

CHROMA TERMS OF SERVICE

Last Updated: July 16, 2019

The Chroma Terms of Service Agreement (the "Agreement") is made by and between the customer identified in a Service Registration Form, Subscription Order, Online Order Form, or Statement of Work that references this Agreement ("Customer" or "You") and Chroma Software, Inc. (referred to herein as "Chroma" or "We"). This Agreement is effective as of the date Customer accepts the terms of this Agreement (the "Effective Date") or, if earlier, when you use any of the Chroma Services. You understand and agree that Chroma will treat your use of the Chroma Services as acceptance of the Terms from that point onwards. You may not access the Services if You are a direct competitor, except with Chroma's prior written consent. In addition, You may not access the Services for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes.

IN ORDER TO USE CHROMA SERVICES, CUSTOMER AGREES TO THE TERMS AND CONDITIONS OF THIS AGREEMENT WHICH WILL GOVERN CUSTOMER'S PURCHASE AND USE OF CHROMA SERVICES. IF YOU ARE ACTING ON BEHALF OF AN ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY. IF CUSTOMER DOES NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN IT MUST NOT PURCHASE OR USE THE CHROMA SERVICES. IF YOU REGISTER FOR A FREE VERSION OR TRIAL FOR OUR SERVICES, THIS AGREEMENT WILL ALSO GOVERN THAT FREE VERSION OR TRIAL.

1. **DEFINITIONS.** As used in this Agreement, the following terms shall have the meanings set forth in this Section 1. Certain other terms may be defined in the context of their use elsewhere in the Agreement.

"Affiliate" means an entity that directly or indirectly controls, is controlled by, or is under common control with a party to this Agreement. For purposes of this definition, "control" means ownership of at least fifty percent (50%) of the outstanding voting shares of the subject entity.

"Applications" means software applications developed by Customers or their partners or a 3rd party service provider.

"Beta Services" means Chroma Services that are not generally available to customers.

"Chromatic" means Chroma's application testing platform or Chroma's user interface development platform both hosted at <https://chromatic.com>.

"Confidential Information" means any and all confidential or proprietary information or materials which have been or are hereafter disclosed or made available by one party (the "Disclosing Party") to the other (the "Receiving Party") in connection with this Agreement, whether provided orally

or in writing and in any form or media, including without limitation: (i) all trade secrets[^] (ii) existing or contemplated products, services, designs, technology, processes, technical data, engineering techniques, methodologies and concepts and any related information[^] (iii) information relating to business plans, sales or marketing methods and customer lists or requirements[^] (iv) Customer's specific terms or pricing set forth in business proposals, this Agreement or any Subscription Order or SOW (as defined below)[^] and (v) where Chroma is the Disclosing Party, (a) Chroma's PreExisting Intellectual Property, (b) General Enhancements, (c) Services Materials, (d) Training Materials, (e) Documentation, and (f) implementation architectures that encompass Chromatic and any of the foregoing items (a) – (e) ("Implementation Architectures").

"Consulting Services" means Chroma consulting services offerings as set forth in an applicable Subscription Order or SOW.

"Content" means information obtained by Chroma from Our content licensors or publicly available sources and provided to Customer pursuant to an Order Form, as more fully described in the Documentation.

"Documentation" means all Chroma published user manuals and guides, regardless of media, that explain or facilitate the use of Chromatic, and other related services.

"General Enhancements" means any improvements, modifications, enhancements, or extensions to or derivative works of Chroma PreExisting Intellectual Property that have or could have general applicability to Chroma customers, including, but not limited to, any modifications to, or derivative works of, Chromatic.

"Intellectual Property" means any and all patents, inventions, copyrights, works of authorship, trademarks, trade secrets, knowhow, and all other intellectual property (whether registered or unregistered and including the right to register such intellectual property) that are, in each case, protected under the laws of any governmental authority having jurisdiction.

"Malicious Code" means code, files, scripts, agents or programs intended to do harm, including, for example, viruses, worms, time bombs and Trojan horses.

"Pre-Existing Intellectual Property" means: (a) Intellectual Property in existence as of the Effective Date of this Agreement, and (b) Intellectual Property that a party creates or develops outside the scope of Services or Support provided by Chroma to Customer under this Agreement and without the use of the other party's Confidential Information.

"Subscription Order" means an online order form or order document executed by the parties that sets forth specific Services and/or Support being purchased by Customer under this Agreement.

"Services" means Chroma technologies, products, support, and/or professional services as set forth in an applicable Subscription Order or SOW.

"Services Materials" means (a) the processes, knowhow, proprietary information and methodologies, document templates, and project tools including, but not limited to, best practice guides and reference architecture materials[^] and (b) utilities, connectors, scripts, tools, Chromatic implementation code, and other software (and any updates thereto) that, in each case, are used by Chroma to deliver the Services or Support to Customer.

"Statement of Work" or "SOW" means a statement of work executed by the parties that describes Services to be provided by Chroma to Customer under this Agreement.

"Training Materials" means Chroma training courses, documentation, and other associated training materials, including any and all updates thereto.

"Training Services" means Chroma's training services offerings as set forth in an applicable Subscription Order or SOW.

"User" means an individual who is authorized by Customer to use a Service, for whom Customer has ordered the Service, and to whom Customer (or Chroma at Your request) has supplied a user identification and password. Users may include, for example, Customer employees, consultants, contractors and agents, and third parties with which Customer transacts business.

"Work Product" means all inventions, improvements, modifications, enhancements, derivatives, processes, methodologies, formulas, designs, drawings, data, information, and works of authorship in which any proprietary right exists or may be acquired or asserted, and which are developed, discovered, invented, authored, or first reduced to practice by Chroma, alone or jointly with Customer and/or any third party or parties, in the course of providing Support under this Agreement[^] provided, however, that Work Product shall not include (a) Chroma's Pre\Existing Intellectual Property, (b) General Enhancements, (c) Services Materials, (d) Training Materials, (e) Documentation, or (f) Implementation Architectures.

"We," "Us" or "Our" means the Chroma Software company described in Section 12 (Governing Law and Venue).

"You" or "Your" means the company or other legal entity for which you are accepting this Agreement, and Affiliates of that company or entity.

"Your Data" means electronic data and information submitted by or for You to the Purchased Services or collected and processed by or for You using the Purchased Services.

2. **CHROMA DELIVERY OF SERVICES AND CONTENT.** Subject to the terms and conditions of this Agreement, Chroma will provide to Customer the Services and Content agreed by the parties in applicable online orders, Subscription Orders and/or SOWs. Subscription Orders and SOWs shall be deemed incorporated herein. Services and Support are only for Customer's internal use. Customer may not use the Services or Support to supply any consulting, training or support services to any third party. All Services and Content delivered under this Agreement are deemed accepted by Customer upon delivery.

- 2.1. **Provision of Purchased Services.** Chroma will (a) make the Services and Content available to Customer pursuant to this Agreement and the applicable Order Forms, and (b) use commercially reasonable efforts to make the online Purchased Services available 24 hours a day, 7 days a week, except for: (i) planned downtime (of which We shall give at least 1 business day notice and which We shall schedule to the extent practicable during the offpeak hours of our choosing), and (ii) any unavailability caused by circumstances beyond Our reasonable control, including, for example, an act of God, act of government, flood, fire, earthquake, civil unrest, war, act of terror, quarantine, strike or other labor problem (other than one involving Our employees), Internet service provider failure or delay, or denial of service attack.
- 2.2. **Protection of Customer Data.** Chroma will maintain administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Customer Data. Those safeguards will include, but will not be limited to, measures for preventing access, use, modification or disclosure of Customer Data by Chroma personnel except (a) to provide the Purchased Services and prevent or address service or technical problems, (b) as compelled by law in accordance with Section 7 below, or (c) as Customer expressly permits in writing.
- 2.3. **Chroma Personnel.** Chroma will be responsible for the performance of Chroma personnel (including Chroma employees and contractors) and their compliance with Chroma obligations under this Agreement, except as otherwise specified herein.
- 2.4. **Free Services:** Some Chroma Services may be provided to you without charge up to certain limits as published on the Chroma website, Online Order, Subscription Order, or SOW. Usage over this limit may require your purchase of Chroma Services.
- 2.5. **Free Trial:** Chroma may make one or more Services available to Customer on a trial basis free of charge until the earlier of (a) the end of the free trial period for which you registered to use the applicable Service(s), or (b) the start date of any Service subscriptions ordered by You for such Service(s). Additional trial terms and conditions may appear as part of a Subscription Order or on a trial registration web page. Any such additional terms and conditions are incorporated into this Agreement by reference and are legally binding. ANY DATA YOU ENTER INTO THE SERVICES, AND ANY CUSTOMIZATIONS MADE TO THE SERVICES BY OR FOR YOU, DURING YOUR FREE TRIAL MAY BE PERMANENTLY LOST UNLESS YOU PURCHASE A SUBSCRIPTION TO THE SAME SERVICES AS THOSE COVERED BY THE TRIAL, PURCHASE UPGRADED SERVICES, OR EXPORT SUCH DATA, BEFORE THE END OF THE TRIAL PERIOD. NOTWITHSTANDING SECTION 9, DURING THE FREE TRIAL THE SERVICES ARE PROVIDED "ASIS" WITHOUT ANY WARRANTY. Please review Documentation during the trial period so that You become familiar with the features and functions of the Services before You make Your purchase.
- 2.6. **Beta Services.** From time to time Chroma may invite Customer to try, at no charge, Chroma products or services that are not generally available to Chroma customers ("Beta Services"). You may accept or decline any such trial in its sole discretion. Any Beta Services will be clearly designated as beta, pilot, limited release, early access, developer preview, non\production or by a description of similar import. Beta Services are provided for evaluation purposes and not for production use, are not supported, may contain bugs or errors, and may be subject to additional terms. Beta Services are not considered "Chroma Services" hereunder and are provided "AS IS" with no express or implied warranty. Chroma may discontinue Beta Services at any time in its sole discretion and may never make them generally available. Chroma will have no liability for any harm or damage arising out of or in connection with a Beta Service.
- 2.7. **Recommendations.** Chroma may, and Customer grants us permission to, make recommendations via Chroma Services or other marketing channels for products or services we think may be of interest to you based on your Application(s), Content, and/or use of Chroma services.
- 2.8. **Modification of Chroma Services.** Chroma is constantly innovating in order to provide the best possible experience for Customers and Users. Customer acknowledges and agree that the form and nature of the Chroma Services provided may change from time to time without prior notice to you. Changes to the form and nature of the Chroma Services will be effective with respect to all versions of Chromatic[^] examples of changes to the form and nature of the Chroma Services includes without limitation security patches, added functionality, and other enhancements.

3. USE OF SERVICES AND CONTENT

- 3.1. **Subscriptions.** Unless otherwise provided in the applicable online order or Subscription Order Form, (a) Services and Content are purchased as subscriptions, (b) new subscriptions may be added during a subscription term, and (c) any added subscriptions may terminate on the same date as the underlying subscriptions. Customer must provide accurate and complete registration information any time you register to use the Chroma Services. Customer is responsible for the security of your passwords and for any use of your account. If you become aware of any unauthorized use of your password or of your account, you agree to notify Chroma immediately.
- 3.2. **Usage Limits.** Chroma Services and Content may be subject to usage limits, including, for example, the quantities specified in a Subscription Order Form or Chromatic website. Chroma Services does not permit you to exceed the usage limits. Chroma reserves the right to enforce usage limits in its sole discretion, which may result in Chroma serving a "quota exceeded" web page to you or your users to whom you serve web pages through your Application via Chroma Services. Repeated exceeding of the usage limits may lead to temporary suspension or termination of your access to Chroma Services. If Customer exceeds a usage limit, Chroma may work with Customer to seek to reduce their usage so that it conforms to that limit. If, notwithstanding Chroma's efforts, Customer is unable or unwilling to abide by a usage limit, Customer will execute an Order Form for additional quantities of the applicable Services promptly upon Chroma's request, and/or pay any invoice for excess usage in accordance with Section 5. Customer remains responsible for all fees and charges incurred through the date of the suspension or termination and will not be entitled for any service credits for any period of suspension.
- 3.3. **Customer Responsibilities.** Customer will (a) be responsible for Users' compliance with this Agreement, (b) be responsible for the accuracy, quality and

legality of Customer Data and the means by which Customer acquired Customer Data, (c) use commercially reasonable efforts to prevent unauthorized access to or use of Services and Content, and notify Chroma promptly of any such unauthorized access or use, (d) use Services and Content only in accordance with the Documentation and applicable laws and government regulations of the United States or other countries, including the country in which you are resident or from which you use Chroma Services. Customer agrees that Chroma has no responsibility or liability for the deletion or failure to store any Customer Data, content, applications, and other communications maintained or transmitted through use of Chroma Services. Customer further acknowledges that you are solely responsible for securing and backing up your Applications and any associated data and content. Customer agrees that your purchases of Chroma Services are not contingent on the delivery of any future functionality or features or dependent on any oral or written public comments made by Chroma or any of its affiliates regarding future functionality or features. Customer is responsible for technical support of its Applications. Customer affirms that you are over the age of 13, as the Chroma Services are not targeted towards, nor intended for use by, anyone under the age of 13.

- 3.4 **Usage Restrictions.** Chroma may suspect or terminate access to Chroma Services if Customer has violated usage restrictions. Customer will not (a) make any Service or Content available to, or use any Service or Content for the benefit of, anyone other than Customer or Your Users, (b) sell, resell, license, sublicense, distribute, rent or lease any Service or Content, or include any Service or Content in a service bureau or outsourcing offering, unless you have been specifically allowed to do so in a separate agreement with Chroma, (c) use a Service or Content to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use a Service to store or transmit Malicious Code, (e) interfere with or disrupt the integrity or performance of any Service or third-party data contained therein, (f) attempt to gain unauthorized access to any Service or Content or its related systems or networks, (g) permit direct or indirect access to or use of any Service or Content in a way that circumvents a contractual usage limit, (h) copy a Service or any part, feature, function or user interface thereof, (i) copy Content except as permitted herein or in an Order Form or the Documentation, (j) frame or mirror any part of any Service or Content, other than framing on Customer's own intranets or otherwise for Customer's own internal business purposes or as permitted in the Documentation, (k) access any Service or Content in order to build a competitive product or service or for the purpose of bringing an intellectual property infringement claim against Chroma, or (l) reverse engineer any Chroma Service unless this is permitted by law, or unless you have been specifically told that you may do so by Chroma, in writing (e.g., through an open source software license). Customer may not develop multiple Applications to simulate or act as a single Application or otherwise access the Chroma Services in a manner intended to avoid incurring fees.
- 3.5 **Open Source Software Licenses.** Open source software licenses for components of the Chroma Services released under an open source license constitute separate written agreements. To the limited extent that the open source software licenses expressly supersede these Terms, the open source licenses govern your agreement with Chroma for the use of the components of the Chroma Services released under an open source license.
- 3.6 **Removal or Suspension of Customer Application and Data.** Customer understands that all information (such as data files, written text, computer software, music, audio files or other sounds, photographs, videos or other images) to which you may have access as part of, or through your use of, the Chroma Services are the sole responsibility of the person from which such content originated. Chroma reserves the right (but shall have no obligation) to remove any or all Customer applications and data from Chroma Services. Customer agrees to immediately take down any content that violates the Acceptable Use Policy, including pursuant to a takedown request from Chroma. In the event that you elect not to comply with a request from Chroma to take down certain content, Chroma reserves the right to directly take down such content. If Chroma is required by a licensor to remove Content, or receive information that Content provided to Customer may violate applicable law or third-party rights, Chroma may notify Customer and in such event You will promptly remove such Content from Your systems. If Customer does not take required action in accordance with the above, Chroma may disable the applicable Content and/or Service until the potential violation is resolved.
- 3.7 **Administrative Access to Chromatic.** Customer agrees not to (a) access (or attempt to access) the administrative interface of Chromatic by any means other than through the interface that is provided by Chroma in connection with the Chroma Services, unless you have been specifically allowed to do so in a separate agreement with Chroma, or (b) engage in any activity that interferes with or disrupts the Chroma Services (or the servers and networks which are connected to Chromatic).

4. NON-CHROMA PROVIDERS

- 4.1 **Non-Chroma Applications and Customer Data.** If Customer installs or enables a Non-Chroma Application for use with a Service, Customer grants Chroma permission to allow the provider of that Non-Chroma Application to access Your Data as required for the interoperation of that Non-Chroma Application with the Service. Chroma is not responsible for any disclosure, modification or deletion of Your Data resulting from access by a Non-Chroma Application.
- 4.2 **Integration with Non-Chroma Applications.** Chroma Services may contain features designed to interoperate with Non-Chroma Applications. To use such features, Customer may be required to obtain access to Non-Chroma Applications from their providers, and may be required to grant Chroma access to Your account(s) on the Non-Chroma Applications. If the provider of a Non-Chroma Application ceases to make the Non-Chroma Application available for interoperation with the corresponding Service features on reasonable terms, Chroma may cease providing those Service features without entitling Customer to any refund, credit, or other compensation.
- 4.3 **Non-Chroma Content.** Chroma Services may include hyperlinks to other web sites or content or resources or email content. Chroma may have no control over any web sites or resources which are provided by companies or persons other than Chroma. Customer acknowledges and agrees that Chroma is not responsible for the quality or availability of any such external sites or resources, and does not endorse any advertising, products or other materials on or available from such web sites or resources. Customer acknowledges and agrees that Chroma is not liable for any loss or damage which may be incurred by you or your Users as a result of the availability of those external sites or resources, or as a result of any reliance placed by you on the completeness, accuracy or existence of any advertising, products or other materials on, or available from, such web sites or resources.

5. FEES PAYMENT AND TERMS AUDIT.

- 5.1 **Fees and Expenses.** For purchased Chroma Services and Support, Customer will pay Chroma the fees set forth in the applicable Subscription Order, Online Order, and/or SOW. Fees for Services may be based on certain metrics, parameters, and/or limitations as set forth in Chroma's Services descriptions, Subscription Orders, or in specific SOWs, including for example, and without limitation, metrics related to the size of Customer's computing environment, application count, application size, and the number of developers using Chromatic.
- 5.2 **Payment Terms.** Unless otherwise agreed by the parties in an applicable Subscription Order or SOW, Chroma will charge Customer credit card specified in an applicable order at the interval indicated in Chroma fees and payment policies or invoice Customer as follows: (a) for Services, upon execution of the applicable Subscription Order^A and (b) for Consulting and Training Services, monthly in arrears as such Services are delivered by Chroma. Customer will pay all invoices issued by Chroma under Subscription Orders and SOWs in full within thirty (30) days of the date of each invoice, without setoff, counterclaim, or deduction of any kind. All late credit card payments or invoiced amounts not paid by Customer when due will accrue interest at the rate of one percent (1.5%) per month or the maximum amount permitted by law, whichever is lower. Chroma may, in its sole discretion and upon ten (10) days prior written notice to Customer, suspend the provision of Services or Support, as applicable, if any invoice is more than thirty (30) days past due. This right of suspension will not limit any other of Chroma's rights or remedies related to Customer's failure to pay. To the fullest extent permitted by law, Customer waives all claims relating to charges unless claimed within 60 days after the charge (this does not affect your credit card issuer rights). Charges are solely based on Chroma's measurements of your use of the Chroma Services, unless otherwise agreed to in writing. Nothing in these Terms obligates Chroma to extend credit to any party. Chroma may change its fees and payment policies for the Chroma Services by notifying you at least fifteen (15) days before the beginning of the billing cycle in which such change will take effect. Changes to the fees or payment policies will be posted on the Chromatic website (or such other URL Chroma may provide from time to time). Customer acknowledges and agrees that any credit card and related billing and payment information that you provide to Chroma may be shared by Chroma with companies who work on Chroma's behalf, such as accounting firms, payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Chroma and servicing your account.
- 5.3 **Refunds & Cancellation.** Customer may cancel and receive a full refund of fees paid within the first thirty (30) days of the initial service provisioning date for orders related to Chromatic. Chroma reserves the right, in its sole discretion, to issue any refunds in the form of credit towards future Chroma

Services. Any subsequent Chromatic orders associated to a Customer's user account or previously associated web domains are not eligible for refund. Customer may only request a cancellation or refund via written notice to Chroma. In the event of cancellation, Customer is responsible for all fees incurred.

- 5.3 **Taxes.** All fees and expenses charged by Chroma under this Agreement are exclusive of any taxes, duties, or similar charges imposed by any government, and Customer agrees to pay for any and all federal, state, or local sales, use, excise, privilege, or other taxes, duties or assessments, however designated or levied, relating to this Agreement, exclusive of taxes based on Chroma's net income. If Customer is required to pay any withholding tax, charge, or levy in respect of any payments due to Chroma hereunder, Customer agrees to gross up payments actually made to Chroma such that Chroma receives sums due hereunder in full and free of any deduction for any such withholding tax, charge, or levy.
- 5.4 **Audit.** During the term of this Agreement and for a period of six (6) months thereafter (the "Audit Period"), Customer agrees to keep and maintain complete and accurate records sufficient to verify Customer's compliance with the terms of this Agreement, including, without limitation, payment of applicable Support fees ("Records"). Such Records must include, at a minimum, information regarding Customer's computing environment and systems on which Support fees are based, including, for example, and without limitation, information relating to Customer's installation and usage of Chromatic on Customer's systems. During the Audit Period, Chroma (or its authorized representative) will have the right, upon ten (10) days prior written notice to Customer, to have an independent third party (subject to Customer's approval not to be unreasonably withheld) perform an inspection and audit of the Records. Audits will be performed during Customer's normal business hours and in a manner that does not unreasonably interfere with Customer's normal business operations. If an Audit reveals that Customer has underpaid Chroma for Support, Customer shall promptly pay such underpaid amounts. Chroma will bear the costs of the Audit⁴ provided, however, that if the Audit reveals underpayment by Customer by more than five percent (5%), Customer will reimburse Chroma for the cost of the Audit.

6. PROPRIETARY RIGHTS.

- 6.1 **Customer Retained Property.** Customer owns and retains all worldwide right, title, and interest in and to all of Customer's Preexisting Intellectual Property and Customer's Confidential Information (together, the "**Customer Retained Property**"). Except as expressly set forth herein, nothing in this Agreement conveys any right, title, or interest in or to the Customer Retained Property to Chroma or any other third party. Chroma acknowledges and agrees that it obtains no right, title or interest from you (or your licensors) under these Terms in or to any Applications or data that you create, submit, post, transmit or display on, or through, the Chroma Services, including any intellectual property rights which subsist in that Application (whether those rights happen to be registered or not, and wherever in the world those rights may exist). Unless you have agreed otherwise in writing with Chroma, you agree that you are responsible for protecting and enforcing those rights and that Chroma has no obligation to do so on your behalf. By creating an Application and associated Data through use of the Chroma Services, you give Chroma a worldwide, royalty/free, and non-exclusive license to reproduce, adapt, modify, translate, publish, publicly perform, publicly display and distribute such Application and Data for the sole purpose of enabling Chroma to provide you with the Chroma Services.
- 6.2 **Chroma Retained Property.** Chroma owns and retains all worldwide right, title and interest in and to all: (a) Chroma's PreExisting Intellectual Property, (b) General Enhancements, (c) Services Materials, (d) Training Materials, (e) Documentation, and (f) Implementation Architectures (together, the "**Chroma Retained Property**"), including any and all Intellectual Property therein and thereto. Except as expressly set forth herein, nothing in this Agreement conveys any right, title, or interest in or to the Chroma Retained Property or Chromatic (including General Enhancements thereto) to Customer or any other third party.
- 6.3 **Work Product.** Subject to the terms and conditions of this Agreement, Customer shall own all worldwide right, title, and interest in and to all Work Product delivered to Customer, including all Intellectual Property therein and thereto, from the time that it is created, authored, invented, discovered, or first reduced to practice, subject to Chroma's rights in the underlying intellectual property embodied therein or used by Chroma to provide the Support. Subject to the terms and conditions of this Agreement, Chroma hereby assigns to Customer all worldwide right, title, and interest in and to any and all Work Product, including all Intellectual Property therein and thereto, that Chroma has or may hereafter acquire. Notwithstanding the foregoing or anything to the contrary, Chroma shall own all worldwide right, title, and interest in and to all Work Product and Intellectual Property therein and thereto related to the Chroma Retained Property. To the extent that any Chroma Retained Property is included in a deliverable provided to Customer as part of any Support or Services, Chroma hereby grants to Customer a non-exclusive, non-transferable, worldwide right and license to internally use, execute, reproduce, display, and perform such Chroma Retained Property solely for use with Chromatic and related Services and Support. Training Materials may only be used by any Customer employee, director, officer, contractor or agent but may not be copied electronically or otherwise (whether or not for archive purposes), modified, translated, re-distributed or disclosed to third parties, lent, hired out, made available to the public, sold, offered for sale, shared, or transferred in any other way. The above license to Chroma Retained Property expressly excludes Chromatic (including General Enhancements thereto) and any open source software included in Services deliverables or provided to Customer as part of Support. Except as expressly set forth herein, nothing in this Agreement conveys any right, title, or interest in or to the Chroma Retained Property to Customer or any other third party.
- 6.4 **Feedback.** Customer may, in its sole discretion or at the invitation by Chroma, provide Chroma with suggestions, enhancement requests, comments, recommendations, or other feedback related to Services provided by Chroma ("Feedback"). If, in the course of performing under this Agreement, Customer provides Chroma with Feedback, Chroma is free to retain, use and incorporate such Feedback in its products, services, and/or Chromatic, without payment of royalties or other consideration.
- 6.5 **Residual Rights.** The parties acknowledge and agree that Chroma is in the business of providing training, consulting, and support services to third parties that are or may be substantially similar to the Services and Support being provided to Customer. Customer agrees that Chroma, its employees, and agents will be free to use and employ their general skills, know-how, and expertise, and to use, disclose, and employ any generalized ideas, concepts, know-how, methods, techniques, or skills gained or learned during the course of any Services or Support performed under this Agreement and retained in the unaided memory of Chroma's employees or agents, subject to its obligations respecting Customer's Confidential Information pursuant to Section 7.
- 6.6 **Reservation of Rights.** Chroma reserves all rights not expressly granted to Customer in this Agreement. Except as expressly stated, nothing herein shall be construed to (1) directly or indirectly grant to a receiving party any title to or ownership of a providing party's intellectual property rights in services or materials furnished by such providing party hereunder, or (2) preclude such providing party from developing, marketing, using, licensing, modifying or otherwise freely exploiting services or materials that are similar to or related to the Support, services, or materials provided hereunder.
- 6.7 **Copyright Policy.** Customer agree to set up a process to respond to notices of alleged infringement that comply with the United States' Digital Millennium Copyright Act ("DMCA notices"). It is Chroma's policy to respond to DMCA notices or other applicable copyright laws and to terminate the accounts of repeat infringers. Chroma reserves the right to take down content in Customer's Application or, if necessary, the Application itself upon receipt of a valid DMCA notice.

7. CONFIDENTIALITY.

- 7.1 **Obligations.** For a period of five (5) years from the date of disclosure of the applicable Confidential Information, the Receiving Party will (i) hold the Confidential Information of the Disclosing Party in trust and confidence and avoid the unauthorized disclosure or release thereof to any other person or entity by using the same degree of care as the Receiving Party uses to avoid unauthorized use, disclosure, or dissemination of its own confidential information of a similar nature, but, in no event, less than a reasonable degree of care, and (ii) not use Confidential Information for any purpose except as expressly contemplated under this Agreement or any Subscription Order or SOW⁴ provided that, to the extent Confidential Information constitutes a trade secret under applicable law, the Receiving Party agrees to protect such information for so long as it qualifies as a trade secret. Notwithstanding any other provision of this Agreement, the Receiving Party may disclose Confidential Information to those of the Receiving Party's employees and contractors having a need to know such Confidential Information, provided that the Receiving Party takes reasonable measures to ensure that such employees and contractors are bound by non-use and non-disclosure obligations at least as restrictive as those contained in this Agreement. Each party shall be liable for all violations of this Section 7 by its employees and contractors.
- 7.2 **Exclusions.** The obligations of the Receiving Party under this Section 7 will not apply to information of the Disclosing Party that the Receiving Party can

demonstrate (i) was in the possession of the Receiving Party at the time of disclosure without any restrictions as to confidentiality of such information, (ii) was generally available to the public at the time of disclosure or became generally available to the public after disclosure through no breach of this Agreement or other wrongful act by the Receiving Party, (iii) was rightfully received by the Receiving Party from a third party without restriction on disclosure, or (iv) is independently developed by the Receiving Party without use of or reference to the Confidential Information. The Receiving Party may disclose Confidential Information to the extent required to comply with binding orders of governmental entities that have jurisdiction over it[^] provided that, to the extent legally permitted, the Receiving Party gives the Disclosing Party reasonable written notice to allow the Disclosing Party to seek a protective order or other appropriate remedy, discloses only such Confidential Information as is required by the governmental entity, and uses commercially reasonable efforts to obtain confidential treatment for any Confidential Information disclosed.

- 7.3 **Return and Destruction.** Upon the written request of the Disclosing Party, the Receiving Party shall promptly return or destroy the Confidential Information, including all copies thereof (certifying the fact of such destruction to the Disclosing Party), with the exception that the Receiving Party (a) may retain an archival copy of the Confidential Information and (b) is not required to destroy or alter computer-based backup files generated in the normal course of its business. Any Confidential Information contained in such archival copies or backup files shall, however, remain subject to the confidentiality obligations of this Section 7.
- 7.4 **Equitable Relief.** The parties acknowledge and agree that any breach of the obligations of this Section 7 may cause the nonbreaching party irreparable harm for which an adequate remedy at law may not be available and that, therefore, the nonbreaching party shall be entitled to seek injunctive relief, in addition to all other remedies available at law.

8. TERM AND TERMINATION.

- 8.1 **Term.** The term of this Agreement will commence on the Effective Date of the applicable order and will continue until terminated as set forth herein. The term for the provision of Support or Services provided under individual Subscription Orders, Online Orders, or SOWs will be as set forth in such Subscription Order, Online Order, or SOW[^] provided, however, that if a Subscription Order for Support does not specify the term for such Support, Support will be deemed to have commenced upon execution of the Subscription Order.
- 8.2 **Termination.** If there are no active Subscription Orders or SOWs in place, either party may terminate this Agreement for convenience by providing written notice to the other party. Each party will have the right to terminate this Agreement or any individual Subscription Order or SOW for cause upon written notice to the other party: (a) if the other party breaches any material term of this Agreement or the applicable Subscription Order or SOW, and, if such breach is capable of cure, the breaching party fails to cure such breach within thirty (30) days of its receipt of notice of the breach from the nonbreaching party, or (b) if (i) the other party becomes insolvent or makes an assignment for the benefit of creditors, (ii) a trustee or receiver is appointed for such other party or for a substantial portion of its assets or (iii) bankruptcy, reorganization or insolvency proceedings are instituted by or against such other party. Termination of a specific Subscription Order or SOW will not result in the termination of any other Subscription Orders or SOWs. Termination of this Agreement for cause will result in the immediate termination of all active Subscription Orders and SOWs.
- 8.3 **Effects of Termination.** Upon any termination, Chroma will be entitled to payment for all Services and Support rendered, and expenses incurred, through the effective date of termination, including for work in progress. Sections 1, 5, 6, 7, 8.3, 9.2, 10, 11 and 12 will survive any termination of this Agreement.

9. WARRANTY

9.1 Limited Warranties.

- (a) Each party represents and warrants that it has the right, power, and authority to enter into, and perform its obligations under, this Agreement and each Subscription Order and SOW.
- (b) Chroma warrants that the Services and Support will be performed by qualified personnel in a professional and workmanlike manner consistent with applicable industry standards. Customer must notify Chroma in writing of any alleged failure by Chroma to perform Support or Services in accordance with the foregoing warranty within thirty (30) days of the delivery of the affected Services or Support. Chroma's entire liability and Customer's sole remedy for Chroma's failure to perform in accordance with the above warranty shall be for Chroma to: (i) use commercially reasonable efforts to cure or correct such failure, or (ii) if Chroma is unable to cure or correct such failure, terminate the affected Services or Support and refund that portion of fees paid by Customer to Chroma that corresponds to such failure to perform.

- 9.2 **Disclaimer.** EXCEPT AS EXPRESSLY PROVIDED IN SECTION 9.1, CHROMA DOES NOT MAKE OR GIVE ANY REPRESENTATION, WARRANTY, OR COVENANT OF ANY KIND, WHETHER EXPRESS OR IMPLIED, IN CONNECTION WITH THE SUPPORT OR SERVICES PROVIDED HEREUNDER. WITHOUT LIMITING THE FOREGOING, AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, CHROMA EXPRESSLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY, QUALITY, NON-INFRINGEMENT, TITLE, OR FITNESS FOR A PARTICULAR PURPOSE AND ANY REPRESENTATION, WARRANTY, OR COVENANT BASED ON COURSE OF DEALING OR USAGE IN TRADE. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY CUSTOMER FROM CHROMA OR THROUGH THE CHROMATIC WILL CREATE ANY WARRANTY NOT EXPRESSLY STATED HEREIN. WITHOUT LIMITING THE FOREGOING, CHROMATIC, ITS SUBSIDIARIES, ITS AFFILIATES, AND ITS LICENSORS DO NOT WARRANT THAT THE CONTENT IS ACCURATE, RELIABLE OR CORRECT[^] THAT CHROMATIC WILL MEET CUSTOMER'S REQUIREMENTS[^] THAT CHROMATIC WILL BE AVAILABLE AT ANY PARTICULAR TIME OR LOCATION, UNINTERRUPTED OR SECURE[^] OR THAT ANY DEFECTS OR ERRORS WILL BE CORRECTED, INCLUDING WITHOUT LIMITATION BY ANY CHROMA SUPPORT. CHROMA SHALL HAVE NO OBLIGATION TO IDENTIFY OR CORRECT ANY DEFECTS OR ERRORS, OR TO MODIFY CHROMATIC OR PERFORM ANY SOFTWARE DEVELOPMENT SERVICES AS PART OF THE CHROMA SUPPORT.

10. INDEMNIFICATION.

- 10.1 **General.** Each party (the "Indemnitor") agrees, at its own expense, to (a) defend the other party, its Affiliates, and their respective directors, officers, employees, and agents (the "Indemnitees") from and against any third party claim, suit, or action brought against any of the Indemnitees for death, bodily injury, or damage to or loss of any real or tangible personal property to the extent arising out of the Indemnitor's (including its employees and agents) gross negligence or willful misconduct in the performance of this Agreement (each a "General Claim"), and (b) indemnify the Indemnitees against any and all liabilities, losses, damages, costs, and expenses finally awarded to an unaffiliated third party by a court of competent jurisdiction or agreed by the Indemnitor in settlement with regard to any such General Claim. Further, Chroma will defend, indemnify, and hold harmless at its expense, any third party claim, action or proceeding (including resulting liabilities, losses, damages, costs, and expenses finally awarded to an unaffiliated third party) against Customer, and its Indemnitees, that the Services infringe, misappropriate, or violate a third party's proprietary rights (a "Customer Infringement Claim"). Customer will defend, indemnify, and hold harmless at its expense, any third party claim, action or proceeding (including resulting liabilities, losses, damages, costs, and expenses finally awarded to an unaffiliated third party) against Chroma, and its Indemnitees, that any Customer technology related to this Agreement infringes, misappropriates, or violates a third party's proprietary rights (a "Chroma Infringement Claim").
- 10.2 **Conditions to Indemnification.** As conditions to indemnification under this Section 10, the indemnified party must (a) notify the indemnifying party promptly in writing of the General Claim, Customer Infringement Claim, or Chroma Infringement Claim, as applicable, for which the indemnified party is seeking indemnification, (ii) grant the indemnifying party sole control over the defense and settlement of each General Claim Customer Infringement Claim, or Chroma Infringement Claim, as applicable, and (iii) provide the indemnifying party with reasonable cooperation in response to such party's requests for assistance. The indemnifying party may not settle or compromise a General Claim Customer Infringement Claim, or Chroma Infringement Claim, as applicable, without the prior written consent of indemnified party if such settlement includes an admission of liability on the part of the indemnified party.

11. LIMITATION OF LIABILITY. EXCEPT (A) WITH REGARD TO EITHER PARTY'S BREACH OF CONFIDENTIALITY OBLIGATIONS UNDER SECTION 7

("CONFIDENTIALITY"), OR (B) TO THE EXTENT THAT AN AMOUNT IS INCLUDED IN A COURT AWARD OR SETTLEMENT RELATED TO EITHER PARTY'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 10 ("INDEMNIFICATION"), IN NO EVENT WILL EITHER PARTY BE LIABLE UNDER THIS AGREEMENT FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION, LOST REVENUE, LOST PROFITS, LOSS OF INCOME, OR LOSS OF BUSINESS ADVANTAGE), WHETHER OR NOT FORESEEABLE, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT WITH REGARD TO (A) EITHER PARTY'S BREACH OF CONFIDENTIALITY OBLIGATIONS UNDER SECTION 5 ("CONFIDENTIALITY"), OR (B) EITHER PARTY'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 8 ("INDEMNIFICATION"), IN NO EVENT WILL EITHER PARTY'S CUMULATIVE AND AGGREGATE LIABILITY UNDER THIS AGREEMENT EXCEED THE AMOUNTS PAID BY CUSTOMER UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE FIRST DATE ON WHICH LIABILITY AROSE. THESE LIMITATIONS OF LIABILITY WILL REMAIN IN FULL FORCE AND EFFECT, REGARDLESS OF WHETHER EITHER PARTY'S REMEDIES HEREUNDER ARE DETERMINED TO HAVE FAILED OF THEIR ESSENTIAL PURPOSE. THE ABOVE LIMITATIONS WILL NOT, HOWEVER, LIMIT CUSTOMER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT.

12. GENERAL.

- 12.1 **Subcontractors.** Chroma may engage third parties to furnish services in connection with Services or Support, provided that such third parties have executed appropriate confidentiality agreements with Chroma. In addition, Services and Support may be performed by Affiliates of Chroma. No engagement by Chroma of a subcontractor or an Affiliate will relieve Chroma of any of its obligations under this Agreement and Chroma shall be fully responsible for the actions or omissions of such subcontractor as they relate to the subject matter of this Agreement.
- 12.2 **Assignment.** Neither party may assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other party, which shall not be unreasonably withheld, except that (i) either party may assign this Agreement or rights granted hereunder to its Affiliate without the consent of the other party, and (ii) the transfer of this Agreement, or rights granted hereunder, by Chroma to a successor entity in the event of a merger, corporate reorganization, or acquisition of all or substantially all the assets of a party shall not constitute an assignment for purposes of this Section 12.2. Any attempted assignment or transfer in violation of this Section 12.2 shall be null and void.
- 12.3 **Governing Law and Venue.** This Agreement is governed by and will be construed in accordance with the laws of the State of California, without regard to conflict of law principles and the terms of this Section 12.3 apply. The parties acknowledge and agree that this Agreement relates solely to the performance of services (not the sale of goods) and, accordingly, will not be governed by the Uniform Commercial Code. In addition, the provisions of the Uniform Computerized Information Transaction Act and United Nations Convention on Contracts for the International Sale of Goods will not apply to this Agreement. All Services and Support provided hereunder are "Commercial Items" as that term is defined in the Federal Acquisition Regulation (FAR) at 48 C.F.R. 2.101. Any legal action or proceeding arising under this Agreement will be brought exclusively in the state or federal courts located in San Francisco County, California, and the parties expressly consent to personal jurisdiction and venue therein.
- 12.4 **Independent Contractors.** The relationship between the parties established under this Agreement is that of independent contractors, and nothing in this Agreement, SOWs or Subscription Orders shall be construed to create an employment, partnership, joint venture, or agency relationship between the parties.
- 12.5 **Notices.** All notices required or permitted under this Agreement must be in writing. Notices will be effective (a) upon delivery, if delivered in person or through use of a reputable courier or overnight delivery service, or (b) two (2) days after mailing, if sent by a form of certified mail. Notices must be sent to the addresses set forth in applicable Subscription Orders or SOWs. Notices to Chroma must additionally be sent to the attention of the Chroma Legal Department, 2612a 8th St, Berkeley, CA 94710.
- 12.6 **Non-Solicitation.** During the term of this Agreement and for a period of one (1) year thereafter, neither party may directly or indirectly solicit, any employee of the other party* provided, however, that nothing herein will prevent a party from hiring any such employee who responds to a general hiring program conducted in the ordinary course of business or who approaches the other party on a wholly unsolicited basis.
- 12.7 **Publicity.** Customer agrees that Chroma may reference and use Customer's name and trademarks in Chroma marketing and promotional materials, including, but not limited to, a list of Chroma customers, the Chroma and/or Chromatic websites, or verbal reference, solely for purposes of identifying Customer as a customer of Chroma Services.
- 12.8 **Severability.** If any provision of this Agreement is held to be invalid or unenforceable, the remaining portions will remain in full force and effect and such provision will be enforced to the maximum extent possible so as to achieve the intent of the parties and will be reformed to the extent necessary to make such provision valid and enforceable.
- 12.9 **No Waiver.** The failure of a party to enforce any provision or exercise any right under this Agreement shall not constitute a waiver of such provision or right and shall not preclude such party from enforcing such provision or exercising such right at any later time.
- 12.10 **Force Majeure.** Except for the obligation to pay sums due hereunder, neither party will be liable to the other for any delay or failure to perform due to causes beyond its reasonable control.
- 12.11 **No Third Party Beneficiaries.** The terms of this Agreement are intended to be, and are solely for the benefit of, Chroma and Customer and do not create any right in favor of any third party.
- 12.12 **Compliance with Export and Other Laws.** Customer acknowledges that items provided hereunder are of United States origin, are provided subject to the U.S. Export Administration Regulations, and may be subject to other applicable national and international laws. Diversion or distribution contrary to applicable export control laws is prohibited. Customer represents that (1) it is not, and is not acting on behalf of, (a) any person who is a citizen, national, or resident of, or who is controlled by the government of any country to which the United States has prohibited export transactions, or (b) any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons or the U.S. Commerce Department's Denied Persons List or Denied Entity List* and (2) it will not permit items delivered under this Agreement to be used for any purposes prohibited by law, including, but not limited to, any prohibited development, design, manufacture, or production of missiles or nuclear, chemical, or biological weapons. Additionally, each of the parties agrees that it will not engage in any illegal, unfair, deceptive, or unethical business practices whatsoever, including, but not limited to, any act that would constitute a violation of the U.S. Foreign Corrupt Practices Act.
- 12.13 **Counterparts and Signatures.** Subscription Orders and SOWs may be executed in counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument. Facsimile and electronic copies of signatures shall have the same effect as originals. If a party elects to sign Subscription Orders or SOWs electronically, it expressly acknowledges and agrees that such electronic signature is the legal equivalent of, and has the same force and effect as, a manual signature.
- 12.14 **Entire Agreement.** This Agreement, together with any Subscription Orders or SOWs, constitutes the entire agreement between the parties concerning the subject matter hereof. Any additional or conflicting terms contained in subscription orders issued by Customer with respect to Services or Support provided hereunder are hereby expressly rejected and shall have no force or effect on the terms of this Agreement or any Subscription Order or SOW. This Agreement supersedes all prior or contemporaneous discussions, proposals, and agreements between the parties, whether written or oral, relating to the subject matter hereof. No amendment, modification, or waiver of any provision of this Agreement will be effective unless in writing and signed by both parties.
- 12.15 **Precedence.** In the event of a conflict between the terms of any Subscription Order or SOW with the terms of this Agreement, the terms of the Subscription Order or SOW shall control but (a) only with respect to the specific Services or Support purchased under such Subscription Order or SOW, and (b) only if the Subscription Order or SOW specifically references the conflicting provision(s) of this Agreement with the intention to supersede such provision(s).