or intended for you; (c) attempt to probe, scan or test the systems used in the Service or to breach any security or authentication measures, except as expressly authorized by Quorum; (d) willfully render any part of the systems used in the Service unusable; or (e) damage, destroy, transfer or fail to maintain the Provided Equipment.

7.3. Content Restrictions. You agree that you will not (and will not allow a third party to) copy, reproduce, capture, store, retransmit or distribute any copyrighted content that is accessed or received through use of the Service for which you do not have rights or which you know or reasonably should know is obscene, harmful to minors, or contains any virus, worm or like threat. You assume all risk and liability for any such prohibited content. You agree to defend, indemnify, and hold Quorum, its resellers, partners and their respective Affiliates harmless from and against any claims, liabilities, damages, losses and expenses, including reasonable attorney fees and costs, in connection with your violation of this Section.

7.4. No Right to Resell or to Provide Services. Except for use of the Service to protect servers or Protected Data of any of your Affiliates, you are expressly prohibited from reselling your onQ HA

Appliances or the Service and from using your onQ HA Appliances or the Service to provide any type of paid or unpaid services to third parties, whether on a time-sharing, service provider or hosting basis.

7.5. Ownership. Quorum and/or its licensors own all right, title and interest, including intellectual property rights, in and to the Service, the Data Centers, the Software, any Provided Equipment and the Site. You acknowledge that this Agreement and your use of the Service do not transfer to you any title to (a) any Provided Equipment or the Software; or (b) the intellectual property in systems used in the Service, the Software or any rights therein, other than the limited right to use the Service and the Software under the terms of your Subscription. Any suggestions, ideas, enhancement requests, feedback, recommendations or other information that you provide to Quorum relating to the Site, the Service or the Software, are hereby deemed assigned by you to Quorum. Quorum reserves all rights not expressly granted hereunder.

8. ORDERS AND PAYMENT.

8.1. Fees. The applicable fees for the Service (including use of any Provided Equipment) and Support are as set forth in Quorum's then-current price list or, if different, as set forth on your Quote. Fees for additional services, including data seeding, data restoration and data deletion, may also apply. Without limiting the forgoing, once (and so long as) an onDemand Recovery Node is built, you will be obligated to pay an additional monthly fee for such server. Except as specifically set forth in this Agreement, all fees are non-refundable. You may not cancel orders once submitted to Quorum.

8.2. Payment Terms. You will be invoiced for Subscriptions and, if applicable, Support upon delivery or renewal, as applicable. All payments to Quorum will be made in U.S. dollars, net 30 calendar days from the date of invoice, unless otherwise stated by Quorum in writing. Any amounts not paid to Quorum when due will accrue interest at the rate of 1½% per month, or the maximum amount allowed by law, if lower. In addition to its other remedies, if any payment is late, Quorum may suspend its performance of this Agreement and your access to the Service until all payments are made current.

8.3. Taxes. You will be liable for and will be invoiced for any and all taxes (other than taxes based on Quorum's or a reseller's net income) which may be assessed for or related to your Subscription or Support or payments made in connection with this Agreement. All fees outlined in Quorum's price list are net of any taxes. Without limiting the foregoing, if you are making a payment to Quorum from outside the United States and any such taxes are required to be withheld from any amounts payable to Quorum hereunder, the amounts so payable to Quorum will be increased to the extent necessary to yield to Quorum (after payment of all such taxes) the amounts otherwise payable to Quorum hereunder without deduction of any such taxes or other amounts.

9. SUPPORT SERVICES.

9.1. Availability of Support. Quorum offers a certain level of Support at no additional charge as part of your Subscription. The description of the customary Support provided with your Subscription, including hours of operation and support policies, and of any additional levels of Support available for purchase, can be found on the Site.

9.2. Access to Support Services. So long as Quorum has received all applicable fees for Support, Quorum will respond promptly to your requests for support as applicable to the level of Support you have purchased. If you need assistance not otherwise included in your Subscription or the level of

Support you have purchased, Quorum will consider in good faith providing such assistance. If Quorum agrees to provide additional assistance, you agree to pay Quorum its then current professional service prices for such assistance.

9.3. Professional Services. Certain activities, such as custom integration, unique installation services, script development, etc., are considered professional services and will be provided by Quorum only as mutually agreed by the parties and at an additional cost.

10. LIMITED WARRANTY/DISCLAIMER.

10.1. Service. Quorum warrants to you for 90 days following delivery of the initial onQ HA Appliance provided hereunder (the "**Warranty Period**") that, when used in strict accordance with Quorum's documentation, the Service (including any Provided Equipment) will operate substantially as described and that, subject to **Section 3.4**, the Recovery Services will be available to you when required for up to 30 calendar days per occurrence. Quorum also warrants that the Service will not be materially decreased during a Subscription term. If Quorum materially breaches the foregoing limited warranties, Quorum or its suppliers shall, within a commercially reasonable time after receipt of notice, use commercially reasonable efforts to (a) correct any errors; (b) provide work-arounds; (c) address a material decrease in the Service and; (d) in the case of Provided Equipment, replace promptly any defective Provided Equipment. If, after a reasonable number of attempts to correct the errors, Quorum is unable to provide the Service in compliance with these limited warranties, you may terminate the Service and Quorum will refund to you any prepaid subscription fees paid to Quorum for the unused portion of the Term. Any claim under this warranty must be made within the Warranty Period, if any. The terms of this Section describe your exclusive remedies, and Quorum's exclusive obligations, with respect to a breach of the warranties in this Section.

10.2. Exclusion. The warranties provided in **Section 10.1** do not apply to a claim the extent arising from (a) your internet connections, your equipment, or your actions as described in **Section 5.2**; (b) your attempt to access the Service using any software or hardware not approved by Quorum or any approved software or hardware that you have not properly maintained, *e.g.* failed to install updates, or that has been modified in a manner not approved by Quorum; (c) any use of the Service not in accordance with Quorum documentation; (d) any use of the Service by you to cover a larger amount of data than permitted by your Subscription; or (e) any abuse, accident, alteration, misuse, or neglect of Provided Equipment or any acts or negligence of any party other than Quorum.

10.3. Disclaimer. **QUORUM MAKES NO WARRANTIES OTHER THAN AS EXPRESSLY PROVIDED HEREIN AND EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF NON-INFRINGEMENT, TITLE, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE TO THE EXTENT PERMITTED BY APPLICABLE LAW. IN PARTICULAR, QUORUM, ITS RESELLERS, PARTNERS AND THEIR RESPECTIVE AFFILIATES MAKE NO WARRANTY THAT (A) THE SERVICE, SUPPORT OR ANY PROVIDED EQUIPMENT WILL MEET YOUR REQUIREMENTS; (B) YOUR USE OF THE SERVICE, SUPPORT OR ANY PROVIDED EQUIPMENT WILL BE TIMELY, UNINTERRUPTED OR ERROR-FREE; OR (C) ANY DEFECTS OR ERRORS IN THE SERVICE OR ANY PROVIDED EQUIPMENT WILL BE CORRECTED.**

11. TERM AND TERMINATION.

11.1. Term and Renewal. This Agreement shall be in effect for the Term; provided that the Term may be extended or terminated as provided herein. This Agreement and your Subscription and Support

will renew automatically at the end of the Term for a one year period, unless a party gives notice to the other party at least 30 calendar days' prior to the expiration of the then-current Term of its intention not to renew. Such renewal will be on the terms of Quorum's then effective Recovery Service Agreement, including the Services as then described on the Site, and at the then-current rates published by Quorum for your Service Level and Support.

11.2. Termination for Default. Either you or Quorum may terminate this Agreement immediately upon notice if the other party should materially breach this Agreement and shall have failed to cure such breach within 30 calendar days of receipt of written notice from the non-breaching party specifying the nature of the breach.

11.3. Effect of Termination Generally. Upon the termination or expiration of this Agreement for any reason, (a) your rights to use the Service, including any Software or Provided Equipment, and to receive Support, immediately terminate; (b) you agree to return promptly all Provided Equipment in accordance with instructions provided by Quorum, and if any Provided Equipment is not received by Quorum within 30 days of the expiration or termination of this Agreement or is received damaged (including due to your negligence in packing and shipping), you will pay Quorum the then current list price of any such Provided Equipment that was not returned or was returned damaged; and (c) you will certify in writing to Quorum that you have returned, destroyed or deleted all copies of the Software in your possession.

11.4. Protected Data. Upon the termination or expiration of this Agreement, Quorum will have no obligation to maintain any of your Protected Data. However, at your written request, Quorum will make available to you, within 15 calendar days of the termination or expiration of this Agreement, access to your Protected Data by re-transmission to your onQ HA Appliance or by other mutually acceptable means. Any access to or transmission of your Protected Data other than by transmission to your onQ HA Appliance will be at your sole expense. You understand and agree that regardless of whether you make arrangements for receipt of your Protected Data as provided above, after such 15-day period Quorum may delete all of the Protected Data from its systems and will have no liability for such action.

11.5. Survival. The expiration or termination of this Agreement will not affect your obligation to pay all amounts due to Quorum accrued prior to termination (or, where applicable, after termination), nor entitle you to reimbursement or refund of any amounts already paid to Quorum. In addition, **Sections 6.1, 6.4, 7.5, 8, 10, 11, 12, 13, 14 and 15** will survive the expiration or termination of this Agreement.

12. LIABILITY LIMIT. **TO THE EXTENT NOT PROHIBITED BY LAW, IN NO EVENT WILL QUORUM, ITS RESELLERS, PARTNERS AND THEIR RESPECTIVE AFFILIATES BE LIABLE FOR ANY INCIDENTAL, SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER, INCLUDING DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, BUSINESS INTERRUPTION, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES OR ANY OTHER COMMERCIAL DAMAGES OR LOSSES, ARISING OUT OF OR RELATED TO YOUR ABILITY TO USE OR INABILITY TO USE THE SERVICE HOWEVER CAUSED, REGARDLESS OF THE THEORY OF LIABILITY AND EVEN IF QUORUM HAS BEEN ADVISED OF THE POSSIBILITY OF DAMAGES. IN NO CASE WILL QUORUM'S TOTAL LIABILITY TO YOU FOR DAMAGES HEREUNDER EXCEED THE AMOUNT PAID TO QUORUM FOR SERVICE UNDER THIS AGREEMENT DURING THE THREE MONTHS PRIOR TO SUCH CLAIM. YOU SPECIFICALLY AGREE THAT THE ALLOCATION OF RISK BY MEANS OF THIS DAMAGES LIMITATION IS A FUNDAMENTAL ELEMENT OF THE BASIS OF THE BARGAIN BETWEEN YOU**

AND QUORUM AND THAT THE PRICING OF THE SERVICE TAKES THIS LIMITATION INTO ACCOUNT. The foregoing does not limit liability for personal injury or death caused by a party.

13. CONFIDENTIALITY.

13.1. Restrictions on Confidential Information. "**Confidential Information**" means any non-public information, data or know-how that is disclosed by a party to this Agreement to the other party in writing, orally or by access to the disclosing party's premises or data and reasonably understood by the receiving party at the time of disclosure to be the confidential or proprietary information of the disclosing party or its customers or suppliers. All Protected Data will be assumed to be your Confidential Information. With respect to Confidential Information, the receiving party will (a) use it solely for the purposes specifically provided in this Agreement; and (b) not disclose it to any person, other than on a need-to-know basis to its own employees or to third party consultants, Affiliates, agents or subcontractors who are bound by nondisclosure agreements at least as strict as this Agreement and who are not competitors of the disclosing party. The receiving party is liable for any misuse of Confidential Information by such employees or third parties. The foregoing obligations will continue for 5 years from the date of disclosure or in perpetuity if the Confidential Information is a trade secret under applicable law. The foregoing obligations do not apply to information that (i) was rightfully in the possession of, or was known by, the receiving party prior to its receipt from the disclosing party, free of any obligation of confidence; (ii) is or becomes generally known to the public without violation of this Agreement; (iii) is obtained by the receiving party from a third party, without an obligation to keep such information confidential; or (iv) is independently developed by or for the receiving party without use of the Confidential Information of the disclosing party. This Section will not affect any other nondisclosure agreement between the parties. If the receiving party is required to disclose Confidential Information pursuant to a judicial or governmental order, or valid subpoena, this Section will not prevent such party from complying with such order or subpoena; however, the receiving party will promptly notify the other party to allow the disclosing party to seek a protective order.

13.2. Terms of this Agreement. Each party agrees to keep confidential and not to disclose the terms and conditions of this Agreement to any third party other than (a) in confidence to its Affiliates, actual or potential investors, banks, lawyers, accountants and other professional advisors; (b) in connection with the enforcement of its rights under this Agreement; (c) as may be required by law, including in connection with the requirements of a public offering or securities filing; (d) in confidence in connection with a merger or acquisition or a proposed merger or acquisition; and (e) by Quorum to the extent the terms and conditions are its then standard terms and conditions.

14. INDEMNITY.

14.1. By Quorum. If a third-party asserts against you a claim that the Service infringes any U.S. patent, copyright or trade secret, Quorum will defend you against such claim at Quorum's expense and pay all damages that a court finally awards or is agreed upon in settlement in connection with such claim. The foregoing indemnity is subject to you promptly notifying Quorum in writing of the claim, allowing Quorum to control the defense or any related settlement negotiations and cooperating with Quorum in the defense of any such claim. Quorum will not effect any settlement of such a claim without your consent, unless such settlement provides you with a full release. If such a claim is made or appears

possible, Quorum may, at its option, secure for you the right to continue to use the Service, modify or replace the Service so it is non-infringing, or, if none of the foregoing options are commercially practicable, in Quorum's reasonable judgment, require you to stop using the Service for a refund or credit of any prepaid subscription fees paid to Quorum for the unused portion of the Term. However, Quorum has no obligation for any claim based on a modified version of the Software or any hardware or the combination, operation, or use of the Service with any software, product, data, or apparatus not provided by Quorum. **THIS SECTION 14.1 STATES QUORUM'S ENTIRE OBLIGATION TO YOU AND YOUR SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO ANY CLAIMS OF INFRINGEMENT.**

14.2. By You. You agree to defend any claim brought against Quorum or its officers, directors or Affiliates by any third party arising from or related to your: (a) violations of law or regulations in connection with the use of the Service; (b) your actual or alleged infringement of a third party's intellectual property rights (except to the extent such infringement is covered by Quorum's indemnification obligations as set forth above); (c) failure to comply with recommended security procedures, including encryption, relating to the Protected Data; or (d) any violation by you of **Section 7**. You agree to pay all damages and costs awarded against Quorum and its officers, directors or Affiliates, by judgment or in settlement, in connection with such a claim as well as any costs incurred by Quorum in response to your request to assist with the defense of the claim.

15. MISCELLANEOUS.

15.1. Export Compliance. You will comply with all applicable laws and regulations in your use of the Service and the onQ HA Appliances. You may not export, re-export or otherwise transfer any portion of the Service, including the onQ HA Appliances, except in full compliance with all applicable laws and regulations, including but not limited to the U.S. Export Administration Act and Regulations.

15.2. Publicity. During the term of this Agreement, unless you request otherwise in writing, Quorum may list you on the Site and in other marketing materials as a customer of Quorum. In addition, you agree to reasonably consider cooperating with Quorum from time to time in connection with serving as a customer reference, providing testimonials for the Service and issuing press releases relating to the relationship between you and Quorum.

15.3. Trademarks and Proprietary Rights Notices. Quorum uses certain trademarks and trade names in connection with the Service. You are not authorized to use any such identifiers for any purpose. You may not remove, alter or cover any copyright notices, trademark notices or other proprietary rights notices placed or embedded on or in the onQ HA Appliances or cause or permit any third party to do any of the foregoing.

15.4. Audit. You agree to implement reasonable controls to ensure compliance with the intended use of the Service, including the onQ HA Appliances, authorized by this Agreement. You agree that Quorum may perform a compliance audit of your use of the Service at any time during your normal business hours, upon reasonable written notice.

15.5. Governing Law; Jurisdiction. This Agreement will be governed and construed by the laws of the State of California, without regard to conflicts of laws rules. You expressly agree that any action at law or in equity arising under this Agreement (other than to enforce a judgment) will be filed only in the Superior Court of the State of California for the County of Santa Clara or the United States District Court for the Northern District of California and you hereby consent and submit to the personal jurisdiction of

such courts for the purposes of litigating any such action. The parties hereby expressly disclaim application of the U.N. Convention for the International Sale of Goods and any state laws enabling such convention.

15.6. Entire Agreement. This Agreement and, to the extent specified in **Section 2.3**, the Quote are the entire agreement between you and Quorum regarding the subject matter herein and supersede any other communications with respect to the Service. There are no promises, terms, conditions or obligations, oral or written, express or implied, between you and Quorum relating to the subject matter hereof other than those contained herein and, to the extent specified in **Section 2.3**, in the Quote.

15.7. Severability; Waiver. If any provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement will continue in full force and effect. Failure by a party to insist upon performance by the other party of any of its obligations under this Agreement will not constitute a waiver of the right to enforce its rights with respect to the same or any other provision.

15.8. Announcements. Announcements and other information relevant to the Service will be posted by Quorum at the Site.

15.9. Assignment. Except pursuant to a merger, acquisition or business combination involving a party, including a sale of all or substantially all of the assets of a party related to this Agreement, neither party may assign this Agreement, by operation of law or otherwise, without the prior written consent of the other party, which will not be unreasonably withheld. Any prohibited assignment, sublicense, or transfer will be null and void. Subject to the foregoing, this Agreement will be binding upon the successors and assigns of both parties.

15.10. Attorneys' Fees. The prevailing party in any legal action brought to enforce or interpret this Agreement, will be entitled to recover all reasonable costs and expenses, including attorneys' fees, incurred in connection with such action.

15.11. *Force Majeure.* The performance by you or Quorum of any your or its obligations hereunder (other than the payment of money) will be excused during any period of time in which the failure to perform results from acts of God, the elements, fire, flood, component shortages, failures of power or telecommunication services, *force majeure*, riot, insurrection, industrial dispute, accident, war, embargoes, legal restrictions or any other cause beyond the reasonable control of such party.

15.12. Other Interpretive Provisions. References in this Agreement to "Sections" are to sections herein, unless otherwise indicated. The words "include" and "including" and words of similar import when used in this Agreement will not be construed to be limiting or exclusive. For purposes of this Agreement, the word "will" shall be equivalent in meaning to the word "shall," both of which describe an act or forbearance which is mandatory under this Agreement. Except as provided in a particular context, the word "or" when used in this Agreement may mean each as well as all alternatives. Headings in this Agreement are for convenience of reference only and are not part of the substance hereof. All terms defined in this Agreement in the singular form will have comparable meanings when used in the plural form and *vice versa*.