

QELLUS

EC America Rider to Product Specific License Terms and Conditions (for U.S. Government End Users)

1. **Scope.** This Rider and the attached Qellus ("Manufacturer") product specific license terms establish the terms and conditions enabling EC America ("Contractor") to provide Manufacturer's information technology products and services to Ordering Activities under EC America's GSA MAS IT contract number GS-35F-0511T (the "Schedule Contract"). Installation and use of the information technology shall be in accordance with this Rider and Manufacturer Specific Terms attached hereto, unless an Ordering Activity determines that it requires different terms of use and Manufacturer agrees in writing to such terms in a valid delivery order placed pursuant to the Schedule Contract.
2. **Applicability.** Whereas GSA and EC America agreed at the time of Schedule Contract award upon a base set of terms and conditions applicable to all manufacturers and items represented on the Schedule Contract; and Whereas, the parties further agreed that all product specific license, warranty and software maintenance terms and conditions would be submitted at the time each new manufacturer was to be added to the Schedule Contract; Now, Therefore, the parties hereby agree that the product specific license, warranty and software maintenance terms set forth in Attachment A hereto (the "Manufacturer Specific Terms" or the "Attachment A Terms") are incorporated into the Schedule Contract, but only to the extent that they are consistent with Federal law, including but not limited to GSAR 552.212-4 Contract Terms and Conditions-Commercial Items. To the extent any Attachment A Terms are inconsistent with Federal law (See, FAR 12.212(a)), such inconsistent terms shall be superseded, unenforceable and of no legal force or effect in all resultant orders under the Schedule Contract, including but not limited to the following provisions:
 - a) **Contracting Parties.** The GSA Customer ("Licensee") is the "Ordering Activity", defined as the entity authorized to order under GSA MAS contracts as set forth in GSA Order OGP 4800.2I, as may be revised from time to time.
 - b) **Changes to Work and Delays.** Subject to GSAR Clause 552.238-81, Modifications (Federal Supply Schedule) (April 2014) (Alternate I – JUN 2016) and (Alternate II – JUN 2016), and 52.212-4(f) Excusable Delays (JUN 2010) regarding which the GSAR and the FAR provisions take precedence.
 - c) **Contract Formation.** Subject to FAR 1.601(a) and FAR 43.102, the GSA Customer Purchase Order must be signed by a duly warranted Contracting Officer, in writing. The same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government.
 - d) **Termination.** Clauses in the Manufacturer Specific Terms referencing termination or cancellation are superseded and not applicable to any GSA Customer order. Termination shall be governed by the FAR, the underlying GSA Schedule Contract and the terms in any applicable GSA Customer Purchase Orders. If the Contractor believes the GSA Customer to be in breach, it must file a claim with the Contracting Officer and continue to diligently pursue performance. In commercial item contracting under FAR 12.302(b), the FAR provisions dealing with disputes and continued performance cannot be changed by the Contracting Officer.
 - e) **Choice of Law.** Subject to the Contracts Disputes Act, the validity, interpretation and enforcement of this Rider shall be governed by and construed in accordance with the Federal laws of the United States. In the event the Uniform Computer Information Transactions Act (UCITA) or any similar Federal laws or regulations are enacted, to the extent allowed by Federal law, they will not apply to this Rider or the underlying Schedule Contract.
 - f) **Equitable remedies.** Equitable remedies are generally not awarded against the Government absent a statute providing therefore. In the absence of a direct citation to such a statute, all clauses in the Manufacturer Specific Terms referencing equitable remedies are superseded and not applicable to any GSA Customer order.
 - g) **Unilateral Termination.** Unilateral termination by the Contractor does not apply to a GSA Customer Purchase Order and all clauses in the Manufacturer Specific Terms referencing unilateral termination rights of the Manufacturer are hereby superseded.
 - h) **Unreasonable Delay.** Subject to FAR 52.212-4(f) Excusable delays, the Contractor shall be liable for default unless the nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and

without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

- i) **Assignment.** All clauses regarding the Contractor's assignment are subject to FAR 52.232-23, Assignment of Claims (JAN 1986) and FAR 42.12 Novation and Change-of-Name Agreements (Sep. 2013). All clauses governing the Contractor's assignment in the Manufacturer Specific Terms are hereby superseded.
- j) **Waiver of Jury Trial.** Waivers of Jury Trials are subject to FAR 52.233-1 Disputes (JULY 2002). The Government will not agree to waive any right that it may have under Federal law. All clauses governing a waiver of jury trial in the Manufacturer Specific Terms are hereby superseded.
- k) **Government Indemnities.** This is an obligation in advance of an appropriation that violates anti-deficiency laws (31 U.S.C. § 1341 and 41 U.S.C. § 6301), since the GSA Customer commits to pay an unknown amount at an unknown future time. The violation occurs when the commitment is made, i.e., when the agreement featuring this clause is incorporated into a Government contract, and not when the clause is triggered. The Interim FAR Rule dated June 21, 2013 and the Office of Legal Counsel opinion dated March 12, 2012 prohibit such indemnifications. All Manufacturer Specific Terms referencing customer indemnities are hereby superseded.
- l) **Contractor Indemnities.** All Manufacturer Specific Terms that violate DOJ's jurisdictional statute (28 U.S.C. § 516) by requiring that the Government give sole control over the litigation and/or settlement to the Contractor are hereby superseded. Nothing contained in the Manufacturer's Specific terms shall be construed in derogation of the U.S. Department of Justice's right to defend any claim or action brought against the U.S., pursuant to its jurisdictional statute.
- m) **Renewals.** All Manufacturer Specific Terms that provide for automatic renewals violate the Anti-Deficiency Act and are hereby superseded. This is an obligation in advance of an appropriation that violates anti-deficiency laws (31 U.S.C. § 1341 and 41 U.S.C. § 6301), since the GSA Customer commits to pay an unknown amount at an unknown future time. The violation occurs when the commitment is made, i.e., when the agreement featuring this clause is incorporated into a Government contract, and not when the clause is triggered.
- n) **Future Fees or Penalties.** All Manufacturer Specific Terms that require the Government to pay any future fees, charges or penalties are hereby superseded unless specifically authorized by existing statutes, such as the Prompt Payment Act (31 U.S.C. § 3901 et seq.) or Equal Access To Justice Act (5 U.S.C. § 504; 28 U.S.C. § 2412).
- o) **Taxes.** Taxes are subject to FAR 52.212-4(k), which provides that the contract price includes all applicable federal, state, local taxes and duties. Contractor shall state separately on its invoices, taxes excluded from the fees, and the GSA Customer agrees to either pay the amount of the taxes (based on the current value of the equipment or services) to Contractor or provide it evidence necessary to sustain an exemption, in accordance with FAR 52.229-1 and FAR 52.229-3.
- p) **Third Party Terms.** When the end user is an instrumentality of the U.S., no license terms bind the GSA Customer unless included in the EULA, and the EULA is made an attachment to the underlying GSA Schedule Contract. All terms and conditions affecting the GSA Customer must be contained in a writing signed by a duly warranted Contracting Officer. Any third party manufacturer shall be brought into the negotiation, or the components acquired separately under federally-compatible agreements, if any.
- q) **Dispute Resolution and Standing.** Any disputes relating to the Manufacturer Specific Terms or to this Rider shall be resolved in accordance with the FAR, the underlying GSA Schedule Contract, any applicable GSA Customer Purchase Orders, and the Contract Disputes Act. The Ordering Activity expressly acknowledges that EC America as contractor, on behalf of the Manufacturer, shall have standing to bring such claim under the Contract Disputes Act.

- r) **Advertisements and Endorsements.** Pursuant to GSAR 552.203-71, use of the name or logo of any U.S. Government entity is prohibited. All Manufacturer Specific Terms that allow the Contractor to use the name or logo of a Government entity are hereby superseded.
 - s) **Public Access to Information.** EC America agrees that the attached Manufacturer Specific Terms and this Rider contain no confidential or proprietary information and acknowledges the Rider shall be available to the public.
 - t) **Confidentiality.** Any provisions in the attached Manufacturer Specific Terms that require the Ordering Activity to keep certain information confidential are subject to the Freedom of Information Act (5 U.S.C. § 552), and any order by a United States Federal Court. When the end user is an instrumentality of the U.S. Government, neither this Rider, the Manufacturer's Specific Terms nor the Schedule Price List shall be deemed "confidential information" notwithstanding marking to that effect. Notwithstanding anything in this Rider, the Manufacturer's Specific Terms or the Schedule Contract to the contrary, the GSA Customer may retain such Confidential Information as required by law, regulation or its bonafide document retention procedures for legal, regulatory or compliance purposes; provided however, that such retained Confidential Information will continue to be subject to the confidentiality obligations of this Rider, the Manufacturer's Specific Terms and the Schedule Contract.
 - u) **Alternate Dispute Resolution.** The GSA Customer cannot be forced to mediate or arbitrate. Arbitration requires prior guidance by the head of a Federal agency promulgated via administrative rulemaking according to 5 U.S.C. § 575(c). GSA has not issued any because it considers the Board of Contract Appeals to be an adequate, binding ADR alternative. All Manufacturer Specific Terms that allow the Contractor to choose arbitration, mediation or other forms of alternate dispute resolution are hereby superseded.
- 3. Order of Precedence/Conflict.** To the extent there is a conflict between the terms of this Rider and the terms of the underlying Schedule Contract or a conflict between the terms of this Rider and the terms of an applicable GSA Customer Purchase Order, the terms of the GSA Schedule Contract or any specific, negotiated terms on the GSA Customer Purchase Order shall control over the terms of this Rider. Any capitalized terms used herein but not defined, shall have the meaning assigned to them in the underlying Schedule Contract.



EULA

Your use of the Product is pursuant to this End User License Agreement ("**EULA**"), which is an agreement between Ordering Activity under GSA Schedule contracts identified in the Order (the user of the Product) and Qellus, and is on behalf of the company providing you access to the Product ("**Customer**") pursuant to an agreement between Customer and Qellus (either directly or indirectly) ("**Agreement**").

YOUR ACCESS AND USE OF THE SERVICE IS CONDITIONED UPON YOUR ACCEPTING THIS EULA AND YOU AGREE (YOURSELF AND ON BEHALF OF YOUR EMPLOYER) TO BE BOUND BY THE TERMS AND CONDITIONS SET FORTH HEREIN.

1. License and Restrictions.

(a) Subject to your compliance with the terms and conditions of this EULA and Agreement, you shall have a non-exclusive, revocable, non-transferable, non-sublicensable, perpetual right to use the Product solely in connection with your performing your duties and services for the Customer, and for no other purposes. All rights to use the Product are expressly stated herein, and Qellus reserves all other rights.

(b) There is no implied right to use the Product. You shall not: (i) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share, or similarly commercially exploit or use the Product to provide services for third parties; (ii) include the Product in other software or databases, or hyperlink, index, or otherwise utilize the Product by automated software means, including: search engines, robots, spiders, crawlers, data mining tools, or any other software that aggregates access to, the Product, (iii) combine the Product with other knowledge banks or through similar technologies; (iv), modify, translate, reverse engineer, disassemble, decompile, create derivative works of, copy, distribute, publish, publicly display, transmit or download for storage the Product; (v) share, distribute, publish, or disclose the Product except within Customer's Sites to the extent necessary; (vi) use the Product in any manner that violates any applicable law; (vii) subscribe for or use the Product with the intent to build a competitive product or service, build a product or service using similar features, ideas, functions, content, or graphics, or copy any ideas, features, functions, or graphics of the Product; (viii) violate or attempt to violate or circumvent any security procedures of the Product; (iv) upload or distribute any files that contain Harmful Code, corrupted files or any other similar software or programs that may damage the operation of the Product; (x) probe, scan, test the vulnerability of, or circumvent any security mechanisms of servers, or networks through which the Product is accessed; (xi) maliciously reduce or impair the accessibility of the Product; (xi) remove any copyright, trademark or other proprietary rights notices; or (xii) use the Product to process or store information or data outside the scope of the Product. Qellus reserves the right, but has no obligation, to take remedial action if any data you enter or process with the Product violates any of the foregoing restrictions, including the removal, deletion, or disablement of access to such data. Qellus shall have no liability to you in the event that Qellus takes such action.

2. **Suspension or Termination.** This EULA will terminate in the event of the termination or expiration of the Agreement, or termination of your status as an "**Authorized User**" (as determined by Customer and/or the Agreement). When the End User is an instrumentality of the U.S., recourse against the United States for any alleged breach of this Agreement must be brought as a dispute under the contract Disputes Clause (Contract Disputes Act). During any dispute under the Disputes Clause, Qellus shall proceed diligently with performance of this Agreement, pending final resolution of any request for relief, claim, appeal, or action arising under the Agreement, and comply with any decision of the Contracting Officer.

3. **Confidentiality.** the Product, and the use thereof, may include, or constitute, or expose proprietary, confidential, or sensitive information (“**Confidential Information**”) of Qellus or its licensors. You shall not use Confidential Information for any purpose other than for your permitted uses of the Product. You shall not disclose Confidential Information to any third parties, without Qellus’ written permission. You agree that any and all suggestions, ideas, feedback, improvements, recommendations, strategies, data, or other information provided by you to Qellus regarding the Products can be freely used by Qellus for any purpose it determines, and hereby assign all rights therein to Qellus. Qellus recognizes that Federal agencies are subject to the Freedom of Information Act, 5 U.S.C. 552, which may require that certain information be released, despite being characterized as “confidential” by the vendor.

4. **Qellus Intellectual Property Rights.** Qellus owns or licenses all right, title and interest, including all intellectual property rights, in and to: (i) the Product, any manuals, instructions, specifications, or other documents or materials which describe the functionality, components, features, or requirements of the Product (“**Documentation**”), and other audio or visual information, documents, software (including object and source code) and works of authorship related to the Product; (ii) the Qellus name, logo, domain names, visual look and feel, product and service names associate with the Product, and other trademarks, trade dress and service marks; (iii) inventions, discoveries, technology, software, hardware, products, processes, algorithms, user interfaces, know-how and other trade secrets, techniques, designs, and other tangible or intangible technical material or information related to the Product or the Documentation; and (iv) all feedback and improvements (collectively, the “**Qellus Proprietary Rights**”). You acknowledge the Product is provided as a service pursuant to the license set forth above, and is not sold to you and that no title or rights of ownership transfer to you under this EULA. You shall not challenge or assist others in challenging the Qellus Proprietary Rights. Qellus and/or its Third Party Providers shall retain all rights not expressly granted hereunder.

5. **Waiver of Warranty**

(a) Qellus represents, warrants, and covenants that the Product will perform in a manner that materially complies with the Documentation, only during the period that Qellus provides maintenance and support services for the Product pursuant to the Agreement. QELLUS PROVIDES THE PRODUCT TO YOU ON AN "AS IS" BASIS. ANY USE OF THE SERVICE IS AT THE YOUR OWN RISK. QELLUS AND ITS THIRD PARTY PROVIDERS MAKE NO WARRANTY OR GUARANTY AS TO THE RELIABILITY, TIMELINESS, QUALITY, SECURITY, SUITABILITY, TRUTH, AVAILABILITY, ACCURACY, OR COMPLETENESS OF THE PRODUCT. QELLUS MAKES NO OTHER WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE IN FACT OR IN LAW, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NONINFRINGEMENT.

6. **LIMITATION OF LIABILITY.** TO THE FULLEST EXTENT PERMITTED UNDER THE APPLICABLE LAW, IN NO EVENT SHALL QELLUS OR ITS THIRD PARTY PROVIDERS HAVE ANY LIABILITY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, PUNITIVE, MULTIPLE, OR EXEMPLARY DAMAGES OF ANY KIND ARISING OUT OF OR RELATING TO THIS EULA HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY, OR FOR DAMAGES ARISING FROM OR RELATED TO LOSS OF PROFITS, LOSS OF DATA, HARM TO REPUTATION OR INDIRECT ECONOMIC DAMAGE FOR ANY CONSEQUENCES ATTRIBUTABLE TO OR RELATED TO ANY USE, MISUSE, INABILITY TO USE, ERRORS, SEQUENCING, COMPLETENESS, OR ACCURACY OF DATA OR INFORMATION CONTAINED OR NOT CONTAINED IN THE PRODUCT REGARDLESS OF WHETHER THE PARTY ALLEGEDLY LIABLE WAS ADVISED, HAD OTHER REASON TO KNOW, OR IN FACT KNEW OF THE POSSIBILITY THEREOF. IN NO EVENT SHALL QELLUS’ TOTAL AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS EULA, REGARDLESS OF THE FORUM AND REGARDLESS OF WHETHER ANY ACTION OR CLAIM IS BASED ON CONTRACT, NEGLIGENCE, TORT, STRICT LIABILITY, OR OTHERWISE, EXCEED THE TOTAL AMOUNTS PAID TO QELLUS UNDER THE AGREEMENT. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY. THE ALLOCATIONS OF LIABILITY IN THIS SECTION 6 REPRESENTS THE AGREED, BARGAINED-FOR UNDERSTANDING OF THE PARTIES AND QELLUS’ COMPENSATION HEREUNDER REFLECTS SUCH ALLOCATIONS, AND SHALL APPLY EVEN IF A REMEDY OR WARRANTY FAILS FOR ITS ESSENTIAL

PURPOSE. THE FOREGOING LIMITATION OF LIABILITY SHALL NOT APPLY TO (1) PERSONAL INJURY OR DEATH RESULTING FROM LICENSOR'S NEGLIGENCE; (2) FOR FRAUD; OR (3) FOR ANY OTHER MATTER FOR WHICH LIABILITY CANNOT BE EXCLUDED BY LAW.

7. **Reserved.** .

8. **Miscellaneous.** This EULA shall be binding upon and inure to the benefit of the parties, and their respective successors and permitted assigns. You may not assign or delegate this EULA, or any portion thereof, to any other person or entity. No failure or delay by either party in exercising any right, power, or remedy under this EULA shall operate as a waiver of any such right, power, or remedy. Any provision of this EULA held or determined by a court (or other legal authority) of competent jurisdiction to be illegal, invalid, or unenforceable in any jurisdiction shall be deemed separate, distinct and independent, and shall be removed, changed and/or interpreted so as to best accomplish the objectives of the original provision to the fullest extent allowed by law and the remaining provisions of this EULA shall remain in full force and effect. The parties are independent contractors. Neither party shall be deemed to be an employee, agent, partner, or legal representative of the other for any purpose nor shall either have any right, power, or authority to create any obligation or responsibility, express or implied. This Agreement is governed by and construed in accordance with the Federal laws of the United States.

PASS THROUGH TERMS

Reseller's sublicensing of the Product to the licensee ("Customer") is pursuant to these Pass Through Terms which shall form a part of Reseller's written agreement with Customer (directly or indirectly).

1. License and Restrictions.

(a) Subject to Customer's compliance with the terms and conditions of these Pass Through Terms, Customer shall have a non-exclusive, revocable, non-transferable, non-sublicensable, perpetual right to use the Product and any manuals, instructions, specifications, or other documents or materials which describe the functionality, components, features, or requirements of the Product ("**Documentation**") solely for Customer's internal use as limited by Customer's agreement with Reseller, and for no other purposes. All rights to use the Product are expressly stated herein, and Qellus reserves all other rights.

(b) There is no implied right to use the Product. Customer shall not: (i) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share, or similarly commercially exploit or use the Product to provide services for third parties; (ii) include the Product in other software or databases, or hyperlink, index, or otherwise utilize the Product by automated software means, including: search engines, robots, spiders, crawlers, data mining tools, or any other software that aggregates access to, the Product, (iii) combine the Product with other knowledge banks or through similar technologies; (iv), modify, translate, reverse engineer, disassemble, decompile, create derivative works of, copy, distribute, publish, publicly display, transmit or download for storage the Product; (v) share, distribute, publish, or disclose the Product; (vi) use the Product in any manner that violates any applicable law; (vii) subscribe for or use the Product with the intent to build a competitive product or service, build a product or service using similar features, ideas, functions, content, or graphics, or copy any ideas, features, functions, or graphics of the Product; (viii) violate or attempt to violate or circumvent any security procedures of the Product; (iv) upload or distribute any files that contain Malware, corrupted files or any other similar software or programs that may damage the operation of the Product; (x) probe, scan, test the vulnerability of, or circumvent any security mechanisms of servers, or networks through which the Product is accessed; (xi) maliciously reduce or impair the accessibility of the Product; (xi) remove any copyright, trademark or other proprietary rights notices; or (xii) use the Product to process or store information or data outside the scope of the Product. Qellus reserves the right, but has no obligation, to take remedial action if any data Customer enters or process with the Product violates any of the foregoing restrictions, including the removal, deletion, or disablement of access to such data. Qellus shall have no liability to Customer in the event that Qellus takes such action.

2. Suspension or Termination. These Pass Through terms, and the license set forth in Section 1 above, shall terminate in the event of the termination or expiration of Customer's agreement with Reseller. In addition, Qellus may terminate these terms and the license in accordance with the Contract Disputes Act, in the event that Customer breaches any provision of these Pass Through terms, that is not cured within thirty (30) days of notice to Customer or to the Reseller.

3. Confidentiality. The Product and Documentation may include, or constitute, or expose proprietary, confidential, or sensitive information ("**Confidential Information**") of Qellus or its licensors. Customer shall not use Confidential Information for any purpose other than for permitted uses of the Product. Customer shall not disclose Qellus Confidential Information to any third parties, without Qellus' written permission except if required by FOIA.

4. Qellus Intellectual Property Rights. Qellus owns or licenses all right, title and interest, including all intellectual property rights, in and to: (i) the Product, the Documentation, and other audio or visual information, documents, software (including object and source code) and works of authorship related to the Product; (ii) the Qellus name, logo, domain names, visual look and feel, product and service names associate with the Product, and

other trademarks, trade dress and service marks; (iii) inventions, discoveries, technology, software, hardware, products, processes, algorithms, user interfaces, know-how and other trade secrets, techniques, designs, and other tangible or intangible technical material or information related to the Product or the Documentation; and (iv) all feedback and improvements (collectively, the “**Qellus Proprietary Rights**”). Customer acknowledges the Product is provided as a service pursuant to the license set forth above, and is not sold to Customer and that no title or rights of ownership is transferred to Customer pursuant to these Pass Through Terms. Customer shall not challenge or assist others in challenging the Qellus Proprietary Rights. Qellus and/or its Third Party Providers shall retain all rights not expressly granted hereunder.

5. **Warranty, Waiver of Warranty.** Qellus represents, warrants, and covenants that the Product will perform in a manner that materially complies with the Documentation, only during the period that Qellus provides maintenance and support services for the Product pursuant to Customer’s agreement with the Reseller. OTHERWISE, QELLUS PROVIDES THE PRODUCT ON AN "AS IS" BASIS. ANY USE OF THE PRODUCT IS AT THE SUBLICENSEE’S OWN RISK. QELLUS AND ITS THIRD PARTY PROVIDERS MAKE NO WARRANTY OR GUARANTY AS TO THE RELIABILITY, TIMELINESS, QUALITY, SECURITY, SUITABILITY, TRUTH, AVAILABILITY, ACCURACY, OR COMPLETENESS OF THE PRODUCT. QELLUS MAKES NO OTHER WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE IN FACT OR IN LAW, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NONINFRINGEMENT.

6. **LIMITATION OF LIABILITY.** TO THE FULLEST EXTENT PERMITTED UNDER THE APPLICABLE LAW, IN NO EVENT SHALL QELLUS OR ITS THIRD PARTY PROVIDERS HAVE ANY LIABILITY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES OF ANY KIND ARISING OUT OF OR RELATING TO THESE PASSTHROUGH TERMS HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY, OR FOR DAMAGES ARISING FROM OR RELATED TO LOSS OF PROFITS, LOSS OF DATA, HARM TO REPUTATION OR INDIRECT ECONOMIC DAMAGE FOR ANY CONSEQUENCES ATTRIBUTABLE TO OR RELATED TO ANY USE, MISUSE, INABILITY TO USE, ERRORS, SEQUENCING, COMPLETENESS, OR ACCURACY OF DATA OR INFORMATION CONTAINED OR NOT CONTAINED IN THE PRODUCT REGARDLESS OF WHETHER THE PARTY ALLEGEDLY LIABLE WAS ADVISED, HAD OTHER REASON TO KNOW, OR IN FACT KNEW OF THE POSSIBILITY THEREOF. IN NO EVENT SHALL QELLUS’ TOTAL AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THESE PASSTHROUGH TERMS, REGARDLESS OF THE FORUM AND REGARDLESS OF WHETHER ANY ACTION OR CLAIM IS BASED ON CONTRACT, NEGLIGENCE, TORT, STRICT LIABILITY, OR OTHERWISE, EXCEED THE FEES PAID TO QELLUS UNDER THE AGREEMENT BETWEEN QELLUS AND CUSTOMER IN THE 6 MONTHS PRECEDING THE EVENT GIVING RISE TO THE CLAIM. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY. THE ALLOCATIONS OF LIABILITY IN THIS SECTION 6 REPRESENTS THE AGREED, BARGAINED-FOR UNDERSTANDING OF THE PARTIES AND QELLUS’S COMPENSATION HEREUNDER REFLECTS SUCH ALLOCATIONS, AND SHALL APPLY EVEN IF A REMEDY OR WARRANTY FAILS FOR ITS ESSENTIAL PURPOSE. THE FOREGOING LIMITATION OF LIABILITY SHALL NOT APPLY TO (1) PERSONAL INJURY OR DEATH RESULTING FROM LICENSOR’S NEGLIGENCE; (2) FOR FRAUD; OR (3) FOR ANY OTHER MATTER FOR WHICH LIABILITY CANNOT BE EXCLUDED BY LAW.

7. **Additional Terms and Conditions.** These Pass Through Terms shall be binding upon and inure to the benefit of the parties, and their respective successors and permitted assigns. No modification, amendment, or waiver of any provision of these Pass Through Terms shall be effective unless agreed to in writing by Qellus. No failure or delay by Qellus in exercising any right, power, or remedy under these Pass Through Terms shall operate as a waiver of any such right, power, or remedy. Any provision of these Pass Through Terms held or determined by a court (or other legal authority) of competent jurisdiction to be illegal, invalid, or unenforceable in any jurisdiction shall be deemed separate, distinct and independent, and shall be removed, changed and/or interpreted so as to best accomplish the objectives of the original provision to the fullest extent allowed by law and the remaining provisions of these Pass Through Terms shall remain in full force and effect. The parties are independent contractors. Neither party shall be deemed to be an employee, agent, partner, or legal representative of the other for any purpose nor shall either have any right, power, or authority to create any obligation or responsibility,

express or implied. This Agreement is governed by and construed in accordance with the Federal laws of the United States.