

LI-COR FLUXSUITE SOFTWARE AS A SERVICE AGREEMENT

This Agreement (the "**Agreement**") is by and between LI-COR, Inc. ("**LI-COR**") and the person ("**Customer**") that has subscribed for and has accepted the terms of service under this Agreement through LI-COR's website or otherwise. This Agreement is effective (the "**Effective Date**") on the date that Customer accepts the terms and conditions by any method that records and verifies Customer's act of such acceptance.

1. Definitions. Capitalized terms herein shall have the meanings ascribed to them in this section or as otherwise defined elsewhere in this Agreement.

"**Access Credentials**" means any user name, identification number, password, license or security key, security token, PIN or other security code, method, technology or device used, alone or in combination, to verify an individual's identity and authorization to access and use the Hosted Services.

"**Authorized User**" means each of the individuals identified and authorized by Customer to use the Services under this Agreement:

"**Customer Data**" means, other than Resultant Data, information, data and other content, in any form or medium that is collected, downloaded or otherwise received, directly or indirectly from Customer or an Authorized User by or through the Services.

"**Customer Systems**" means the Customer's information technology infrastructure, including computers, software, hardware, databases, electronic systems (including database management systems) and networks, whether operated directly by Customer or through the use of third-party services.

"**Documentation**" means any manuals, instructions or other documents or materials that the LI-COR provides or makes available to Customer in any form or medium and which describe the functionality, components, features or requirements of the Services or LI-COR Materials, including any aspect of the installation, configuration, integration, operation, use, support or maintenance thereof.

"**Harmful Code**" means any software, hardware or other technology, device or means, including any virus, worm, malware or other malicious computer code, the purpose or effect of which is to (a) permit unauthorized access to, or to destroy, disrupt, disable, distort, or otherwise harm or impede in any manner any (i) computer, software, firmware, hardware, system or network or (ii) any application or function of any of the foregoing or the security, integrity, confidentiality or use of any data Processed thereby, or (b) prevent Customer or any Authorized User from accessing or using the Services or

LI-COR Systems as intended by this Agreement. Harmful Code does not include any LI-COR Disabling Device.

"Intellectual Property Rights" means any and all registered and unregistered rights granted, applied for or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection or other intellectual property rights laws, and all similar or equivalent rights or forms of protection, in any part of the world.

"Law" means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree or other requirement of any federal, state, local or foreign government or political subdivision thereof, or any arbitrator, court or tribunal of competent jurisdiction.

"Losses" means any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys' fees and the costs of enforcing any right to indemnification hereunder and the cost of pursuing any insurance LI-COR's.

"Permitted Use" means any use of the Services by an Authorized User for the benefit of Customer.

"Person" means an individual, corporation, partnership, joint venture, limited liability entity, governmental authority, unincorporated organization, trust, association or other entity.

"Personal Information" means any information that does or can identify a specific individual or by or from which a specific individual may be identified, contacted or located.

"Process" means to take any action or perform any operation or set of operations that the Services are capable of taking or performing on any data, information or other content.

"LI-COR Disabling Device" means any software, hardware or other technology, device or means (including any back door, time bomb, time out, drop dead device, software routine or other disabling device) used by LI-COR or its designee to disable Customer's or any Authorized User's access to or use of the Services automatically with the passage of time or under the positive control of LI-COR or its designee.

"LI-COR Materials" means the Service Software, Specifications, Documentation and LI-COR Systems and any and all other information, data, documents, materials, works and other content, devices, methods, processes, hardware, software and other technologies and inventions, including any deliverables, technical or functional descriptions, requirements, plans or reports, that are provided or used by LI-COR or any

Subcontractor in connection with the Services or otherwise comprise or relate to the Services or LI-COR Systems.

"**LI-COR Personnel**" means all individuals involved in the performance of Services as employees, agents or independent contractors of LI-COR or any Subcontractor.

"**LI-COR Systems**" means the information technology infrastructure used by or on behalf of LI-COR in performing the Services, including all computers, software, hardware, databases, electronic systems (including database management systems) and networks, whether operated directly by LI-COR or through the use of third-party services.

"**Resultant Data**" means information, data and other content that is derived by or through the Services from Processing Customer Data and is sufficiently different from such Customer Data that such Customer Data cannot be reverse engineered or otherwise identified from the inspection, analysis or further Processing of such information, data or content.

"**Service Software**" means the FluxSuite software application or applications and any third-party or other software, and all new versions, updates, revisions, improvements and modifications of the foregoing, that LI-COR provides remote access to and use of as part of the Service described in paragraph 2. FluxSuite is a web-based tool designed to collect information from distributed (remote) data sensors. This data (computed flux measurements) is set via the Internet to a central aggregation/reporting server (fluxsuite.com), where it is made available to LI-COR's customers through a browser-based web tool. This tool provides end-users with the ability to view their data graphically, query the datasets, download information, and set alerts for unusual instrument readings. These alerts are in the form of an email that is sent to the addresses specified by the user.

2. Services.

2.1 Services. Subject to and conditioned on Customer's and its Authorized Users' compliance with the terms and conditions of this Agreement, during the Term, LI-COR shall use commercially reasonable efforts to provide to Customer and its Authorized Users the ability to access and use the Service Software as a service described in the Documentation and this Agreement (the "**Services**"). LI-COR provides the Service as a tool intended to gather and report on environmental sensor data. Such Services include hosting or contracting with others to host a website through which the Service Software can be used and then managing, operating and maintaining the Service Software for remote electronic access and use by Customer and its Authorized Users ("**Hosted Services**") in substantial conformity with the Specifications 24 hours per day, seven days per week every day of the year, except for:

- (a) Scheduled Downtime in accordance with **Section 5.3**;
- (b) Service downtime or degradation due to a Force Majeure Event;

(c) any other circumstances beyond LI-COR's reasonable control, including Customer's or any Authorized User's use of Third Party Materials, misuse of the Hosted Services, or use of the Services other than in compliance with the express terms of this Agreement and the Specifications; and

(d) any suspension or termination of Customer's or any Authorized Users' access to or use of the Hosted Services as permitted by this Agreement.

2.2 Service and System Control. Except as otherwise expressly provided in this Agreement, as between the parties:

(a) LI-COR has and will retain sole control over the operation, provision, maintenance and management of the Services and LI-COR Materials.

(b) Customer has and will retain sole control over the operation, maintenance and management of, and all access to and use of, the Customer Systems, and sole responsibility for all access to and use of the Services and LI-COR Materials by any Person by or through the Customer Systems or any other means controlled by Customer or any Authorized User.

2.3 Service Management. Each party shall, throughout the Term, maintain within its organization a service manager to serve as needed as such party's primary point of contact for day-to-day communications, consultation and decision-making regarding the Services.

2.4 Changes. LI-COR reserves the right, in its sole discretion, to make any changes to the Services and LI-COR Materials that it deems necessary or useful to: (a) maintain or enhance (i) the quality or delivery of LI-COR's services to its customers, (ii) the competitive strength of or market for LI-COR's services or (iii) the Services' cost efficiency or performance; or (b) to comply with applicable Law.

2.5 Subcontractors. LI-COR may from time to time in its discretion engage third parties to perform some of the tasks included in the Services (each, a "**Subcontractor**").

2.6 Suspension or Termination of Services. LI-COR may, directly or indirectly, and by use of a LI-COR Disabling Device or any other lawful means, suspend, terminate or otherwise deny Customer's, any Authorized User's or any other Person's access to or use of all or any part of the Services or LI-COR Materials, without incurring any resulting obligation or liability, if: (a) LI-COR receives a judicial or other governmental demand or order, subpoena or law enforcement request that expressly or by reasonable implication requires LI-COR to do so; or (b) LI-COR believes, in its discretion, that: (i) Customer or any Authorized User has failed to comply with, any material term of this Agreement, or

accessed or used the Services beyond the scope of the rights granted or for a purpose not authorized under this Agreement or in any manner that does not comply with any material instruction or requirement of the Specifications; (ii) Customer or any Authorized User is, has been, or is likely to be involved in any fraudulent, misleading or unlawful activities; or (iii) this Agreement expires or is terminated. This **Section 2.6** does not limit any of LI-COR's other rights or remedies, whether at law, in equity or under this Agreement.

3. Authorization and Customer Restrictions.

3.1 Authorization. Subject to and conditioned on Customer's payment of the Fees and compliance and performance in accordance with all other terms and conditions of this Agreement, LI-COR hereby authorizes Customer to access and use, during the Term, the Services and such LI-COR Materials as LI-COR may supply or make available to Customer.

3.2 Reservation of Rights. Nothing in this Agreement grants any right, title or interest in or to (including any license under) any Intellectual Property Rights in or relating to, the Services, LI-COR Materials or Third Party Materials, whether expressly, by implication, estoppel or otherwise. All right, title and interest in and to the Services, the LI-COR Materials and the Third Party Materials are and will remain with LI-COR and the respective rights holders in the Third Party Materials.

3.3 Authorization Limitations and Restrictions. Customer shall not permit any unauthorized Person to, access or use the Services or LI-COR Materials except as expressly permitted by this Agreement and, in the case of Third-Party Materials, the applicable third-party license agreement.

4. Customer Obligations.

4.1 Customer Systems and Cooperation. Customer shall at all times during the Term: (a) set up, maintain and operate in good repair and in accordance with the Specifications all Customer Systems on or through which the Services are accessed or used; (b) provide LI-COR Personnel with such access to Customer's premises and Customer Systems as is necessary for LI-COR to perform the Services in accordance with the Availability Requirement and Specifications; and (c) provide all cooperation and assistance as LI-COR may reasonably request to enable LI-COR to exercise its rights and perform its obligations under and in connection with this Agreement.

4.2 Data Quality. Customer is responsible for the quality and reliability of the data that is uploaded to the Service Software under this Agreement.

4.3 Effect of Customer Failure or Delay. LI-COR is not responsible or liable for any delay or failure of performance caused in whole or in part by Customer's delay in

performing, or failure to perform, any of its obligations under this Agreement (each, a "**Customer Failure**").

4.4 Corrective Action and Notice. If Customer becomes aware of any actual or threatened activity prohibited by **Section 3.3**, Customer shall, and shall cause its Authorized Users to, immediately: (a) take all reasonable and lawful measures within their respective control that are necessary to stop the activity or threatened activity and to mitigate its effects (including, where applicable, by discontinuing and preventing any unauthorized access to the Services and LI-COR Materials and permanently erasing from their systems and destroying any data to which any of them have gained unauthorized access); and (b) notify LI-COR of any such actual or threatened activity.

5. Service Levels and Credits.

5.1 Service Levels. Subject to the terms and conditions of this Agreement, LI-COR will use commercially reasonable efforts to make the Hosted Services Available at least ninety-nine and one half percent (99.5%) of the time as measured over the course of each calendar month during the Term (each such calendar month, a "**Service Period**"), excluding unavailability as a result of any of the Exceptions described below in this **Section 5.1** (the "**Availability Requirement**"). "**Service Level Failure**" means a material failure of the Hosted Services to meet the Availability Requirement. "**Available**" means the Hosted Services are available for access and use by Customer and its Authorized Users over the Internet and operating in material accordance with the Specifications. For purposes of calculating the Availability Requirement, the following are "**Exceptions**" to the Availability Requirement, and neither the Hosted Services will be considered un-Available nor any Service Level Failure be deemed to occur in connection with any failure to meet the Availability Requirement or impaired ability of Customer or its Authorized Users to access or use the Hosted Services that is due, in whole or in part, to any: (a) act or omission by Customer or any Authorized User/access to or use of the Hosted Services by Customer or any Authorized User, or using Customer's or an Authorized User's Access Credentials, that does not strictly comply with this Agreement and the Specifications; (b) Customer Failure; (c) Customer's or its Authorized User's Internet connectivity; (d) Force Majeure Event; (e) failure, interruption, outage or other problem with any software, hardware, system, network, facility or other matter not supplied by LI-COR pursuant to this Agreement; (f) Scheduled Downtime; or (g) disabling, suspension or termination of the Services pursuant to **Section 2.6**.

5.2 Service Level Failures and Remedies. In the event of a Service Level Failure, LI-COR may issue a credit to Customer in an amount determined in LI-COR's discretion based on the nature and length of the Service Level Failure. (each a "**Service Credit**"), subject to the following:

- (a) LI-COR has no obligation to issue any Service Credit unless (i) Customer reports the Service Failure to LI-COR immediately on becoming aware of it; and (ii)

requests such Service Credit in writing within fourteen (14) days after the end of the Service Period in which the Service Level Failure occurred; and

Any Service Credit payable to Customer under this Agreement will be issued to Customer in the form of additional days of service added onto the end of the Subscription Period. This **Section 5.2** sets forth LI-COR's sole obligation and liability and Customer's sole remedy for any Service Level Failure.

5.3 Scheduled Downtime. LI-COR will give Customer at least twenty-four (24) hours prior notice of all scheduled outages of the Hosted Services ("**Scheduled Downtime**").

6. Data Backup. To mitigate against data loss, LI-COR will backup the data and store it in a secondary location, however, the Services do not replace the need for Customer to maintain regular data backups or redundant data archives. NOTWITHSTANDING THE FOREGOING, LI-COR HAS NO OBLIGATION OR LIABILITY FOR ANY LOSS, ALTERATION, DESTRUCTION, DAMAGE, CORRUPTION OR RECOVERY OF CUSTOMER DATA.

7. Security.

7.1 LI-COR will employ security measures in accordance with applicable industry practice and LI-COR's data privacy and security policy as amended from time to time ("**Privacy and Security Policy**"). LI-COR adheres to the "Safe Harbor Policy" for customer data. Go to: www.licor.com/corp/pdf/Safe_Harbor_Policy.pdf

7.2 Data Breach Procedures. LI-COR maintains a data breach plan in accordance with the criteria set forth in LI-COR's Privacy and Security Policy and shall implement the procedures required under such data breach plan on the occurrence of a "Data Breach" (as defined in such plan).

7.3 Prohibited Data. Customer acknowledges that the Services are not designed with security and access management for Processing the following categories of information: (a) Personal Information; (b) data that is classified and or used on the U.S. Munitions list, including software and technical data; (c) articles, services and related technical data designated as defense articles or defense services; and (d) ITAR (International Traffic in Arms Regulations) related data, (each of the foregoing, "**Prohibited Data**"). Customer shall not, and shall not permit any Authorized User or other Person to, provide any Prohibited Data to, or Process any Prohibited Data through, the Services, the LI-COR Systems or any LI-COR Personnel. Customer is solely responsible for reviewing all Customer Data and shall ensure that no Customer Data constitutes or contains any Prohibited Data.

7.4 Customer Control and Responsibility. Customer has and will retain sole responsibility for: (a) all Customer Data, including its content and use; (b) all information, instructions and materials provided by or on behalf of Customer or any Authorized User in connection with the Services; (c) Customer's information technology infrastructure, including computers, software, databases, electronic systems (including database management systems) and networks, whether operated directly by Customer or through the use of third-party services ("**Customer Systems**"); (d) the security and use of Customer's and its Authorized Users' Access Credentials; and (e) all access to and use of the Services and LI-COR Materials directly or indirectly by or through the Customer Systems or its or its Authorized Users' Access Credentials, with or without Customer's knowledge or consent, including all results obtained from, and all conclusions, decisions and actions based on, such access or use.

7.5 Access and Security. Customer shall employ all physical, administrative and technical controls, screening and security procedures and other safeguards necessary to: (a) securely administer the distribution and use of all Access Credentials and protect against any unauthorized access to or use of the Hosted Services; and (b) control the content and use of Customer Data, including the uploading or other provision of Customer Data for Processing by the Hosted Services.

8. Fees; Payment Terms.

8.1 Fees. Customer shall pay LI-COR the fees set forth and amended from time to time in LI-COR's price catalog ("**Fees**") in accordance with this **Section 8**.

8.2 Fee Increases. LI-COR may increase Fees by providing written notice to Customer at least 60 calendar days prior to the commencement of the change.

8.3 Reserved.

8.4 Taxes. All Fees and other amounts payable by Customer under this Agreement are exclusive of taxes and similar assessments. Customer is responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state or local governmental or regulatory authority on any amounts payable by Customer hereunder, other than any taxes imposed on LI-COR's income.

8.5 Payment. Customer shall pay all Fees and Reimbursable Expenses when due. Customer shall make all payments hereunder in US dollars. Customer shall make payments to the address or account specified by LI-COR or such other address or account as LI-COR may specify in writing from time to time.

8.6 Late Payment. If Customer fails to make any payment when due then, in addition to all other remedies that may be available:

(a) LI-COR may charge interest on the past due amount at the rate of 1.5% per month calculated daily and compounded monthly or, if lower, the highest rate permitted under applicable Law;

(b) Customer shall reimburse LI-COR for all costs incurred by LI-COR in collecting any late payments or interest, including attorneys' fees, court costs and collection agency fees; and

(c) if such failure continues for thirty (30) days following written notice thereof, LI-COR may suspend performance of the Services until all past due amounts and interest thereon] have been paid, without incurring any obligation or liability to Customer or any other Person by reason of such suspension.

8.7 No Deductions or Setoffs. All amounts payable to LI-COR under this Agreement shall be paid by Customer to LI-COR in full without any setoff, recoupment, counterclaim, deduction, debit or withholding for any reason (other than any deduction or withholding of tax as may be required by applicable Law).

9. Intellectual Property Rights.

9.1 Services and LI-COR Materials. All right, title and interest in and to the Services and LI-COR Materials, including all Intellectual Property Rights therein, are and will remain with LI-COR and the respective rights holders in the Third-Party Materials. Customer has no right, license or authorization with respect to any of the Services or LI-COR Materials (including Third-Party Materials) except as expressly set forth in **Section 3.1** or the applicable third-party license, in each case subject to **Section 3.3** All other rights in and to the Services and LI-COR Materials (including Third-Party Materials) are expressly reserved by LI-COR and the respective third-party licensors.

9.2 Customer Data. As between Customer and LI-COR, Customer is and will remain the sole and exclusive owner of all right, title and interest in and to all Customer Data, including all Intellectual Property Rights relating thereto, subject to the rights and permissions granted in **Section 9.3**.

9.3 Consent to Use Customer Data. Customer hereby grants all such rights and permissions in or relating to Customer Data: (a) to LI-COR, its Subcontractors and the LI-COR Personnel as are necessary or useful to perform the Services; and (b) to LI-COR as are necessary or useful to enforce this Agreement and exercise its rights and perform its hereunder.

10. Confidentiality.

10.1 Confidential Information. In connection with this Agreement each party (as the "**Disclosing Party**") may disclose or make available Confidential Information to the other party (as the "**Receiving Party**"). Subject to **Section 10.2**, "**Confidential Information**"

means information in any form or medium (whether oral, written, electronic or other) that the Disclosing Party considers confidential or proprietary, including information consisting of or relating to the Disclosing Party's technology, trade secrets, know-how, business operations, plans, strategies, customers, and pricing, and information with respect to which the Disclosing Party has contractual or other confidentiality obligations. Without limiting the foregoing: all LI-COR Materials are the Confidential Information of LI-COR and the terms of this Agreement are the Confidential Information of LI-COR.

10.2 Exclusions. Confidential Information does not include information that: (a) was rightfully known to the Receiving Party without restriction on use or disclosure prior to such information's being disclosed or made available to the Receiving Party in connection with this Agreement; (b) was or becomes generally known by the public other than by the Receiving Party's or any of its Representatives' noncompliance with this Agreement; (c) was or is received by the Receiving Party on a non-confidential basis from a third party that was not or is not, at the time of such receipt, under any obligation to maintain its confidentiality; or (d) was or is independently developed by the Receiving Party without reference to or use of any Confidential Information.

10.3 Protection of Confidential Information. As a condition to being provided with any disclosure of or access to Confidential Information, the Receiving Party shall:

(a) not access or use Confidential Information other than as necessary to exercise its rights or perform its obligations under and in accordance with this Agreement;

(b) except as may be permitted by and subject to its compliance with **Section 10.4**, not disclose or permit access to Confidential Information other than to its Representatives who: (i) need to know such Confidential Information for purposes of the Receiving Party's exercise of its rights or performance of its obligations under and in accordance with this Agreement; (ii) have been informed of the confidential nature of the Confidential Information and the Receiving Party's obligations under this **Section 10.3**; and (iii) are bound by confidentiality and restricted use obligations at least as protective of the Confidential Information as the terms set forth in this **Section 10.3**;

(c) safeguard the Confidential Information from unauthorized use, access or disclosure using at least the degree of care it uses to protect its sensitive information and in no event less than a reasonable degree of care; and

(d) ensure its Representatives' compliance with, and be responsible and liable for any of its Representatives' non-compliance with, the terms of this **Section 10**.

10.4 Compelled Disclosures. If the Receiving Party or any of its Representatives is compelled by applicable Law to disclose any Confidential Information then, to the extent permitted by applicable Law, the Receiving Party shall: (a) promptly, and prior to such

disclosure, notify the Disclosing Party in writing of such requirement so that the Disclosing Party can seek a protective order or other remedy or waive its rights under **Section 10.3**; and (b) provide reasonable assistance to the Disclosing Party in opposing such disclosure or seeking a protective order or other limitations on disclosure. If the Disclosing Party waives compliance or, after providing the notice and assistance required under this **Section 10.4**, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose only that portion of the Confidential Information that the Receiving Party is legally required to disclose.

11. Term and Termination.

11.1 Term. The term (“Term”) of this Agreement commences as of the Effective Date and continues until terminated by either party as provided below. .

11.2 Reserved.

11.3 Termination. In addition to any other express termination right set forth elsewhere in this Agreement:

(a) LI-COR may terminate this Agreement, effective on written notice to Customer, if Customer: (i) fails to pay any amount when due hereunder, and such failure continues more than thirty (30) days after LI-COR’s delivery of written notice thereof; or (ii) breaches any of its obligations under **Section 3.3** (Use Limitations and Restrictions), **Section 7.3** (Prohibited Data) or **Section 10** (Confidentiality).

(b) either party may terminate this Agreement, effective on written notice to the other party, if the other party materially breaches this Agreement, and such breach: (i) is incapable of cure; or (ii) being capable of cure, remains uncured 60 days after the non-breaching party provides the breaching party with written notice of such breach; and

(c) either party may terminate this Agreement, effective immediately upon written notice to the other party, if the other party: (i) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due; (ii) files or has filed against it, a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency Law; (iii) makes or seeks to make a general assignment for the benefit of its creditors; or (iv) applies for or has appointed a receiver, trustee, custodian or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

11.4 Effect of Expiration or Termination. Upon any expiration or termination of this Agreement, except as expressly otherwise provided in this Agreement:

(a) all rights, licenses, consents and authorizations granted by either party to the other hereunder will immediately terminate;

(b) LI-COR shall immediately cease all use of any Customer Data or Customer's Confidential Information and permanently erase all Customer Data and Customer's Confidential Information from all systems LI-COR directly or indirectly controls, provided that, for clarity, LI-COR's obligations under this **Section 11.4(b)** do not apply to any Resultant Data;

(c) Customer shall immediately cease all use of any Services or LI-COR Materials related to this Agreement and permanently erase LI-COR's Confidential Information from all systems Customer directly or indirectly controls;

(d) notwithstanding anything to the contrary in this Agreement, with respect to information and materials then in its possession or control: (i) the Receiving Party may retain the Disclosing Party's Confidential Information (ii) LI-COR may retain Customer Data, in the case of each of subclause (i) (ii) in its then current state and solely to the extent and for so long as required by applicable Law; (iii) LI-COR may also retain Customer Data in its backups, archives and disaster recovery systems until such Customer Data is deleted in the ordinary course; and (iv) all information and materials described in this **Section 11.4(d)** will remain subject to all confidentiality, security and other applicable requirements of this Agreement;

(e) LI-COR may disable all Customer and Authorized User access to the Hosted Services and LI-COR Materials;

(f) if Customer terminates this Agreement pursuant to **Section 11.3(b)**, Customer will be relieved of any obligation to pay any Fees attributable to the period after the effective date of such termination and LI-COR will refund to Customer Fees paid in advance;

(g) if LI-COR terminates this Agreement pursuant to **Section 11.3(a)** or **Section 11.3(b)**, all Fees that would have become payable had the Agreement remained in effect until expiration of the Term will become immediately due and payable, and Customer shall pay such Fees, together with all previously-accrued but not yet paid Fees and Reimbursable Expenses, on receipt of LI-COR's invoice therefor.

11.5 Surviving Terms. The provisions set forth in the following sections, and any other right or obligation of the parties in this Agreement that, by its nature, should survive termination or expiration of this Agreement, will survive any expiration or termination of this Agreement: **Section 3.3, Section 10, Section 11.4, this Section 11.5, Section 12, Section 13, Section 14 and Section 16.**

12. Representations and Warranties.

12.1 Mutual Representations and Warranties. Each party represents and warrants to the other party that:

(a) it is duly organized, validly existing and in good standing as a corporation or other entity under the Laws of the jurisdiction of its incorporation or other organization;

(b) it has the full right, power and authority to enter into and perform its obligations and grant the rights, licenses, consents and authorizations it grants or is required to grant under this Agreement;

(c) when executed this Agreement will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms.

12.2 Additional LI-COR Representations, Warranties and Covenants. LI-COR represents, warrants and covenants to Customer that LI-COR will perform the Services using personnel of required skill, experience and qualifications and in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services and will devote adequate resources to meet its obligations under this Agreement.

12.3 Additional Customer Representations, Warranties and Covenants. Customer represents, warrants and covenants to LI-COR that Customer owns or otherwise has and will have the necessary rights and consents in and relating to the Customer Data so that, as received by LI-COR and Processed in accordance with this Agreement, they do not and will not infringe, misappropriate or otherwise violate any Intellectual Property Rights of any third party or violate any applicable Law.

12.4 DISCLAIMER OF WARRANTIES. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN SECTION 12.1, SECTION 12.2 AND SECTION 12.3, ALL SERVICES AND LI-COR MATERIALS ARE PROVIDED "AS IS" AND LI-COR HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHER, AND LI-COR SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE OR TRADE PRACTICE. WITHOUT LIMITING THE FOREGOING, LI-COR MAKES NO WARRANTY OF ANY KIND THAT THE SERVICES OR LI-COR MATERIALS, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET CUSTOMER'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEM OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE OR ERROR FREE. ALL THIRD-PARTY MATERIALS ARE PROVIDED "AS IS" AND ANY REPRESENTATION OR WARRANTY OF OR CONCERNING ANY THIRD PARTY MATERIALS IS STRICTLY BETWEEN CUSTOMER AND THE THIRD-PARTY OWNER OR DISTRIBUTOR OF THE THIRD-PARTY MATERIALS.

13. Indemnification.

13.1 LI-COR Indemnification. LI-COR shall indemnify, defend and hold harmless Customer from and against any and all Losses incurred by Customer arising out of or relating to any claim, suit, action or proceeding (each, an "**Action**") by a third party (other than an Affiliate of Customer) that Customer's use of the Services (excluding Customer Data and Third Party Materials) in compliance with this Agreement (including the Specifications) infringes a U.S. Intellectual Property Right. The foregoing obligation does not apply to any Action or Losses arising out of or relating to any:

(a) access to or use of the Services or LI-COR Materials in combination with any hardware, system, software, network or other materials or service not provided or authorized in writing by LI-COR;

(b) modification of the Services or LI-COR Materials other than: (i) by or on behalf of LI-COR ; or (ii) with LI-COR's written approval in accordance with LI-COR's written specification;

(c) failure to timely implement any modifications, upgrades, replacements or enhancements made available to Customer by or on behalf of LI-COR; or

(d) act, omission or other matter described in **Section 13.2(a)**, **Section 13.2(b)**, **Section 13.2(c)** or **Section 13.2(d)**, whether or not the same results in any Action against or Losses by any LI-COR Indemnitee.

13.2 Customer Indemnification. Customer shall indemnify, defend and hold harmless LI-COR and its Subcontractors and Affiliates, and each of its and their respective officers, directors, employees, agents, successors and assigns (each, a "**LI-COR Indemnitee**") from and against any and all Losses incurred by such LI-COR Indemnitee in connection with any Action by a third party (other than an Affiliate of a LI-COR Indemnitee) that/to the extent that such Losses arises out of or relates to any:

(a) Customer Data, including any Processing of Customer Data by or on behalf of LI-COR in accordance with this Agreement;

(b) any other materials or information (including any documents, data, specifications, software, content or technology) provided by or on behalf of Customer or any Authorized User, including LI-COR's compliance with any specifications or directions provided by or on behalf of Customer or any Authorized User to the extent prepared without any contribution by LI-COR;

(c) allegation of facts that, if true, would constitute Customer's breach of any of its representations, warranties, covenants or obligations under this Agreement; or

(d) negligence/gross negligence or more culpable act or omission (including recklessness or willful misconduct) by Customer, any Authorized User, or any third party on behalf of Customer or any Authorized User, in connection with this Agreement.

13.3 Indemnification Procedure. Each party shall promptly notify the other party in writing of any Action for which such party believes it is entitled to be indemnified pursuant to **Section 13.1** or **Section 13.2**, as the case may be. The Indemnitor shall immediately take control of the defense and investigation of such Action and shall employ counsel to handle and defend the same, at the Indemnitor's sole cost and expense. The Indemnitee's failure to perform any obligations under this **Section 13.3** will not relieve the Indemnitor of its obligations under this **Section 13** except to the extent that the Indemnitor can demonstrate that it has been materially prejudiced as a result of such failure. The Indemnitee may participate in and observe the proceedings at its own cost and expense with counsel of its own choosing.

13.4 Mitigation. If any of the Services or LI-COR Materials are, or in LI-COR's opinion are likely to be, claimed to infringe, misappropriate or otherwise violate any third-party Intellectual Property Right, or if Customer's or any Authorized User's use of the Services or LI-COR Materials is enjoined or threatened to be enjoined, LI-COR may, at its option and sole cost and expense:

(a) obtain the right for Customer to continue to use the Services and LI-COR Materials materially as contemplated by this Agreement;

(b) modify or replace the Services and LI-COR Materials, in whole or in part, to seek to make the Services and LI-COR Materials (as so modified or replaced) non-infringing, while providing materially equivalent features and functionality, in which case such modifications or replacements will constitute Services and LI-COR Materials, as applicable, under this Agreement; or

(c) by written notice to Customer, terminate this Agreement and require Customer to immediately cease any use of the Services and LI-COR Materials.

THIS SECTION 13 SETS FORTH CUSTOMER'S SOLE REMEDIES AND LI-COR'S SOLE LIABILITY AND OBLIGATION FOR ANY ACTUAL, THREATENED OR ALLEGED CLAIMS THAT THIS AGREEMENT OR ANY SUBJECT MATTER HEREOF (INCLUDING THE SERVICES AND LI-COR MATERIALS) INFRINGES, MISAPPROPRIATES OR OTHERWISE VIOLATES ANY THIRD PARTY INTELLECTUAL PROPERTY RIGHT.

14. Limitations of Liability.

14.1 EXCLUSION OF DAMAGES. IN NO EVENT WILL LI-COR OR ANY OF ITS LICENSORS, SERVICE PROVIDERS, OR SUPPLIERS BE LIABLE UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY AND OTHERWISE, FOR ANY: (a) LOSS OF PRODUCTION, USE, BUSINESS, REVENUE OR PROFIT; (b) IMPAIRMENT, INABILITY TO USE OR LOSS, INTERRUPTION OR DELAY OF THE SERVICES, OTHER THAN FOR THE ISSUANCE OF ANY APPLICABLE SERVICE CREDITS PURSUANT TO SECTION 5.2 , (c) LOSS, DAMAGE, CORRUPTION OR RECOVERY OF DATA, OR BREACH OF DATA OR SYSTEM SECURITY, OR (d) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED OR PUNITIVE DAMAGES, REGARDLESS OF WHETHER SUCH PERSONS WERE ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

14.2 CAP ON MONETARY LIABILITY. IN NO EVENT WILL THE AGGREGATE LIABILITY OF LI-COR AND ITS LICENSORS, SERVICE PROVIDERS, AND SUPPLIERS UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER, UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY AND OTHERWISE, EXCEED THE AMOUNT OF FEES PAID BY CUSTOMER TO LI-COR . THE FOREGOING LIMITATION APPLIES NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

15. Force Majeure.

15.1 No Breach or Default. In no event will LI-COR be liable or responsible to Customer, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, when and to the extent such failure or delay is caused by any circumstances beyond LI-COR reasonable control (a "**Force Majeure Event**"), including acts of God, flood, fire, earthquake or explosion, war, terrorism, invasion, riot or other civil unrest, embargoes or blockades in effect on or after the date of this Agreement, national or regional emergency, strikes, labor stoppages or slowdowns or other industrial disturbances, passage of Law or any action taken by a governmental or public authority, including imposing an embargo, export or import restriction, quota or other restriction or prohibition or any complete or partial government shutdown, or national or regional shortage of adequate power or telecommunications or transportation. Either party may terminate this Agreement if a Force Majeure Event affecting the other party continues substantially uninterrupted for a period of 30 days or more.

16. Miscellaneous.

16.1 Further Assurances. Upon a party's reasonable request, the other party shall, at the requesting party's sole cost and expense, execute and deliver all such documents and instruments, and take all such further actions, necessary to give full effect to this Agreement.

16.2 Relationship of the Parties. The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

16.3 Public Announcements. Neither party shall issue or release any announcement, statement, press release or other publicity or marketing materials relating to this Agreement or otherwise use the other party's trademarks, service marks, trade names, logos, domain names or other indicia of source, affiliation or sponsorship, in each case, without the prior written consent of the other party, provided, however, that LI-COR may, without Customer's consent, include Customer's name in its lists of LI-COR's current or former customers of LI-COR in promotional and marketing materials.

16.4 Notices. All notices, requests, consents, claims, demands, waivers and other communications under this Agreement have binding legal effect only if in writing and addressed to LI-COR as follows:

4647 Superior St, Lincoln NE 68504

E-Mail: Fluxsuitelegal.licor.com

Attention: Fluxsuite Administrator

16.5 Reserved

16.6 Headings. The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

16.7 Entire Agreement. This Agreement, together with any other documents incorporated herein by reference, constitutes the sole and entire agreement of the parties with respect to the subject matter of this Agreement and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter.

16.8 Assignment. Customer shall not assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance, under this Agreement,

in each case whether voluntarily, involuntarily, by operation of law or otherwise, without LI-COR's prior written consent. Any purported assignment, delegation or transfer in violation of this **Section 16.8** is void. This Agreement is binding upon and inures to the benefit of the parties hereto and their respective permitted successors and assigns.

16.9 No Third-party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective permitted successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

16.10 Amendment and Modification; Waiver. No amendment to or modification of or rescission, termination or discharge of this Agreement is effective unless it is in writing and signed by each party. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

16.11 Severability. If any provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

16.12 Governing Law; Submission to Jurisdiction. This Agreement is governed by and construed in accordance with the internal laws of the State of Nebraska, USA without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the State of Nebraska. Any legal suit, action or proceeding arising out of or related to this Agreement or the licenses granted hereunder shall be instituted exclusively in the federal courts of the United States or the courts of the State of Nebraska in each case located in the city of Lincoln and County of Lancaster, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding. Service of process, summons, notice or other document by mail to such party's address set forth herein shall be effective service of process for any suit, action or other proceeding brought in any such court.

16.13 Waiver of Jury Trial. Each party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal action arising out of or relating to this Agreement or the transactions contemplated hereby.

16.14 Equitable Relief. Each party acknowledges and agrees that a breach or threatened breach by such party of any of its obligations under **Section 10** or, in the case of Customer, **Section 3.3**, **Section 4.4** or **Section 7.3**, would cause the other party irreparable harm for which monetary damages would not be an adequate remedy and agrees that, in the event of such breach or threatened breach, the other party will be entitled to equitable relief, including a restraining order, an injunction, specific performance and any other relief that may be available from any court, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity or otherwise.

16.15 Execution. This Agreement shall be deemed executed upon acceptance by the parties by electronic or digital signature or any other method that evidences acceptance.