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| **TO:** | Red Pepper Software, LLC |
| **FROM:** | Kyle Harvey & Megha Kundra |
| **DATE:** | July 11, 2023 |
| **SUBJECT:** | MSA Review Playbook – Red Pepper Software, LLC |

**Executive Summary**

The purpose of this MSA review playbook is to outline material changes, and appropriate responses to those changes, in the redline negotiations that Red Pepper Software, LLC (“***Red Pepper***” or “***Service Provider***”) receives from its requesting customers and clients. Outlined on the pages that follow is a table of the material provisions in Red Pepper’s standard Master Services Agreement, which was last updated and reviewed by our firm on June 29, 2023 (the “***MSA***”). Although this playbook is valuable in understanding the range of acceptable changes to material provisions in the MSA, this document cannot handle every unique request from customers (especially business-level decisions or decisions based on those customers’ internal policies). If Red Pepper encounters any changes that are beyond the scope of this playbook, please feel free to contact Fabian VanCott.

**NOTE ON PLAYBOOK**: WE STRESS THAT THIS PLAYBOOK IS HELPFUL GUIDANCE IN LOOKING AT MATERIAL CHANGES TO TERMS COMMONLY NEGOTIATED IN THE MSA, BUT THE PLAYBOOK CANNOT, AND DOES NOT, CONSTITUTE LEGAL ADVICE ON EVERY CHANGE A CUSTOMER REQUESTS WITHOUT FABIAN VANCOTT’S REVIEW AND INPUT AT THAT TIME. THANK YOU.

[*MSA review playbook follows on next page*]

| Section | **MSA Original Language** | **Generally acceptable changes:**  **(consider accepting these changes regardless of client value to Red Pepper)** | **Unacceptable, unless as a last resort:**  **(consider accepting for only those clients who will provide extremely high return)** |
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| **Section 1: Background and Services Summary** | | | |
| 1.c | i. [WORK MADE FOR HIRE]: General software research and development, software architecture, and custom software consulting. The original work created as part of Services provided shall be considered a "work made for hire" as defined by the copyright laws of the United States. See Section 6 for “Terms and Conditions For Use, Reproduction, or Distribution.” [OR]  [CONFIGURATION WITHOUT CODE]: General software research and development, software architecture, and custom software consulting to configure solutions for Buyer, according to the specifications and terms of this Agreement and each SOW (consistent with Section 6 below). [OR]  [ALL CODE RETAINED BY SERVICE PROVIDER]: General software research and development, software architecture, and custom consulting for Buyer’s products and services, but with all source code, original works, and other intellectual property matters and rights retained by Service Provider in the course of the Services (consistent with Section 6 below and the license granted to Buyer). | Minor modifications to clarify scope of deliverables for Work Made for Hire scenario are acceptable. For example, further clarification that Red Pepper will give further assurances on filings or assistance if such deliverables cannot constitute work made for hire.  Example additions that are acceptable for work made for hire scenario:  To the extent any work product or intellectual property therein does not qualify as work made for hire, Service Provider shall, and hereby does: (i) assign, transfer, and otherwise convey to Buyer, all right, title, and interest in and to such work product; and (ii) irrevocably waive all claims Service Provider may now or hereafter have in any jurisdiction to so-called “moral rights” or rights of droit moral with respect to the work product. | However, changes that indicate that a client will own know-how or internal, underlying information of Red Pepper, in a work made for hire scenario, are **UNACCEPTABLE**.  For the two configuration scenarios, language implying work made for hire doctrine applies are **UNACCEPTABLE**. |
| 1.d | The “Effective Date” of this Agreement is:  The date of last signature set forth on the signature page below. | Specified dates acceptable. | Specified dates acceptable. |
| **Section 2: Engagement and Performance of Services** | | | |
| 2.a | **a. Scope of Work:** This Agreement governs each Scope of Work (“SOW”) with respect to the Services provided by Service Provider, except that any conflict between the terms of this Agreement and a separate SOW will be resolved in favor of the SOW if the SOW explicitly states that it is intended to modify the conflicting terms of this Agreement. This Agreement does not obligate Service Provider to perform any Services, or Buyer to perform any Services, until both parties have signed an SOW and then only for the Project specified in the SOW. Both parties must sign an SOW for it to be effective. However, a Purchase Order, herein understood to be a verbal or written request for services which reasonably includes the verbiage “purchase order” (each, a “Purchaser Order”), is effective if Service Provider: (a) signs and returns it to Buyer; (b) begins performance; or (c) acknowledges it by email or any other commercially reasonable means. If Service Provider commences Services for Buyer in the absence of a SOW or a Purchase Order and Buyer accepts such Services, this Agreement will nevertheless apply, unless the parties otherwise mutually agree in writing. | Can accept deletion of language that the parties are required to sign separate SOWs if Buyer sufficiently includes language that would be in the SOW in this Agreement (for example, delivery timelines). Red Pepper’s internal team should review such language. | **GENERALLY DO NOT ACCEPT** mandatory language indicating that Red Pepper must perform Services, accept SOWs, or accept POs without Service Provider consent.  For example, the following language would be **UNACCEPTABLE**, unless this is an enterprise-level client worth being bound to minimum deliverables:  This Agreement ~~does not~~ obligates Service Provider to accept a minimum of \_\_\_\_\_ SOWs or POs during the Term ~~perform any Services, and Buyer to request those Services, until both parties have signed an SOW and then only for the Project specified in the SOW~~. |
| 2.b | **b. Service Delivery:** Buyer hereby engages Service Provider to provide the Services to Buyer, and Buyer will pay Service Provider for the Services, in accordance with the terms and conditions of this Agreement. It is agreed and understood that Service Provider is providing a “service” and not a “good,” as those terms may be used under the Uniform Commercial Code, as adopted by the governing law of this Agreement (independent of any final software deliverables to Buyer). | Edits to this section are uncommon, but minor changes on a case-by-case basis should be fine. | Edits as follows should generally be **UNACCEPTABLE** (as shown below): b. Service Delivery: Buyer hereby engages Service Provider to provide the Services to Buyer, and Buyer will pay Service Provider for the Services, in accordance with the terms and conditions of this Agreement. ~~It is agreed and understood that Service Provider is providing a “service” and not a “good,” as those terms may be used under the Uniform Commercial Code, as adopted by the governing law of this Agreement (independent of any final software deliverables to Buyer).~~ |
| 2.c | **c. Performance**: Service Provider will perform the services of this Agreement in a timely and professional manner, consistent with industry standards, at a location, place and time that Service Provider deems appropriate, and all in accordance with this Agreement. It is understood that there are inherent uncertainties in custom software development and Service Provider does not guarantee, represent, or warrant that the code will work within the exact scopes or time or cost constraints requested by Buyer. Any specific warranties or guarantees regarding bug fixes and performance of code may be outlined and agreed by both parties in the applicable SOW, but otherwise the Services and any underlying code are provided “as is”. The manner and means that Service Provider chooses to complete the Services are in Service Provider's sole discretion and control. | Can accept edit to say that Service Provider will perform the services in a manner, at a location, place and time that ***both*** parties deem appropriate according to the SOWs applicable delivery dates (making it “mutual”).  Can accept Buyer’s addition of language regarding bug fixes, performance of code, downtime, etc. that would typically be in a SOW or a Service Level Commitment and their removal of reference to the SOW. Red Pepper’s legal team should review such language added by Buyer. If Buyer adds any language about “downtime” of Services, we recommend pushing for downtime of .5%, or in other words, uptime of 99.5%. Lower estimates of downtime (.1% or .3%) should require case-by-case approval. | Red Pepper **SHOULD NOT GENERALLY ACCEPT** any edits to limitation of representation and warranty to the performance of the Services provided “as is”.  If a Buyer proposes specific representations on source code, Services, etc., consider contacting legal counsel. |
| 2.d | **d. Testing and Acceptance:** At the time of completion of the Services, Service Provider will submit the completed deliverables, code, or other Services to Buyer for inspection and testing during a 3-day period (provided, such inspection period is also subject to any additional testing periods in the applicable SOW). Acceptance of the Services on the part of Buyer is constituted by any of the following conditions being met: (i) final payment from Buyer for Services billed, (ii) passage of the 3-day inspection period without notice of non-functioning code to Service Provider, or (iii) the usage of any of the software code or other Services in a production environment. ALL ACCEPTED SERVICES ARE OFFERED “AS IS” WITH NO ATTACHED GUARANTEES, REPRESENTATIONS, OR WARRANTIES UNLESS EXPRESSLY DESCRIBED AND AGREED TO BY THE PARTIES IN THE APPLICABLE SOW. | changes to the testing/acceptance timeline (e.g., 5 or 7 days for testing) are generally acceptable on approval from Red Pepper’s internal team. | **DO NOT GENERALLY ACCEPT** deletion of the following, unless significant business reason for accepting those changes exists: d. Testing and Acceptance: At the time of completion of the Services, Service Provider will submit the completed deliverables, code, or other Services to Buyer for inspection and testing during a 3-day period (provided, such inspection period is also subject to any additional testing periods in the applicable SOW). Acceptance of the Services on the part of Buyer is constituted by any of the following conditions being met: (i) final payment from Buyer for Services billed, (ii) passage of the 3-day inspection period without notice of non-functioning code to Service Provider, ~~or (iii) the usage of any of the software code or other Services in a production environment. ALL ACCEPTED SERVICES ARE OFFERED “AS IS” WITH NO ATTACHED GUARANTEES, REPRESENTATIONS, OR WARRANTIES UNLESS EXPRESSLY DESCRIBED AND AGREED TO BY THE PARTIES IN THE APPLICABLE SOW.~~ |
| 2.e | **e. Hosting and maintenance:** Hosting and Maintenance of any developed software are typically necessary for the services described under this Agreement and are NOT included in this Agreement unless otherwise specifically stated in a separate SOW associated with this Agreement. | Edits to be reviewed by business team—no initial legal concerns given the light language in this Section. | Edits to be reviewed by business team—no initial legal concerns given the light language in this Section. |
| 2.f | **f. Software Training:** Training on the use of the software developed is NOT included in this Agreement unless otherwise specifically stated in a separate SOW associated with this Agreement. | Edits to be reviewed by business team—no initial legal concerns given the light language in this Section. | Edits to be reviewed by business team—no initial legal concerns given the light language in this Section. |
| **Section 3: Compensation** | | | |
| 3.b | Buyer will pay Service Provider according to the terms set forth in the SOWs. Service Provider will commit the necessary hours to complete projects in a timely manner. | Acceptable if a Buyer inserts modifiers or other language indicating that “undisputed fees billed under each SOW will be paid. | **GENERALLY AVOID FIXED HOURS DELIVERABLES** (e.g. 30 hours per week), unless a pay-per-hour system is agreed to. |
| 3.c | In addition to the payment for Services specified in the applicable Statement of Work, Buyer shall reimburse Service Provider for all reasonable out-of-pocket costs and expenses incidentally incurred or advanced by Service Provider or its employees, independent contractors or agents in connection with the Services rendered under this Agreement or any Project in a SOW, provided that such material expenses (in excess of $500) have been approved in advance by Buyer or its representative. | Minor edits to align with Buyer’s internal reimbursement requirements (e.g., Red Pepper submitting receipts or itemized invoices) are generally fine if reasonably defined. | **DO NOT GENERALLY** accept deletion of this provision wholesale. |
| 3.d | Until such time as the amounts due under Service Provider’s outstanding invoices are paid by Buyer in full for the completed Services, Buyer acknowledges and agrees that Service Provider retains, and holds in escrow for immediate release on payment, all rights and powers to the provided code, its application, and use in connection with the Services (including all intellectual and proprietary rights therein). | Edits (shown in red) along the following lines are acceptable, if Buyer has concerns about the retention of rights Red Pepper is claiming:  Until such time as the amounts due under Service Provider’s outstanding invoices are paid by Buyer in full for the completed Services, Buyer acknowledges and agrees that Service Provider retains, and holds in escrow for immediate release on payment, all rights and powers to the provided code, its application, and use in connection with the Services (including all intellectual and proprietary rights therein). The parties acknowledge and agree that such retention of rights by Service Provider will not inhibit the final delivery of the works or Services as “works made for hire” upon full payment by Buyer, in accordance with this Section and the remainder of this Agreement. | Wholesale removal of this Section is **UNACCEPTABLE**. |
| 3.e | Any balance left unpaid beyond the due date of the invoice associated with the SOW will be considered a “Late Payment” and charged a $300 late fee, in part to address administrative costs and expenses associated with a missed payment. In addition, all amounts not paid by the due date will accrue interest at a rate of 2% per month at compounded interest, accruing on the first day overdue. All payments are first applied to Late Fees and interest, and then applied to outstanding principal amounts. If any balance or other amounts due and payable under this Agreement are referred by Service Provider to an attorney or third party debt collection agency for collection, Buyer agrees to be responsible for all collection costs, reasonable attorney’s fees, court costs, and a collection fee as allowed by applicable law (including, without limitation, Utah Code § 12-1-11). | ***Late Fee/Interest Rate:*** Edits to lower to interest rate are acceptable (down to 1% or 1.5%) if reviewed by Red Pepper’s internal team.  ***Referral of Fees for Third-Party Debt Collection***: Red Pepper should not generally accept deletion of referral of any balance or amounts due and payable to third party debt collection (except for high-value clients). However, if Buyer deletes the last sentence in this section, Red Pepper can propose an additional qualifier that states that you will provide 30 days’ notice to Buyer of such planned referral (as follows, in red), rather than removing the last sentence:  …. If any balance or other amounts due and payable under this Agreement are referred by Service Provider to an attorney or third party debt collection agency for collection, Buyer agrees to be responsible for all collection costs, reasonable attorney’s fees, court costs, and a collection fee as allowed by applicable law (including, without limitation, Utah Code § 12-1-11); provided that Service Provider agrees to provide at least twenty (20) days advance notice to Buyer before making such referral for collection (in addition to any other termination or breach notices under this Agreement). | Making the referral for collection costs mutual, or dropping it entirely from the last sentence of this Section, **MAY BE ACCEPTABLE** for extremely high-value Buyers (case-by-case decision). |
| **Section 4: Contractual Relationship** | | | |
| 4.a | a. Service Provider's relationship with Buyer will be that of a contractor, and nothing in this Agreement should be construed to create a partnership, joint venture, or employer-employee relationship. Service Provider (i) is not the agent of Buyer; (ii) is not authorized to make any representation, contract, or commitment on behalf of Buyer; (iii) will be solely responsible for all tax returns and payments required to be filed with or made to any federal, state, or local tax authority with respect to Service Provider's performance of services and receipt of fees under this Agreement. | Changes to this Section are likely uncommon, but minor edits that do not imply an agency relationship or anything other than arms-length contracting should be fine. | N/A – review unique edits on a case-by-case basis. |
| 4.b | b. Service Provider does not provide any guarantee, representation, or warranty on any third party services utilized to fulfill requirements under this Agreement or any Project. | See “Unacceptable” column. | Edits to this section are **GENERALLY UNACCEPTABLE**. Buyer may ask Red Pepper to take responsibility for the third-party services used under this Agreement; however, you should not provide any guarantees or warranties of any third-party services or products generally. |
| **Section 5: Confidential Information; Data Privacy** | | | |
| 5.a | **a. Non-Disclosure and Confidentiality.** Service Provider agrees that during the Term of this Agreement and thereafter for a period of three (3) years, except as expressly authorized in writing by Buyer, it (a) will not use or permit the use of Confidential Information (defined below) in any manner or for any purpose not expressly set forth in this Agreement; (b) will not disclose, lecture upon, publish, or permit others to disclose, lecture upon, or publish any such Confidential Information to any third party without first obtaining Buyer's express written consent on a case-by-case basis, except for production or disclosures for legal requests; (c) will limit access to Confidential Information to Service Provider personnel who need to know such information in connection with their work for Buyer; and (d) will maintain in strict confidentiality all Confidential Information. "Confidential Information" includes, but is not limited to, all non-public information related to Buyer's business and its actual or anticipated research and development, including without limitation (i) trade secrets, inventions, ideas, processes, computer source and object code, formulae, data, programs, other works of authorship, know-how, improvements, discoveries, developments, designs, and techniques; (ii) information regarding products or plans for research and development, marketing and business plans, budgets, financial statements, contracts, prices, suppliers, and customers; (iii) information regarding the skills and compensation of Buyer's employees, contractors, and any other service providers; (iv) the existence of any business discussions, negotiations, or agreements between Buyer and any third party; and (v) all such information related to any third party that is disclosed to Buyer or to Service Provider during the course of Buyer's business ("Third Party Information"). Notwithstanding the foregoing, it is understood that Service Provider is free to use: (A) information that is generally known in the public, trade, or industry; (B) information that is not gained as a result of a breach of this Agreement, including through independent development by Service Provider; and (C) Service Provider's own skill, knowledge, know-how, and experience. | Changes to extend confidentiality period up to five (5) years are generally acceptable, but anything longer is not (especially an indefinite period).  Cannot accept removal of ability to share Confidential Information to Service Provider personnel.  Minor qualifiers to the categories of permitted disclosures are likely fine, so long as they do not remove the disclosure categories entirely. | **DO NOT ACCEPT** removal of the last clause here:  … Notwithstanding the foregoing, it is understood that Service Provider is free to use: (A) information that is generally known in the public, trade, or industry; (B) information that is not gained as a result of a breach of this Agreement, including through independent development by Service Provider; and (C) Service Provider's own skill, knowledge, know-how, and experience.  Minor edits from Buyer to clarify that information “generally known” … “without breach of this agreement” are fine. |
| 5.b | **b. Disclosures for Legal Proceedings.** If Service Provider is required to disclose any Confidential Information in a judicial or other formal proceeding (including for audits from administrative parties), Service Provider will exercise best efforts to give Buyer advance written notice before disclosing the Confidential Information in any such proceeding and, to the extent permitted by applicable law, will seek to limit disclosures in the proceeding to the Confidential Information that is strictly necessary for the proceeding (as determined by legal counsel of Service Provider). | It is okay to accept removal of “exercise best efforts” so that you are required to give Buyer advance written notice before disclosing Confidential Information. But in this case, you should move the “to the extent permitted by applicable law” clause before “will give Buyer advance written notice” so that you are only required to give advance written notice **and** limit disclosures to Confidential Information that is strictly necessary for a proceeding, to the extent permitted by law. | N/A – review unique edits on a case-by-case basis. |
| 5.c | **c. Employee Non-Recruitment.** It is agreed that the employees and professional personnel (each, an “Impacted Employee”) of both Service Provider and Buyer are highly trained individuals whose talents are important and valuable assets to their respective companies. The parties recognize and agree that the loss of such Impacted Employees, from their respective businesses, is a material cause for concern to both parties and that the needs of Impacted Employees and of the parties change over time. It is therefore agreed that neither Buyer nor Service Provider shall, during the Term and for a period of six (6) months thereafter, approach, solicit, recruit, offer for employment, or hire any Impacted Employee of the other Party without prior written and informed consent of the other Party. In the event that Buyer breaches this Section, it is recognized that irreparable injury to Service Provider would result from any such breach, especially in light of the potential need for the Impacted Employee to provide the Services and complete Projects hereunder. Service Provider shall be entitled to injunctive relief in the event of any breach or threatened breach of this Section, in addition to any other remedy in law or equity arising therefrom (including, without limitation, consequential, special, and punitive damages for loss profits or inability to perform Services). | Red Pepper can accept minor modifications to the time period of six months (e.g., up to 1 year or down to three months). | **DO NOT ACCEPT** deletion of non-recruitment/non-solicitation language in its entirety. Consider pushing back with shorter timeframes if a party moves to remove this entirely (e.g., 3 months).  If a party is adamant on dropping this, reinforce that this is “MUTUAL”—in other words, the Section benefits both parties and is not just a protection for Red Pepper. The development space is competitive, and this is a standard provision in the industry. |
| 5.d | **d. Processing of Personal Data.** Buyer acknowledges and agrees that Service Provider may need to collect and process personal data of Buyer’s natural-person end users or clients (collectively, “Personal Data”) in the course of the Services to adequately provide software deliverables and solutions. In such circumstances, Service Provider will collect and process Personal Data only as a service provider and processor acting on behalf of Buyer, according to the written instructions of Buyer. In no event will Service Provider be a controller or joint controller with Buyer for processing of Personal Data. Service Provider will not directly or indirectly sell any Personal Data or retain, use, or disclose any Personal Data for any reason other than for the purpose of providing the Services to Buyer under the terms of this Agreement and in accordance with applicable privacy laws. To the extent Service Provider may receive, maintain, use, process, or disclose Personal Data on behalf of Buyer in circumstances or with respect to Personal Data that is subject to strict U.S. consumer privacy laws (such as CPRA or VCDPA) or international data protection laws (such as GDPR) that require a formal data processing agreement (a “DPA”), Buyer acknowledges and agrees that Service Provider shall engage in processing all Personal Data subject to the terms of a mutually acceptable DPA, which shall be incorporated into the terms of this Agreement on execution. | Red Pepper can accept specific “DPA” language added by Buyer within the MSA and removal of reference to execution of a separate DPA. Such DPA language (for example, security provisions, written instructions, subprocessors clauses), if added into the MSA by Buyer, should be reviewed by Red Pepper’s internal team. | Red Pepper needs to retain the right to collect and process Buyer data to provide the Services. Red Pepper cannot accept deletion of this Section wholesale or deletion of the language that states that Service Provider is acting only as a processor on behalf of Buyer. Unless reviewed with legal, **DO NOT ACCEPT LANGUAGE IMPLYING RED PEPPER IS A CONTROLLER OF ITS BUYERS’ DATA—**such a statement can carry onerous compliance obligations or audit risk on the part of Red Pepper. |
| **Section 6: Terms and Conditions for Use, Reproduction, or Distribution** | | | |
| 6.b | Subject to Section 6.c below, for the general purposes of this Agreement, software developed for and on behalf of Buyer (which has been fully paid for) will be provided with perpetual license and right of access to Buyer during the Term and thereafter to install, operate, or use in object code for Buyer’s internal business operations and in accordance with this Agreement and each SOW. However, any license to software under this Section shall be subject to, and limited by, Service Provider’s rights (or the lack thereof) to license and convey such rights to Buyer; provided, however, that such access and license are not redundant based on ownership of the final Services deliverables or software to Buyer for each Project (i.e., if such works are work made for hire rather than licensed to Buyer). AS A DIRECT LIMITATION ON THE LICENSE AND RIGHTS UNDER THIS SECTION, AND SUBJECT TO ANY OPEN SOURCE PROVISIONS OF THIS AGREEMENT, THE BUYER AGREES NOT TO REVERSE ENGINEER, DISASSEMBLE, DECOMPILE, DECODE, OR OTHERWISE ATTEMPT TO DERIVE OR GAIN ACCESS TO THE SOURCE CODE OF THE SERVICES DELIVERABLES OR ANY SOFTWARE PORTION THEREOF. | As context, this Section lays out that your Buyer only receives a license and related access rights to use software or other code-based deliverables under the MSA (assuming of course, work made for hire has not been agreed to with this Buyer). Although Buyer is paying for Red Pepper to develop the software, it’s common for the developer to retain ownership in the developed products.  Minor modifications to the capitalized portion are acceptable, so long as it is clear that the mis-use of the deliverables is a breach by Buyer. | If Buyer asks to remove this Section, ask them to explain why/justify the removal. If Buyer continues to push back on the clause regarding the prohibition on reverse engineering, disassembling, decompiling, decoding or otherwise attempting to derive or gain access to the source code of the Services, you can add or accept a “knowingly” qualifier but include this sentence at the end of the paragraph: “By way of clarification, “knowingly” or any similar phrase or qualification based on knowledge, means the actual knowledge of Buyer and the knowledge that each such person would have reasonably obtained after making due and appropriate inquiry with respect to the particular matter in question.”  The new provision would look as follows:  AS A DIRECT LIMITATION ON THE LICENSE AND RIGHTS UNDER THIS SECTION, AND SUBJECT TO ANY OPEN SOURCE PROVISIONS OF THIS AGREEMENT, THE BUYER AGREES NOT KNOWINGLY TO REVERSE ENGINEER, DISASSEMBLE, DECOMPILE, DECODE, OR OTHERWISE ATTEMPT TO DERIVE OR GAIN ACCESS TO THE SOURCE CODE OF THE SERVICES DELIVERABLES OR ANY SOFTWARE PORTION THEREOF. By way of clarification, “knowingly” or any similar phrase or qualification based on knowledge, means the actual knowledge of Buyer and the knowledge that each such person would have reasonably obtained after making due and appropriate inquiry with respect to the particular matter in question. |
| 6.c | [USE IF WORK MADE FOR HIRE: If the original work created as part of Services is stated to be “a work made for hire” in Section 1.c, Buyer shall be the sole and exclusive owner and copyright proprietor of all rights and title in and to the results and proceeds of original work created as part of the Services provided that Service Provider has the right to convey. If for any reason the results and proceeds of original work created as part of the Services provided are determined at any time not to be a "work made for hire,” Service Provider hereby irrevocably transfers and assigns to Buyer all of its rights, titles and interests therein, including all copyrights, as well as all renewals and extensions thereto. Service Provider agrees to execute, at its standard list rate outlined in the most recent SOW with Buyer, any further transfers, assignments or other documents, as may be requested by Buyer or its designees from time to time, necessary to facilitate the transfer of copyright in the work product from Service Provider to Buyer. To the extent this Section applies to the Services, during the Term, Buyer hereby grants Service Provider a fully paid, non-assignable, non-exclusive license and right of access to use the original work in connection with Service Provider providing or supporting the Services and any further Projects.] OR  [USE IF NOT WORK MADE FOR HIRE: Consistent with Section 1.c and Section 6.b, and subject to the applicability of open source rights, Buyer acknowledges and agrees that all right, title, and interest in and to (i) any work product or deliverables under the Services or any Project and (ii) all inventions and other derivative works, customizations, enhancements, and improvements under the Services are and will remain the exclusive property of Service Provider and its licensors (if any).] | In the work made for hire scenario, certain additional language on “further assurances” are acceptable, such as:  To the extent any work product or intellectual property therein does not qualify as work made for hire, Service Provider shall, and hereby does: (i) assign, transfer, and otherwise convey to Buyer, all right, title, and interest in and to such work product; and (ii) irrevocably waive all claims Service Provider may now or hereafter have in any jurisdiction to so-called “moral rights” or rights of droit moral with respect to the work product. | If not using work made for hire, ensure that ownership still remains with Red Pepper and that no provision drafted by the Buyer implies that Buyer will have ownership over any work, source or object code, deliverables, or pre-existing materials of Red Pepper. Cannot accept any removal of language stating that Buyer is the sole and exclusive owner of the work in the configuration scenarios. |
| 6.e | Service Provider may also utilize tools, components, source code, or other property which has been previously developed by Service Provider for the purpose of reuse across multiple Services and for multiple buyers or clients of Service Provider.  Service Provider shall maintain a copyright to these components, but grants to Buyer a license as defined in the source code. To the actual knowledge of Service Provider, these tools, components, source code, or other property are distinct from the business functionality contemplated under this Agreement; accordingly, such tools are not “a work made for hire” under this Agreement. | Minor edits that do not limit rights to re-use components and source code are fine.  Tread carefully if Buyer asks for a representation as to IP ownership of source code and underlying tools. Red Pepper should submit those requests to legal counsel. | **DO NOT ACCEPT** removal of the sentence that such tools, components, source code and other property are not “a work made for hire”. Strong edits here might imply that pre-existing materials or underlying know-how of Red Pepper are not permissible in creating the Services code. |
| 6.f | With Buyer’s written consent (which may be documented through email confirmation), Service Provider may retain a limited license to post the name and likeness (i.e., branded name, mark, logo, or icon) of Buyer in Service Provider’s informational and marketing pieces, such as a logo list on Service Provider’s website. | Can accept deletion of this provision wholesale, if needed.  Typically, this provision is not make or break for our clients as Service Providers, but let us know if there is any specific concern for Red Pepper here. Since you are already giving them the right to consent before you post their name and likeness, there isn't much more that can be added to "soften" the provision. | See “Generally Acceptable Changes”. |
| **Section 7: Liability** | | | |
| 7.a | WITH REGARD TO ANY CLAIM ASSERTED BY THE BUYER AGAINST THE SERVICE PROVIDER RELATING TO THIS AGREEMENT, ASSOCIATED SOW, OR THE SERVICES, WHETHER SAID CLAIM ARISES IN LAW OR IN EQUITY, SERVICE PROVIDER’S LIABILITY IS LIMITED TO, AND THE MAXIMUM DAMAGE, LOSS, OR JUDGMENT THAT CAN BE AWARDED TO THE BUYER IS, BEFORE ATTORNEYS’ FEES AND COSTS, THE TOTAL AMOUNT PAID BY THE BUYER TO THE SERVICE PROVIDER. EXCEPT FOR BUYER’S LIABILITY UNDER SECTION 5.B, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR SPECIAL DAMAGES, WHATSOEVER, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, LOSS OF USE, AND THE LIKE, ARISING OUT OF THIS AGREEMENT OR ASSOCIATED SOW, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. | Consider accepting edits to make this provision “mutual” (i.e., a limitation for both parties).  [Liability Cap]: Consider accepting a liability cap up to Red Pepper’s applicable coverage amounts under insurance or can accept language stating that Service Provider’s liability under this Agreement is limited to the total amount of fees paid and the total amount of fees accrued but not yet paid under this Agreement in a 12-24 month period preceding the event giving rise to claim. Example of what this looks like:  WITH REGARD TO ANY CLAIM ASSERTED BY THE BUYER AGAINST THE SERVICE PROVIDER RELATING TO THIS AGREEMENT, ASSOCIATED SOW, OR THE SERVICES, WHETHER SAID CLAIM ARISES IN LAW OR IN EQUITY, SERVICE PROVIDER’S LIABILITY IS LIMITED TO, AND THE MAXIMUM DAMAGE, LOSS, OR JUDGMENT THAT CAN BE AWARDED TO THE BUYER IS, BEFORE ATTORNEYS’ FEES AND COSTS, [$1,000,000]. EXCEPT FOR BUYER’S LIABILITY UNDER SECTION 5.B, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR SPECIAL DAMAGES, WHATSOEVER, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, LOSS OF USE, AND THE LIKE, ARISING OUT OF THIS AGREEMENT OR ASSOCIATED SOW, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. | Generally, do not accept carveouts to this liability for data privacy, confidentiality, or other provisions unless the Buyer is an enterprise-level client worth the business risk. An edit such as this would look as follows:  EXCEPT FOR BREACH OF PRIVACY OR CONFIDENTIALITY OBLIGATIONS UNDER THIS AGREEMENT, WITH REGARD TO ANY CLAIM ASSERTED BY THE BUYER AGAINST THE SERVICE PROVIDER RELATING TO THIS AGREEMENT, ASSOCIATED SOW, OR THE SERVICES, WHETHER SAID CLAIM ARISES IN LAW OR IN EQUITY, SERVICE PROVIDER’S LIABILITY IS LIMITED TO, AND THE MAXIMUM DAMAGE, LOSS, OR JUDGMENT THAT CAN BE AWARDED TO THE BUYER IS, BEFORE ATTORNEYS’ FEES AND COSTS, THE TOTAL AMOUNT PAID BY THE BUYER TO THE SERVICE PROVIDER. EXCEPT FOR BUYER’S LIABILITY UNDER SECTION 5.B, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR SPECIAL DAMAGES, WHATSOEVER, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, LOSS OF USE, AND THE LIKE, ARISING OUT OF THIS AGREEMENT OR ASSOCIATED SOW, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. |
| 7.b | Except for any liability which is caused by the sole negligence, gross negligence or willful misconduct of Service Provider, its employees, agents or contractors, or where Service Provider is found guilty of infringement on delivered code, Buyer shall defend, indemnify, and hold harmless Service Provider, its affiliates, and their respective officers, directors, agents and employees from any and all claims, demands, losses, causes of actions, damage, lawsuits, judgements, including attorneys’ fees and costs (collectively, “Losses”), arising out of or relating to: (i) the use and implementation of the Services by Buyer after acceptance, (ii) breach or alleged breach by Buyer of this Agreement or any associated SOW, including misuse of the Services or any software deliverables thereunder on the part of Buyer, or (iii) any claim by any third party or data subject that the Personal Data processed by Service Provider under this Agreement was not lawfully collected by Buyer or otherwise breaches the privacy rights of the third party or data subject under the policies and procedures of Buyer. | Can accept edits to limit the scope of subclause (i) here, as follows:  (i) The use and implementation of the Services by Buyer after acceptance in a manner that is not authorized by this Agreement or in a way in which the Company has indicated the Services should not be used.  Caps and limitations on indemnity amounts are generally acceptable, if made mutual for both parties in Section 7.a. | **DO NOT ACCEPT** removal of indemnification by Buyer for breach by Buyer, including misuse of Services or any software deliverables or any claim by any third party or data subject that the Personal Data was not lawfully collected by Buyer or otherwise breaches third party privacy rights.  Consider submitting any unique additions or removals to legal counsel. |
| 7.c | Except for any liability which is caused by the sole negligence, gross negligence or willful misconduct of Buyer, its employees, agents or contractors, or for any liability based on Buyer’s breach of the terms of this Agreement, Service Provider shall defend, indemnify, and hold harmless Buyer, its affiliates, and their respective officers, directors, agents and employees from any and all Losses arising out of or relating to: (i) Service Provider’s obligations under this Agreement or (ii) Service Provider’s obligations under any related Project or SOW. | Only consider accepting IP indemnities in favor of the Client if Red Pepper is confident the source code or other pre-existing materials are solely the property of red pepper. Many Buyers will want an IP representation on software deliverables. | **DO NOT ACCEPT** added indemnification language for any Losses arising out of third party or subcontractor’s actions or omissions arising under this Agreement that are outside the control or knowledge of Red Pepper. |
| 7.d | In the event of any action at law or in equity between Buyer and Service Provider to enforce any of the provisions hereof, the prevailing Party to such litigation shall recover from the other Party all costs and expenses, including actual attorneys’ fees and costs, incurred therein by the prevailing Party; and if the prevailing Party shall recover judgment in any such action or proceeding, such costs, expenses and attorneys’ fees may be included in and as part of such judgment. THE AFOREMENTIONED NOTWITHSTANDING, BUYER SPECIFICALLY AGREES THAT THE LIABILITY OF SERVICE PROVIDER SHALL BE CAPPED BY AND SUBJECT TO THE LIMITATIONS IN SECTION 7.A ABOVE. | Otherwise, see comments in Section 7.A regarding liability cap | **GENERALLY DO NOT ACCEPT** removal of this section unless Buyer is adamant on no attorneys’ fees and they are an enterprise level client.  Otherwise, see comments in Section 7.A regarding liability cap |
| **Section 8: Termination** | | | |
| 8.a | a. Term. Unless specifically outlined in the SOW, it is understood that Service Provider intends to provide uninterrupted Services until the Services and Projects outlined in each SOW are complete (such period being the “Term”). | Changes to this provision are only acceptable if parties agree to a fixed term (e.g., 1 or 2 years). | See “Generally Acceptable Changes”. |
| 8.b | b. Notice of Termination: In the event of termination of this Agreement according to this Section 8, the terminating Party must give a final written notice through normal historical communication methods (requiring at a minimum to be an Email and Phone Call) and captioned “Notice of Termination”. The day the notice was sent to Buyer or Service Provider from the other Party shall be understood to be the “Date of Notice of Termination”. | Changes here are likely uncommon, and any such changes will likely not be too material in nature. | Changes here are likely uncommon, and any such changes will likely not be too material in nature. |
| 8.c | c. Termination with Cause: Either Party has the right to terminate this Agreement, for cause, in the event that the other Party has materially breached the Agreement and fails to cure such breach within fifteen (15) days of receipt of written notice from the non-breaching Party, setting forth in reasonable detail the nature of the breach. | Can accept breach cure period of up to thirty (30) days, but no fewer than fifteen (15) days notice for the cause period.  Buyers may try and add additional events defining “cause”—e.g., bankruptcy, insolvency, or other matters. So long as mutual, those provisions should be acceptable. | See “Generally Acceptable Changes”; otherwise, removal is unacceptable.  A Buyer may request for “Termination for Convenience”, through which they can terminate on [x] days notice. **OUR FIRST RECOMMENDATION IS TO REJECT TERMINATION FOR CONVENIENCE IN FAVOR OF THE BUYER**.  If that fails in negotiations, we caution against accepting any timeline less than 60 days’ notice, and then only with addition of a clause stating that:  In the event of any termination for convenience by Buyer, Buyer shall promptly pay all fees accrued and due as of the date of termination. |
| 8.d | **d. Early Termination by Buyer:** If Buyer intentionally or by an act of omission withholds or inhibits Service Provider from fulfilling the Services or any Project outlined in a SOW (e.g., not providing access to necessary portions of Buyer’s systems after request), and such actions of Buyer last five (5) business days or more after Service Provider has given a Notice of Termination or other reasonable notice detailing the actions of Buyer that are inhibiting the Services, Buyer shall be considered in material breach of this Agreement by means of an ”Early Termination”. For any Early Termination on the part of Buyer, (i) Buyer shall promptly pay Service Provider for all earned but unpaid fees, as may be detailed in a final invoice or written request for payment from Service Provider and (ii) this Agreement may be terminated, in the discretion of Service Provider, immediately after receipt of payment. If Buyer fails to make final payment of fees due to Service Provider within ten (10) days after Service Provider’s written request for payment (which may be through the Notice of Termination described in this Section), all remaining fees due from Buyer shall be overdue and be considered a Late Payment under Section 3 above. | Consider accepting actions of Buyer that inhibits Service Provider from fulling the Services where such actions last up to **ten (10) days or another defined period**. | Buyers may attempt to make this mutual. Consider only accepting a mutual provision for high-value clients. This provision likely does not apply to Buyer because it relates to fulfillment of SOWs and Services, not payment obligations on the part of Buyer.  Otherwise, edits to this section are unacceptable. |
| 8.e | **e. Termination by Frustration of Purpose, Impossibility, or Insolvency of a Party**: In the case of an unforeseen event which makes performance impossible, illegal, or materially different from what was originally intended under this Agreement or an applicable SOW, Buyer will be obligated to pay the amount earned under the Agreement up to the Date of Notice of Termination by frustration of purpose, and this Agreement shall thereafter immediately terminate. | Clarifying edits to require notice or amendment of the agreement to allow continued performance are acceptable, if mutual. | Removal of the section is **UNACCEPTABLE**. |
| 8.f | **f. Return of Property**: Upon termination of the Agreement or upon Buyer’s written request, Service Provider will promptly deliver to Buyer or delete all of Buyer's property together with all copies thereof, and any other material containing or disclosing Third Party Information or Confidential Information. | Buyer may add language requesting a certificate of destruction in the event of deletion or destruction of Buyer’s property and information. This is fine but push back for an attestation or written confirmation by Service Provider of such destruction as a certificate may be difficult to obtain. | Buyer may propose that Service Provider deliver **and** delete all of Buyer’s property together with all copies and any material disclosing Third Party or Confidential Information. Returning all of these items can create a significant burden on Red Pepper, given that it is often much easier to just delete any information or property. Where possible, you should try to keep the “or” language in and avoid an obligation to return customer data on a format specified by customer |
| **Section 9: General Provisions** | | | |
| 9.a | **Governing Law and Venue:** This Agreement and the Services provided to Buyer are governed by Utah law (without regard to its conflict of laws provisions), and Buyer agrees that any dispute shall be brought exclusively by the parties in Utah’s Third District Court or in the United States District Court for the District of Utah. BUYER EXPRESSLY WAIVES (i) ANY OBJECTION TO THE JURISDICTION OF SAID COURTS AND (ii), TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT TO TRIAL BY JURY IN ANY DISPUTE OR CLAIM UNDER THIS AGREEMENT, IN LIGHT OF THE COMPLEX NATURE OF THE SERVICES. | We recommend Red Pepper push for the following order of priority on governing law:   1. Homes state (e.g., Utah) 2. Then Delaware (as a neutral location) 3. Finally, New York as a secondary neutral location. | If it is a sticking point for Buyer, Red Pepper can accept any U.S. State, but it would be preferable not to have California law govern this Agreement, given California’s unique data privacy, IP, employment, and other laws.  Additionally, we want to avoid a range of contracts across the country that are being governed by different laws. This creates a cost and time burden for Red Pepper if you have to litigate all over the country.  **DO NOT ACCEPT VENUE (i.e., where suits can be brought) IN ANY OTHER LOCATION OUTSIDE UTAH OR DELAWARE, UNLESS A HIGH-VALUE CLIENT REQUESTS THEIR LOCATION.** |
| 9.d | **d. Assignment:** Subject to the limitations in this Section, this Agreement, and the Party's rights and obligations herein, are personal to the Party and may not be assigned, delegated, or otherwise transferred by either Party without the other's prior written consent, and any attempted assignment, delegation, or transfer in violation of the foregoing will be null and void. Service Provider may transfer and assign, whether by operation of law, merger, direct assignment, or otherwise, any of its rights and obligations under this Agreement without consent of Buyer, provided that such assignment does not materially impact the rights of Buyer and the timely completion of the Services and any related Project. | Can accept edits to this Section to allow Buyer to also transfer and assign any of its obligations under the Agreement without consent so long as such assignment does not materially impact the rights of Service Provider (i.e., making the provision mutual, as shown below). Notice requirements are also generally acceptable:  Subject to the limitations in this Section, this Agreement, and the Party's rights and obligations herein, are personal to the Party and may not be assigned, delegated, or otherwise transferred by either Party without the other's prior written consent, and any attempted assignment, delegation, or transfer in violation of the foregoing will be null and void. Each Party ~~Service Provider~~ may transfer and assign, whether by operation of law, merger, direct assignment, or otherwise, any of its rights and obligations under this Agreement without consent of the other party ~~Buyer~~, provided that such assignment does not materially impact the rights of the non-assigning party ~~Buyer~~ and the timely completion of the Services and any related Project. The assigning party agrees to provide advance notice of any such assignment permitted by this Section. | **WE STRONGLY RECOMMEND** that Red Pepper accept any removal of their ability to assign the agreement on a change of control, merger, or other exit transaction. As a young company, Red Pepper needs to be able to assign its rights and obligations under the Agreement without Buyer’s consent in the event of a merger, reorganization, consolidation or transfer of all or substantially all of Service Provider’s assets to an interested buyer. This is not an uncommon request in the SaaS and software realm. |