



## Master Software & Services Agreement

By accepting this Software & Services Agreement (the "Agreement"), you (referred to as "You" or the "Customer") agree to follow and be bound by the terms and conditions of this Agreement with PrimaryIO (the "Company"). Company and Customer acknowledge and agree that this Agreement shall be effective immediately upon the date that Customer clicks the "I ACCEPT" button (the "Effective Date").

This service agreement governs the use of the Services (defined below) provided by PrimaryIO, to you, the customer.

### AGREEMENT

WHEREAS, Customer desires to obtain access to the ConvertIO software platform and services with respect to certain of its information technology needs; and PrimaryIO wishes to provide the software platform and services to Customer, each on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

### 1. SERVICES

- 1.1. **Purpose:** This Agreement sets forth the terms and conditions under which the Company agrees to provide
  - i. Virtual machine conversion service ("Conversion Services") solution called ConvertIO (together with any applicable documentation thereto, and programming and user interfaces therefor, a "Platform") to Authorized Users
- 1.2. **Services:** Subject to the terms and conditions of this Agreement, during the Term, PrimaryIO shall use commercially reasonable efforts to provide
  - i. Customer and Authorized Users access to the software platform, and
  - ii. Customer with the Professional Services, and
  - iii. Customer with reasonable technical support servicesSubject to the terms and conditions of this Agreement, during the Term, the Company hereby grants Customer and Authorized Users a non-exclusive, non-sublicensable, non-transferable, worldwide license to access and use the ConvertIO platform, solely for internal business purposes as set forth herein.
- 1.3. **Professional Services:** Each applicable Statement of Work/Order document shall specify and further describe the Professional Services to be provided in accordance with the representations and warranties set forth herein, and may, but need not, include, the

Professional Services offered, limitations, milestones, fees, term and other applicable terms and conditions.

- 1.4. **Changes to Platform**: The Company may, in its sole discretion, make any changes to the software platform that it deems necessary or useful to
  - i. maintain or enhance-
    - a. the quality or delivery of Company's products or services to its customers,
    - b. the competitive strength of, or market for, Company's products or services,
    - c. such Platform's cost efficiency or performance, or
  - ii. to comply with applicable law.

## 2. AUTHORIZED USER

- 2.1. **Administrative Access**. During the conversion and migration processes, Customer will identify an administrative resource and credentials in the appropriate Customer systems to enable the requisite project tasks and software implementations in order to successfully accomplish the automated conversions and migrations from VMware to IBM Cloud. This will require credentials to be provided by Customer to Company in both VMware and IBM Cloud environments.
- 2.2. **Authorized Users**. Any Company-provided access to software platform and associated Customer use are for designated Customer Authorized Users and cannot be shared or used by more than one Authorized User, but may be reassigned to new Authorized Users replacing former Authorized Users who no longer require ongoing use of the applicable Platform. Any Customer-provided access to systems are for designated Company Authorized Users. Access is only for authorized use and users during the term of this Agreement.
- 2.3. **Authorized User Conditions to Use**. As a condition to access and use of a Platform,
  - i. Each Authorized User shall agree to abide by the terms of the Company's end-user terms of use which it may adopt from time to time.
  - ii. Customer Users shall agree to abide by the terms of this Agreement, or a subset thereof.
  - iii. Customer shall immediately notify PrimaryIO of any violation of the terms of any of the foregoing by any Authorized User upon becoming aware of such violation and shall be liable for any breach of the foregoing agreements by any Authorized User.
- 2.4. **Account Responsibility**.
  - a. Customer will be responsible for



- i. all uses of any Platform account that Customer has access to, whether or not Customer has authorized the particular use or user, and regardless of Customer's knowledge of such use, and
  - ii. securing its Company account, passwords (including but not limited to administrative and user passwords) and files.
- b. The Company is not responsible for any losses, damages, costs, expenses or any loss of information claims that result from stolen or lost passwords by any users.

### 3. RESTRICTIONS AND RESPONSIBILITIES

3.1. **Software Restrictions.** Customer will not, nor permit or encourage any third party to, directly or indirectly –

- i. reverse engineer, decompile, disassemble, or otherwise attempt to discover or derive the source code, object code or underlying structure, ideas, know-how or algorithms relevant to a Platform or any software, documentation or data related to a Platform ("Software") or Services.
- ii. modify, translate, or create derivative works based on a Platform or any Software (except to the extent expressly permitted by Company or authorized within the Services)
- iii. use a Platform or any Software for timesharing, resale or service bureau purposes or other computer service to a third party.
- iv. modify, remove, or obstruct any proprietary notices or labels; or
- v. use any Software or a Platform in any manner to assist or take part in the development, marketing, or sale of a product potentially competitive with such Software or Platform.

For the avoidance of doubt, Software and the Services, including all user-visible aspects of the Services, are the Confidential Information of the Company, and Customer will comply with Section 4 with respect thereto.

3.2. **Customer Compliance.** Customer shall use, and will ensure that all Authorized Users use, the Platform, Software, and the Services in full compliance with this Agreement, and all applicable laws and regulations. Customer represents and warrants that it

- i. has accessed and reviewed any terms of use or other policies relating to a Platform provided by the Company.
- ii. understands the requirements thereof, and
- iii. agrees to comply therewith.

The Company may suspend Customer's account and access to the Platform and performance of the Services at any time and without notice if the Company believes



that Customer is in violation of this Agreement. Although Company has no obligation to monitor Customer's use of a Platform or services, Company may do so and may prohibit any use it believes may be (or alleged to be) in violation of the foregoing.

- 3.3. **Cooperation**. Customer shall provide all cooperation and assistance as PrimaryIO may reasonably request to enable PrimaryIO to perform its obligations under, and in connection with, this Agreement.
- 3.4. **Training and Education**. Customer shall use commercially reasonable efforts to cause Customer Users, if any, to be educated and trained in the proper use and operation of Platform that Customer Users utilize, and to ensure that Platform is used in accordance with applicable manuals, instructions, specifications, and documentation provided by the Company.
- 3.5. **Customer systems**. Customer shall be responsible for obtaining and maintaining both the functionality and security of any equipment and ancillary services needed to connect to, access or otherwise use the Platform, including hardware, routers, firewalls, servers, software, operating systems, networking, web servers and the like (collectively, "Equipment").
- 3.6. **Restriction on export**. Customer may not remove or export from the United States or allow the export or reexport of the Services, Software or anything related to a Platform, or any direct product thereof in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority.
- 3.7. **DFARS**. Software, Platform and the Services and any documentation provided by PrimaryIO are deemed to be "commercial computer software" and "commercial computer software documentation" pursuant to Defense Federal Acquisition Regulation Supplement, codified under Chapter 2 of Title 48, United States Code of Federal Regulations, Section 227.7202, and Federal Acquisition Regulation, codified in Title 48 of the United States Code of Federal Regulations, Section 12.12. Any use, modification, reproduction, release, performance, display, or disclosure of the Software or documentation by the United States Government is governed solely by the terms of this Agreement and is prohibited except to the extent expressly permitted by this Agreement.

#### 4. CONFIDENTIALITY

- 4.1. **Confidential Information**. Each party (the "Receiving Party") understands that the other party (the "Disclosing Party") has been, and may be, exposed to or acquired business,



technical or financial information relating to the Disclosing Party's business (hereinafter referred to as "Confidential Information"). Confidential Information of Company includes non-public information regarding features, functionality and performance of the Platform and Software. Confidential Information of Customer includes non-public data provided by Customer to Company to enable the provision of access to, and use of, the Services as well as all content, data and information recorded and stored by each Platform for Customer ("Customer Data"). The terms and conditions of this Agreement, including all pricing and related metrics, are Company's Confidential Information.

- 4.2. **Exceptions.** Notwithstanding anything to the contrary contained herein, Confidential Information shall not include any information that the Receiving Party can document (i) is or becomes generally available to the public, (ii) was in its possession or known by it prior to receipt from the Disclosing Party, (iii) was rightfully disclosed to it without restriction by a third party, or (iv) was independently developed without use of any Confidential Information of the Disclosing Party.
- 4.3. **Non-use and Non-disclosure.** With respect to Confidential Information of the Disclosing Party, the Receiving Party agrees to: (i) use the same degree of care to protect the confidentiality, and prevent the unauthorized use or disclosure, of such Confidential Information it uses to protect its own proprietary and confidential information of like nature, which shall not be less than a reasonable degree of care, (ii) hold all such Confidential Information in strict confidence and not use, sell, copy, transfer reproduce, or divulge such Confidential Information to any third party, (iii) not use such Confidential Information for any purposes whatsoever other than the performance of, or as otherwise authorized by, this Agreement.
- 4.4. **Compelled Disclosure.** Notwithstanding Section 4.3, the Receiving Party may disclose Confidential Information of the Disclosing Party to the extent necessary to comply with a court order or applicable law; provided, however that the Receiving Party delivers reasonable advance notice of such disclosure to the Disclosing Party and uses reasonable efforts to secure confidential treatment of such Confidential Information, in whole or in part.
- 4.5. **Remedies for Breach of Obligation of Confidentiality.** The Receiving Party acknowledges that breach of its obligation of confidentiality may cause irreparable harm to the Disclosing Party for which the Disclosing Party may not be fully or adequately compensated by recovery of monetary damages. Accordingly, in the event of any violation, or threatened violation, by the Receiving Party of its obligations under this Section, the Disclosing Party shall be entitled to seek injunctive relief from a court



of competent jurisdiction in addition to any other remedy that may be available at law or in equity, without the necessity of posting bond or proving actual damages.

## 5. PROPRIETARY RIGHTS

5.1. **Ownership.** Customer shall own all right, title and interest in and to the Customer Data, as well as any data that is based on or derived from the Customer Data and provided to Customer as part of the Services.. The Company shall own and retain all right, title and interest in and to

- i. Platform, Software and the Services and all improvements, enhancements, or modifications thereto
- ii. any software, applications, inventions, or other technology developed in connection with the Services, and
- iii. all intellectual property and proprietary rights in and related to any of the foregoing (collectively, "Services IP").

To the extent Customer acquires any right, title or interest in any Services IP, Customer hereby assigns all its right, title, and interest in such Services IP to the Company.

5.2. **Customer Data License.** Customer hereby grants to Company license to extract, transfer, analyze, load and (re)format the Customer Data:

- i. as necessary for Company to provide the Services in accordance with this Agreement during the Term and

5.3. **No Other Rights.** No rights or licenses are granted except as expressly set forth herein.

## 6. BILLING AND PAYMENTS

6.1. **Billing.** Customer is billed through their IBM account, by IBM.

## 7. TERM AND TERMINATION

7.1. **Term.** This Agreement is for the service term necessary to complete the associated services as defined in the accompanying statement of work. Term may be terminated by Customer prior to the end of the then-current term.

7.2. **Termination.** Customer may terminate this agreement for any reason. If Customer requests termination under this Section, Customer is not entitled to any refund of Fees for the Services.

Each party may terminate this agreement with immediate effect by delivering notice of the termination to the other party, if:



- i. The other party has made any inaccuracy in, or otherwise materially breaches, any of its obligations, covenants, or representations, and;
- ii. The failure, inaccuracy, or breach continues for a period of thirty (30) days' after the injured party delivers notice to the breaching party reasonably detailing the breach.

The Company may terminate this agreement with immediate effect by delivering notice of the termination to the Customer if the Customer fails to pay the invoice amount on time two (2) times over any term.

Notwithstanding the foregoing, if Customer is a state agency or a political subdivision of a state, or a federal agency or a political subdivision of the federal government, Customer may terminate this Agreement at any time (i) for convenience upon ninety (90) days' written notice to Company, or (ii) if adequate funds to pay Company all fees owed hereunder are not appropriated to such Customer during the Term, unless otherwise authorized by law; provided, it is expressly agreed that Customer shall not activate this non-appropriation provision for its convenience, substitution for another procurement system or solution, or to circumvent the requirements of this Agreement in any way.

- 7.3. **Effect of Termination.** Upon termination of the Agreement, each outstanding Statement of Services, if any, shall terminate and Customer shall immediately cease all use of, and all access to, the Platform and Services and Company shall immediately cease providing the Professional Services. If (i) Company terminates this Agreement pursuant to the second sentence of Section 7.2, or (ii) Customer terminates this Agreement pursuant to clause (i) of the last sentence of Section 7.2, all Fees that would have become payable had each outstanding Service remained in effect until expiration of its current term will become immediately due and payable.
- 7.4. **Survival.** Sections [3.1, 4–6, 7.2, 7.4, and 9–17] shall survive any termination or expiration of this Agreement. All other rights and obligations shall be of no further force or effect.

## **8. WARRANTY AND DISCLAIMER**

- 8.1. **Warranties.** Company represents and warrants that it will perform the Professional Services in a professional and workmanlike manner. Each party represents and warrants that it has the legal power to enter into this Agreement. Additionally, Customer warrants that (i) Customer owns or has a license to use and has obtained all consents and approvals necessary for the provision and use of all of the Customer Data that is placed on, transmitted via or recorded by a Platform and the Services; (ii) the provision and use of Customer Data as contemplated by this Agreement and each Platform and



the Services does not and shall not violate any Customer's privacy policy, terms-of-use or other agreement to which Customer is a party or any law or regulation to which Customer is subject to.

8.2. **Disclaimer.**

EXCEPT AS EXPRESSLY PROVIDED HEREIN OR IN A STATEMENT OF SERVICE, COMPANY DOES NOT WARRANT THAT ACCESS TO THE PLATFORMS, SOFTWARE OR SERVICES WILL BE UNINTERRUPTED OR ERROR FREE, NOR DOES COMPANY MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. FURTHER, COMPANY MAKES NO REPRESENTATIONS OR WARRANTIES WITH RESPECT TO SERVICES PROVIDED BY THIRD PARTY TECHNOLOGY SERVICE PROVIDERS RELATING TO OR SUPPORTING A PLATFORM, INCLUDING HOSTING AND MAINTENANCE SERVICES, AND ANY CLAIM OF CUSTOMER ARISING FROM OR RELATING TO SUCH SERVICES SHALL, AS BETWEEN COMPANY AND SUCH SERVICE PROVIDER, BE SOLELY AGAINST SUCH SERVICE PROVIDER. THE PLATFORMS, SOFTWARE AND SERVICES ARE PROVIDED "AS IS," AND COMPANY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

9. **INDEMNITY**

9.1. **Indemnification by Company.** Company will defend Customer against any claim, suit, demand, or action made or brought against Customer by a third party alleging that the Services, or Customer's use or access thereof in accordance with this Agreement, infringes any intellectual property rights of such third party, and will indemnify and hold harmless Customer from any damages, losses, liabilities, costs and fees (including reasonable attorney's fees) finally awarded against Customer in connection with or in settlement of any such claim, suit, demand, or action. The foregoing obligations do not apply with respect to portions or components of any Platform or Service (i) not supplied by Company, (ii) made in whole or in part in accordance with Customer specifications, (iii) that are modified after delivery, or granting of access, by Company, (iv) combined with other products, processes or materials where the alleged infringement relates to such combination, (v) where Customer continues allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement, or (vi) where Customer's use of the Services is not strictly in accordance with this Agreement. If, due to a claim of infringement, a Platform is held by a court of competent jurisdiction to be or is believed by Company to be infringing,



Company may, at its option and expense (a) replace or modify such Platform to be non-infringing provided that such modification or replacement contains substantially similar features and functionality, (b) obtain for Customer a license to continue using such Platform, or (c) if neither of the foregoing is commercially practicable, terminate this Agreement and Customer's rights hereunder and provide Customer a refund of any prepaid, unused fees for such Platform. This Section states Customer's sole and exclusive remedies for claims of infringement.

#### **10. LIMITATION OF LIABILITY**

IN NO EVENT SHALL (I) EITHER PARTY'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY EXCEED IN THE AGGREGATE THE TOTAL FEES PAID OR OWED BY CUSTOMER AND VENDORS HEREUNDER DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE DATE OF THE EVENT GIVING RISE TO THE CLAIM (SUCH AMOUNT BEING INTENDED AS A CUMULATIVE CAP AND NOT PER INCIDENT), AND (II) EITHER PARTY HAVE ANY LIABILITY TO THE OTHER FOR ANY LOST PROFITS OR REVENUES OR FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, COVER, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES, HOWEVER CAUSED, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATIONS AND DISCLAIMERS SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

#### **11. ARBITRATION**

Any dispute arising out of or relating to this Agreement, or its subject matter, shall be resolved exclusively by binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Either party may send a notice to the other party of its intention to file a case with the AAA under this Section ("Arbitration Notice"). The arbitration will be conducted in the State of California by a single arbitrator knowledgeable in government contracting matters and the commercial aspects of "software as a service" arrangements and intellectual property. The parties will mutually appoint an arbitrator within thirty (30) days of the Arbitration Notice. If the parties are unable to agree on an arbitrator, then the AAA will appoint an arbitrator who meets the foregoing knowledge requirements. The arbitration hearing will commence within sixty (60) days after the appointment of the arbitrator and the hearing will be completed and an award rendered in writing within sixty (60) days after the commencement of the hearing. Prior to the hearing, each party will have the right to take up to four (4) evidentiary depositions, and exchange two (2) sets of document production requests and two sets, each, of not more than ten (10) interrogatories. The arbitrator will provide detailed written explanations to the parties to



support their award and regardless of outcome, each party shall pay its own costs and expenses (including attorneys' fees) associated with the arbitration proceeding and fifty percent (50%) of the fees of the arbitrator and the AAA. The arbitration award will be final and binding and may be enforced in any court of competent jurisdiction.

## **12. SECURITY**

Company may, from time to time, host and/or maintain a Platform using a third-party technology service provider and Customer acknowledges that Company cannot offer any additional or modified procedures other than those put in place by such technology provider with respect to such technology service.

## **13. PUBLICITY**

Customer agrees that Company may identify Customer as a customer and use Customer's logo and trademark in Company's promotional materials. Customer may request that Company stop doing so by submitting an email to support@primaryio.com at any time. Customer acknowledges that it may take Company up to 30 days to process such request. Notwithstanding anything herein to the contrary, Customer acknowledges that Company may disclose the existence and terms and conditions of this Agreement to its advisors, actual and potential sources of financing and to third parties for purposes of due diligence.

## **14. NOTICES**

All notices, consents, and other communications between the parties under or regarding this Agreement must be in writing (which includes email and facsimile) and be addressed according to information provided on an Order Form. All notices, consents, and other communications between the parties under a Statement of Services will be sent to the recipient's address specified thereon. All communications will be deemed to have been received on the date actually received. Either party may change its address for notices by giving written notice of the new address to the other party in accordance with this Section.

## **15. FORCE MAJEURE**

Company is not responsible nor liable for any delays or failures in performance from any cause beyond its control, including, but not limited to acts of God, changes to law or regulations, embargoes, war, terrorist acts, acts or omissions of third party technology providers, riots, fires, earthquakes, floods, power blackouts, strikes, weather conditions or acts of hackers, internet service providers or any other third party or acts or omissions of Customer or any Authorized User.

## **16. ASSIGNMENT**



Neither party may assign this Agreement to any third party without the prior written consent of the other; provided that no consent is required in connection with an assignment to an affiliate or in connection with any merger, reorganization, consolidation, sale of assets or similar transaction. Company may sublicense any or all its obligations hereunder. For the avoidance of doubt, a third-party technology provider that provides features or functionality in connection with a Platform shall not be deemed a sublicensee under this Agreement.

## **17. GENERAL PROVISIONS**

If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable. This Agreement, together with Statement of Services entered into hereunder and all exhibits, annexes and addenda hereto and thereto are the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement. All waivers and modifications must be in a writing signed by both parties, except as otherwise provided herein. No agency, partnership, joint venture, or employment is created as a result of this Agreement, and neither party has authority of any kind to bind the other party in any respect whatsoever. In the event of a conflict between this Agreement and any Statement of Services, such Statement of Services shall prevail unless otherwise expressly indicated in this Agreement or such Statement of Services. The heading references herein are for convenience purposes only and shall not be deemed to limit or affect any of the provisions hereof. Unless otherwise indicated to the contrary herein by the context or use thereof: (i) the words “hereof,” “hereby,” “herein,” “hereto,” and “hereunder” and words of similar import shall refer to this Agreement as a whole and not to any particular Section or paragraph of this Agreement; (ii) the words “include,” “includes” or “including” are deemed to be followed by the words “without limitation;” (iii) references to a “Section” or “Exhibit” are references to a section of, or exhibit to this Agreement; and (iv) derivative forms of defined terms will have correlative meanings.

