

## TERMS OF USE

These terms of use (“**Terms of Use**”) are a legal binding agreement between **Customer** and the Agilent Technologies, Inc. (“**Agilent**”). These Terms of Use shall supersede any other provisions, terms and conditions set forth by Customer, and the rights of the parties shall be governed exclusively by the provisions, terms and conditions set forth herein.

### 1. DEFINITIONS

- a) “**Agreement**” means these Terms of Use.
- b) “**Authorized Users**” means the individual registered users of the Services that are entitled to access and use the Software; Authorized Users are the only users that can log in to the Services and must be known by Agilent.
- c) “**Confidential Information**” means any non-public information that a party to the Agreement marks as being confidential or, if disclosed orally, reduced to writing and further disclosed to the receiving party within thirty (30) days of disclosure. Notwithstanding the foregoing, Confidential Information includes, but is not limited to the Services, Documentation and Software, the contents of this Agreement, the Data and Agilent’s business policies or practices.
- d) “**Customer**” and “**Customer’s**” means the legal entity you represent and to which Agilent will provide the Services. If you are agreeing to this Agreement on behalf of a company, organization or other entity, you represent and warrant that you have the authority to enter into this Agreement on its behalf.
- e) “**Data**” means the information including but not limited to Personal Data that Customer inputs into the Software and/or the information resulting from the use of the Software.
- f) “**Documentation**” means the manual or other materials available with the Services containing the instructions for use of the Software.
- g) “**Personal Data**” means Data that can directly or indirectly identify individuals.
- h) “**Services**” means the services of providing functionality of the Software, including but not limited to access and use of the Software and Documentation, storage and back-up of Data, support and maintenance.
- i) “**Software**” means Agilent’s Seahorse Analytics software.
- j) “**Third Party Components**” means any third-party software or database (e.g., medical taxonomies) that is integrated with but not included in the Software. Third Party Components are subject to a separate agreement.

### 2. Services

- a) **Access to and use of the Services.** Subject to the terms and conditions of the Agreement, Agilent grants Customer a non-exclusive and non-transferable license to access and use the Services and Documentation. Customer may only allow Authorized Users to access and use the Services and Documentation. An Authorized User may not share its right to use with other users. Customer will not, directly or indirectly, or by any technical means, make the Services or the Documentation accessible to other users other than the Authorized Users.
- b) The Services and Documentation will operate on Agilent’s servers and Customer will access and use the Software through the Internet in an application service provider (ASP) mode.
- c) **Storage and Backup of Data.** Data will be stored on Agilent’s online and offline servers.
- d) **Support and Maintenance.** Agilent may provide, in its sole discretion: (i) updates, bug fixes, small improvements, and upgrades to the Services or Documentation, and (ii) technical support by email or telephone to a help desk, but is under no obligation to do so.

### 3. OBLIGATIONS

- a) **Infrastructure and Communication Requirements.** Customer is solely responsible for acquiring, maintaining, updating and troubleshooting all software, hardware and communications means (such as Internet and network connections) by which Customer accesses and uses the Services.
- b) **Software.** Except as otherwise expressly provided for in the Agreement, Customer agrees to: (i) only use the Services for internal business purposes, and for the purposes, expressly specified in the Agreement; (ii) not decompile or reverse assemble the Software except to the extent this is expressly allowed by law; (iii) not sublicense, rent, lease or export the Services; (iv) unless as permitted under the Agreement, not copy, reproduce, transmit or distribute the Software or any portion thereof, or facilitate a third party to do

## TERMS OF USE

so; and (v) not use any device or software to interfere with the proper operation of the Services or otherwise use the Services in a manner which interferes with or disrupts the integrity or performance of the Services or any third party data contained therein.

- c) **Intended Use.** Customer will use the Services in accordance with its intended use and Documentation. Customer is responsible for ensuring that the way that it uses Services complies with all applicable laws and regulations.

## 4. DISCLAIMER & WARRANTY

To the maximum extent permitted by applicable law: (i) the Services and are provided “as-is” (ii) AGILENT MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND, WHETHER WRITTEN OR ORAL, EXPRESSED OR IMPLIED, AND AGILENT SPECIFICALLY DISCLAIMS ALL WARRANTIES OR CONDITIONS, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, regarding the Services; (iii) Agilent does not warrant that the Services will be accurate, complete or without error; (iv) the use of the Services is entirely at Customer’s risk and Agilent makes no warranties as to the accuracy, quality or reliability of the reports, results, Data or other information obtained by or from accessing and using the Services; (v) Agilent does not warrant that the communications to or through the use of the Services will be uninterrupted or error free, and (vi) Agilent does not warrant that the communications will be secure or that Data will not be lost, damaged or corrupted. SHOULD THE SERVICES PROVE DEFECTIVE, YOU ASSUME THE ENTIRE RISK AND COST RESULTING FROM OR RELATING TO THE DEFECT.

## 5. CONFIDENTIALITY

Each party agrees to keep confidential the Confidential Information received from the other party and to protect the confidentiality thereof in the same manner as it would protect the confidentiality of its own Confidential Information. Each party shall exercise at least a reasonable degree of care in the protection of Confidential Information. Information shall cease to qualify as Confidential Information which is (i) publicly available without breach of this Agreement, (ii) rightfully obtained by the receiving party from another source without a duty of confidentiality, (iii) independently developed or ascertained by the receiving party, (iv) already in the receiving party’s possession without a duty of confidentiality, or (v) required to be disclosed under operation of law provided the disclosing party has been given reasonable advance notice to object to such disclosure.

## 6. INTELLECTUAL PROPERTY RIGHTS

- a) Subject to the limited rights expressly granted herein, all right, title and interest in and to the Services, Documentation and Software, including all rights in and to patents, copyrights, trademarks, and all other intellectual property rights in the Services, Documentation and Software will remain with Agilent. No rights are granted to Customer hereunder other than as expressly set forth herein.
- b) Customer acknowledges and agrees that Agilent will own all right, title and interest in and to any suggestions, recommendations or feedback (“Feedback”) provided by Customer to incorporate into or improve the Services. Agilent will be entitled to use the Feedback without restriction or compensation to Customer. Customer hereby irrevocably assigns to Agilent all right, title, and interest in and to the Feedback.
- c) Customer will not (i) modify, copy or create derivative works based on the Services; (ii) reverse engineer the Services; or (iii) remove, deface, cover, alter or obscure any copyright or trademark notices and/or legends or other proprietary notices associated with the Services.
- d) As between Customer and Agilent, and subject to the limited rights granted by Customer herein, Customer owns all right, title and interest in and to all Customer’s Data. Customer grants to Agilent during the term of this Agreement a non-exclusive, royalty-free, fully-paid, transferable license to host, cache, record, copy, transmit, store and display Customer’s Data solely for the purpose of providing the Services to Customer. Agilent will not access Customer’s Data, except as necessary to provide or improve the Services, respond to service or technical problems, comply with the law or an order of a government or regulatory body, or at Customer’s request.
- e) To the extent that Customer loads third party Data from external sources such as public or private databases, Customer warrants that it has all appropriate rights and licenses from such external sources to access, upload, and use such Data.

## TERMS OF USE

### 7. TERM AND TERMINATION

- a) **Termination.** Either party may terminate this Agreement at any time, with or without cause, upon prior notice. In addition, this Agreement will terminate automatically (without requirement for notice) if either party is subject to a voluntary or involuntary bankruptcy petition, becomes insolvent, is unable to pay its debts as they become due, ceases to do business as a going concern, makes an offer or assignment or compromise for the benefit of creditors, or there is a substantial cessation of its regular course of business, or a receiver or trustee is appointed for such party's assets.
- b) **Effect of Termination.** Upon termination Customer will no longer have access to the Services, except in accordance with section 7c) below.
- c) **Return of Data.** During the thirty (30) days following termination or the expiration of the Agreement, Agilent will not erase Customer's Data and Customer may retrieve Customer's Data from the Services. After the thirty (30) day period, Agilent will have no obligation to retain or make Customer's Data available to Customer. Agilent shall have the right to retain copies of the data in accordance with its legal and regulatory obligations.

### 8. PROCESSING OF DATA INCLUDING PERSONAL DATA

- a) In the event that any Data is Personal Data, Customer acknowledges and agrees that Agilent:
  - i) to perform its obligations hereunder, will, on Customer's behalf, process the Personal Data of individuals in the European Economic Area subject to the GDPR as a data processor in accordance with the Data Processing Agreement (which is incorporated in its entirety into this Agreement and is appended hereto as Schedule 1, including Appendices 1- 3, and including the EU Standard Contractual Clauses (controller to non-EU processor per Decision 2010/87/EU)). For the avoidance of doubt, nothing contained herein shall expressly or impliedly modify the EU Standard Contractual Clauses, nor shall affect any Regulator's or Data Subject's rights under the EU Standard Contractual Clauses; and;
  - ii) at Customer's request, will execute all other appropriate data processing agreements, that may be required under applicable data protection laws.
- b) Customer warrants that, in view of the use of the Personal Data referred to above under (i) and (ii):
  - i) it is legally entitled to transfer all Personal Data to Agilent for the purpose of delivering the Services, and to process any and all Personal Data, as contemplated herein, and
  - ii) any and all transfers and processing of Personal Data comply in full with all laws, statutory rules and codes of practice, to which Customer is subject; and
  - iii) it has ensured that it has obtained all appropriate permits, certifications and consents (including but not limited to, from the relevant data subjects), for submitting Data (including Personal Data into consortia), whether submitted by Customer through the automated submission features in the software, or submitted at the request of Customer.

### 9. LIMITATION OF LIABILITY

- a) SUBJECT TO CLAUSE 10b) BELOW: IN NO EVENT WILL AGILENT, ITS SUBCONTRACTORS OR SUPPLIERS BE LIABLE FOR ANY DIRECT, SPECIAL, INCIDENTAL, INDIRECT, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO LOST PROFITS OR LOST REVENUE, THE COST OF PROCURING SUBSTITUTE SERVICES REGARDLESS OF WHETHER SUCH CLAIMS ARE BASED ON CONTRACT, TORT, WARRANTY OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ADDITION, AGILENT WILL NOT BE LIABLE FOR DAMAGES OF ANY KIND ARISING FROM (I) CUSTOMER'S INABILITY TO ACCESS OR USE THE SERVICES, IN CASE OF TERMINATION OR SUSPENSION OF THIS AGREEMENT OR CUSTOMER'S ACCESS TO THE SERVICES OR DISCONTINUATION OF THE SERVICES, OR (II) ANY UNAUTHORIZED ACCESS, ALTERATION OF, DELETION, CORRUPTION OR LOSS OF CUSTOMER'S DATA, OR (III) ANY FAILURE TO TRANSMIT OR RECEIVE ANY DATA.

## TERMS OF USE

- b) THE EXCLUSIONS AND LIMITATIONS IN CLAUSE 10a) SHALL APPLY TO THE FULLEST EXTENT PERMISSIBLE AT LAW BUT AGILENT DOES NOT EXCLUDE AND/OR LIMIT LIABILITY FOR DEATH OR BODILY INJURY CAUSED BY THE GROSS NEGLIGENCE OF AGILENT, ITS OFFICERS, EMPLOYEES, CONTRACTORS OR AGENTS.
- c) THE REMEDIES IN THIS AGREEMENT ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES.

## 10. INDEMNIFICATION BY CUSTOMER

Customer will defend, indemnify and hold Agilent and Agilent's officers, directors, employees, consultants, agents, and suppliers harmless against any loss, damage or costs (including reasonable attorneys' fees) incurred in connection with any suit, action or claims (a "Claim") made or brought against Agilent by a third party arising out of or related to Customer's Data, or Customer's use of the Services in violation of this Agreement, provided Agilent promptly notifies Customer in writing and provides control of the defense or settlement, and assistance to Customer. If Customer does not diligently pursue resolution of the Claim nor provide Agilent with reasonable assurances that Customer will diligently pursue resolution, then Agilent, without in any way limiting its other rights and remedies, may defend the Claim.

## 11. MISCELLANEOUS

- a) **Entire Agreement – Modifications.** The Agreement constitutes the entire understanding and agreement between Customer and Agilent. The Agreement replaces all prior negotiations and dealings between Customer and Agilent pertaining to the Software and Services. The Agreement cannot be modified unless by an instrument in writing signed by Customer and Agilent.
- b) **Severability.** If any provision of the Agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect. If a provision of these Terms of Use is found to be incompatible with a provision of the Offer, the Offer shall prevail.
- c) **Law Compliance.** The parties agree to comply with applicable laws and regulations. Agilent may suspend performance if Customer is in violation of applicable laws or regulations.
- d) **Governing Law and Jurisdiction.** This Agreement shall be governed by the laws of the State of California. The parties agree that suit may only be brought in the State for Federal Courts located in the County of Santa Clara, California. Customer hereby consents to the jurisdiction and venue of such courts. The Uniform Laws of the United Nations Convention of Contracts for the International Sale of Goods shall not apply.
- e) **Assignment.** Customer may not assign or transfer this Agreement without Agilent's prior written consent. Agilent may assign or transfer any of its rights or obligations under this Agreement upon notice in connection with a merger, reorganization, transfer, sale of assets or product lines, demerger or spin-off transaction or change of control or ownership of Agilent, or its permitted successive assignees or transferees. Any assignment in violation of this Clause will be null and void.
- f) **Independent Contractors.** Agilent and Customer are independent contractors, and neither party, nor any of their respective affiliates, is an agent of the other for any purpose or has the authority to bind the other.
- g) **Privacy.** Subject to Clause 8 of this Agreement, during the course of Customer's relationship with Agilent, Agilent may collect and process as a Data Controller: (i) non-sensitive Personal Data relating to Customer and its employees and contractors only to enable Customer to order products or services, make requests, register for customized communications programs and enhance Customer's experience on Agilent's websites; and (ii) regulated and/ or sensitive Personal Data which Agilent processes as a Data Processor, on behalf of Customer, pursuant to Customer utilizing the Software and the Services. When acting as a Data Processor, Agilent will store and process Customer Personal Data in accordance with the terms of this Agreement and Agilent's Privacy Statement available at [www.agilent.com/go/privacy](http://www.agilent.com/go/privacy). Agilent will not sell, rent or lease any Customer Personal Data to others.
- h) **Export Control.** If Customer, including its affiliates or collaborators, exports, re-exports, transfers products, technology/software/technical data purchased and/or subject to this Agreement, Customer assumes all responsibility for complying with all applicable U.S., EU and/or all relevant local export controls laws and regulations and embargoes/sanctions regimes. Customer, including its Affiliates, shall obtain all the necessary governmental authorizations prior to an export, re-export and/or transfer. Customer, including its affiliates or collaborators, also expressly agrees not to, unless it has obtained all necessary governmental authorizations to directly

## TERMS OF USE

or indirectly sell, authorize, facilitate and/or transfer any products, technology, software or technical data subject to this Agreement and/or allow any access to the Software and/or up/down load any data (including but not limited to Personal Data), and/or to provide or receive Personal Data to or from end-destinations, entities and/or individuals subject to U.S., EU and/or relevant local export controls and embargoes/sanctions regimes. For the avoidance of doubt, embargoed end-destinations shall include, but not be limited to Cuba, Iran, North Korea, Sudan and Syria. Agilent may, without notice, suspend performance if Customer is in violation of Applicable Laws. Further information on restricted destinations can be obtained from <http://www.bis.doc.gov> and <https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>, and [https://eeas.europa.eu/topics/sanctions-policy\\_en](https://eeas.europa.eu/topics/sanctions-policy_en).

- i) **Delays.** Agilent will not be liable for performance delays or for non-performance, due to causes beyond its reasonable control.
- j) **U.S. Federal Government.** The Services, including related software and technology, are provided to the federal government in accordance with the following: software and technical data rights granted to the federal government include only those rights customarily provided to end user customers. Agilent provides this customary commercial license in software and technical data pursuant to FAR 12.211 (Technical Data) and 12.212 (Computer Software) and, for the Department of Defense, DFARS 252.227-7015 (Technical Data – Commercial Items) and DFARS 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation).
- k) **Waiver.** The failure by Agilent to enforce any provision of this Agreement will not constitute a present or future waiver of such provision nor limit Agilent's right to enforce such provision at a later time. All waivers by Agilent must be in writing to be effective.
- l) **English.** The parties to this Agreement have agreed that all correspondence and related documentation to this Agreement and associated with the Software shall be rendered in English.

## 12. (COMPONENT(S) OF) OPEN SOFTWARE

The Software may utilize third party software made available under various open source software licenses ("Open Source Components"). The terms associated with the Open Source Components are available in the user guide, help documentation, and/or the release notes for the Software. You agree to comply with any and all applicable terms. In addition to the warranty disclaimers contained in the terms associated with the Open Source Components, Agilent makes the following disclaimers regarding the Open Source Components on behalf of itself, and the copyright holders, contributors, and licensors of the Open Source Components: To the maximum extent permitted by applicable law, the Open Source Components are provided by the copyright holders, contributors, licensors, and Agilent "as is" and AGILENT MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND, WHETHER WRITTEN OR ORAL, EX-PRESSED OR IMPLIED, AND AGILENT SPECIFICALLY DISCLAIMS ALL WARRANTIES OR CONDITIONS, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, regarding the Open Source Components. In no event will the copyright owner, contributors, licensors, or Agilent be liable for any direct, indirect, incidental, special, exemplary, or consequential damages (including, but not limited to, procurement of substitute goods or services; loss of use, data, or profits; or business interruption), however caused and on any theory of liability, whether in contract, strict liability, or tort (including negligence or otherwise) arising in any way out of the use of the Open Source Components.

**TERMS OF USE****Schedule 1 Data Processing Agreement****Background:**

- (a) This Data Processing Agreement is between: (i) Agilent Technologies, Inc. (the "Data Processor") and the Data Controller (i.e., Customer), and incorporates the terms and conditions set out herein (the "Agreement").
- (b) The Data Controller wishes to appoint the Data Processor to provide various services to the Data Controller, as further described in Appendix 1.
- (c) The Agreement is being put in place to ensure that the Data Processor processes the Data Controller's Personal Data on the Data Controller's instructions and in compliance with the Applicable Data Protection Laws (as defined below).

**1. Definitions**

1.1 For the purposes of this Agreement, the following expressions bear the following meanings unless the context otherwise requires:

**"Applicable Data Protection Laws"** means any law, statute, declaration, decree, directive, legislative enactment, order, ordinance, regulation, rule or other binding instrument of the Data Controller's Member State which implements the Directive and the GDPR once it takes effect (in each case as amended, consolidated or re-enacted from time to time); and for the avoidance of doubt notwithstanding anything expressed or implied in the Terms of Use;

**"Data Subject"** means the living individuals who are the subject of the Personal Data;

**"Directive"** means Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

**"GDPR"** means Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC;

**"Personal Data"** has the meaning given to it in the GDPR;

**"Privacy Shield Programme"** means the EU-US Privacy Shield Framework as designed by the US Department of Commerce and approved by the European Commission to as having adequate protection under the Directive;

**"Process, Processed or Processing"** has the meaning given to it in the GDPR;

**"Regulator"** means the data protection supervisory authority which has jurisdiction over a Data Controller's Processing of Personal Data; and

**"Third Countries"** means all countries outside of the scope of the data protection laws of the European Economic Area (EEA), excluding countries approved as having adequate protection by the European Commission such as Andorra, Argentina, Canada, Faroe Islands, Guernsey, Isle of Man, Israel, Jersey, New Zealand, Switzerland and Uruguay and any other countries approved from time to time by the European Commission as offering adequate protection for Personal Data.

## TERMS OF USE

### 2. Conditions of Processing

2.1 This Agreement, in conjunction with the Terms of Use to which this Agreement is appended, governs the terms under which the Data Processor is required to Process Personal Data on behalf of the Data Controller.

### 3. Data Processor's Obligations

3.1 The Data Processor shall only Process Personal Data on behalf of the Data Controller and in accordance with, and for the purposes set out in the documented instructions received from the Data Controller from time to time; if it cannot provide such compliance for whatever reason, it agrees to inform the Data Controller of its inability to comply as soon as reasonably practicable.

3.2 The Data Processor shall implement the technical and organisational security measures specified in Appendix 2 of this Agreement before Processing the Data Controller's Personal Data and shall continue to comply with them during the term of this Agreement.

3.3 The Data Processor shall promptly notify the Data Controller about a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, the Data Controller's Personal Data. In such case, the Data Processor shall take commercially reasonable steps to mitigate the harmful effects known to the Data Processor of a use or disclosure of the Personal Data in violation of this Agreement.

3.4 The Data Processor shall provide all reasonable assistance in response to inquiries from the Data Controller or its Regulator relating to the Data Processor' Processing of the Data Controller's Personal Data and abide by any specific advice that the Regulator addresses to the Data Processor with regard to the Processing of such Personal Data.

3.5 The Data Processor shall upon written request from the Data Controller make available to the Data Controller all information necessary to demonstrate compliance with the obligations laid down in this Agreement.

3.6 Where:

3.6.1 a Data Subject exercises his or her rights under the Applicable Data Protection Laws in respect of Personal Data Processed by the Data Processor on behalf of the Data Controller, including in case of a request from a Data Subject for access to that Data Subject's Personal Data, or for the rectification, erasure or blocking of such Personal Data; or

3.6.2 the Data Controller is required to deal or comply with any assessment, enquiry, notice or investigation by the Regulator; or

3.6.3 the Data Controller is required under the Applicable Data Protection Laws to carry out a mandatory data protection impact assessment or consult with the Regulator prior to Processing Personal Data entrusted to the Data Processor under this Agreement;

then the Data Processor will provide reasonable assistance to the Data Controller to enable the Data Controller to comply with obligations which arise as a result thereof, provided that the Data Controller shall bear the reasonable costs of such assistance.

3.7 The Data Processor shall carry out a request from the Data Controller to amend, transfer or delete any of the Personal Data to the extent necessary to allow the Data Controller to comply with its responsibilities as a Data Controller.

## TERMS OF USE

- 3.8 The Data Controller acknowledges and agrees that the Data Processor may, or may appoint an affiliate or third party subcontractor to, Process the Data Controller's Personal Data in a Third Country, provided that it ensures that such Processing takes place in accordance with the requirements of the Data Protection Laws.

In such case, the Data Processor shall comply, and procure that any relevant affiliate or third party subcontractor it appoints that Processes, accesses and/or stores the Personal Data in a Third Country shall comply with the Data Importer's obligations set out in the Standard Contractual Clauses for the transfer of Personal Data to data processors established in third countries set out in the Commission Decision of 5 February 2010 (C(2010) 593) (the "**Clauses**"), which are hereby incorporated into and form part of this Agreement in the form set out in this Schedule 1 and in Appendices 1-3 (and the technical and organisation security measures set out in Appendix 2 shall apply for the purposes of Appendix 2 to the Clauses), and the Data Controller will comply with the Data Exporter's obligations in such Clauses. Unless such recipient is otherwise deemed to have adequate protection from time to time as approved by the European Commission.

### 4. Data Controller's Obligations

- 4.1 The Data Controller warrants that: (i) the legislation applicable to it does not prevent the Data Processor from fulfilling the instructions received from the Data Controller and performing its obligations under this Agreement, and that (ii) it has complied and continues to comply with the Applicable Data Protection Laws, in particular that it has obtained any necessary consents or given any necessary notices, and otherwise has a legitimate ground to disclose the data to the Data Processor and enable the Processing of the Personal Data by the Data Processor as set out in this Agreement and envisaged by any agreement in place between the parties.
- 4.2 The Data Controller agrees that it will indemnify and hold harmless the Data Processor on demand from and against all claims, liabilities, costs, expenses, loss or damage (including consequential losses, loss of profit and loss of reputation and all interest, penalties and legal and other professional costs and expenses) incurred by the Data Processor arising directly or indirectly from a breach of this Clause 4.

### 5. Changes in Applicable Data Protection Laws

- 5.1 The parties agree to negotiate in good faith modifications to this Agreement if changes are required for the Data Processor to continue to process the Data Controller's Personal Data in compliance with the Applicable Data Protection Laws or to address the legal interpretation of the Applicable Data Protection Laws, including to comply (i) with the GDPR (or any GDPR replacement legislation) and any guidance on the interpretation of its provisions once it takes effect, and (ii) the Standard Contractual Clauses for the transfer of personal data to third countries under Directive 95/46/EC contained in the Annex to the European Commission Decision of 27 December 2001 or any other mechanisms or findings of adequacy are invalidated or amended, or (iii) if changes to the membership status of a country in the European Union or the European Economic Area require such modification.

### 6. Sub-Contracting

- 6.1 The Data Controller hereby consents to the use of the subcontractor(s) set out in Appendix 3 for the purposes further described in Appendix 3. If the Data Processor appoints a new subcontractor or intends to make any changes concerning the addition or replacement of the subcontractors set out in Appendix 3, it shall provide the Data Controller with twenty (20) business days' prior written notice, during which the Data Controller is allowed to object against the appointment or replacement. If the Data Controller does not object, the Data Processor may proceed with the appointment or replacement. The Data Processor shall ensure on that it has a written agreement in place with all subcontractors which contains obligations on the subcontractor which are no less onerous on the relevant subcontractor than the obligations on the Data Processor under this Agreement.



## TERMS OF USE

### 7. Confidentiality

7.1 Each party (the “**Recipient**”) undertakes to the other party (the “**Discloser**”) to:

7.1.1 hold all Personal Data of the Discloser which it obtains in relation to this Agreement, in strict confidence; and

7.1.2 ensure that employees, agents, officers, consultants and advisers authorised to Process the Personal Data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality.

7.2 The obligation in Clause 7.1 will not apply to a disclosure of Personal Data that is:

7.2.1 **required by any law or regulation of any country with jurisdiction over the affairs of any the Data Processor;**

7.2.2 **required by any order of any court of competent jurisdiction;**

### 8. Termination

Termination of this Agreement shall be co-terminus with termination of the Services.

### 9. Consequences of Termination

9.1 Upon termination of this Agreement in accordance with Clause 8, the Data Processor shall:

9.1.1 at the choice of the Data Controller, delete or return all the Data Controller’s Personal Data to the Data Controller after the end of the provision of services relating to the Processing, and delete existing copies of the Personal Data unless any European Member State law requires storage of such Personal Data; and

9.1.2 cease Processing Personal Data on behalf of the Data Controller.

### 10. Informal Dispute Resolution

10.1 In the event of a dispute between the Data Processor and the Data Controller, such dispute shall be referred to the following for resolution:

10.1.1 Firstly, the **service manager** (or other person of equivalent or higher seniority) of each party, who shall both endeavour to resolve the dispute within fifteen (15) days; followed by

10.1.2 the **Vice President** (or other person of equivalent or higher seniority) of each party who shall both endeavour to resolve the dispute within fifteen (15) days.

10.2 Should the dispute remain unresolved after reference to the escalation procedure set out in Clause 10.1, the dispute may be submitted for formal resolution in accordance with Clause 11.

### 11. Law and Jurisdiction

This Agreement shall be governed by and construed in all respects in accordance with the laws of the Member State in which the Data Controller is established, in every particular including formation and interpretation and shall be deemed to have been made in English, and each party hereby submits to the jurisdiction of the courts of the Data Controller’s Member State.



**The Standard Contractual Clauses**

For the purposes of (i) the Data Processing Agreement (the “**Agreement**”) between Customer as the Data Controller, and Agilent Technologies, Inc. as the Data Processor; and (ii) Article 26(2) of the Directive for the transfer of personal data to processors established in third countries which do not ensure an adequate level of protection, Customer (the “**Data Exporter**”) and Agilent Technologies, Inc. (the “**Data Importer**”) have agreed on the following contractual clauses (the “**Clauses**”) in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the Data Exporter to the Data Importer of the personal data specified in Appendix 1 to these Model Clauses.

**Clause 1**

**Definitions**

For the purposes of the Clauses:

- (a) *‘personal data’, ‘special categories of data’, ‘process/processing’, ‘controller’, ‘processor’, ‘data subject’ and ‘supervisory authority’ shall have the same meaning as in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(1);*
- (b) *‘the Data Exporter’ means the controller who transfers the personal data;*
- (c) *‘the Data Importer’ means the processor who agrees to receive from the Data Exporter personal data intended for processing on his behalf after the transfer in accordance with his instructions and the terms of the Clauses and who is not subject to a third country’s system ensuring adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;*
- (d) *‘the sub-processor’ means any processor engaged by the Data Importer or by any other sub-processor of the Data Importer who agrees to receive from the Data Importer or from any other sub-processor of the Data Importer personal data exclusively intended for processing activities to be carried out on behalf of the Data Exporter after the transfer in accordance with his instructions, the terms of the Clauses and the terms of the written subcontract;*
- (e) *‘the applicable data protection law’ means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the Data Exporter is established;*
- (f) *‘technical and organisational security measures’ means those measures aimed at protecting personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.*

**Clause 2**

**Details of the transfer**



The details of the transfer and in particular the special categories of personal data where applicable are specified in Appendix 1 which forms an integral part of the Clauses.

**Clause 3**

**Third-party beneficiary clause**

1. The data subject can enforce against the Data Exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.
2. The data subject can enforce against the Data Importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the Data Exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the Data Exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the Data Exporter, in which case the data subject can enforce them against such entity.
3. The data subject can enforce against the sub-processor this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where both the Data Exporter and the Data Importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the Data Exporter by contract or by operation of law as a result of which it takes on the rights and obligations of the Data Exporter, in which case the data subject can enforce them against such entity. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
4. The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by national law.

**Clause 4**

**Obligations of the Data Exporter**

The Data Exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the Data Exporter is established) and does not violate the relevant provisions of that State;
- (b) that it has instructed and throughout the duration of the personal data-processing services will instruct the Data Importer to process the personal data transferred only on the Data Exporter's behalf and in accordance with the applicable data protection law and the Clauses;
- (c) that the Data Importer will provide sufficient guarantees in respect of the technical and organisational security measures specified in Appendix 2 to this contract;
- (d) that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing, and that these measures ensure a level of security appropriate to the risks presented by



**TERMS OF USE**

**Exhibit E440**

- the processing and the nature of the data to be protected having regard to the state of the art and the cost of their implementation;
- (e) that it will ensure compliance with the security measures;
  - (f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive 95/46/EC;
  - (g) to forward any notification received from the Data Importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the Data Exporter decides to continue the transfer or to lift the suspension;
  - (h) to make available to the data subjects upon request a copy of the Clauses, with the exception of Appendix 2, and a summary description of the security measures, as well as a copy of any contract for sub-processing services which has to be made in accordance with the Clauses, unless the Clauses or the contract contain commercial information, in which case it may remove such commercial information;
  - (i) that, in the event of sub-processing, the processing activity is carried out in accordance with Clause 11 by a sub-processor providing at least the same level of protection for the personal data and the rights of data subject as the Data Importer under the Clauses; and
  - (j) that it will ensure compliance with Clause 4(a) to (i).

**Clause 5**

**Obligations of the Data Importer**

The Data Importer agrees and warrants:

- (a) to process the personal data only on behalf of the Data Exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the Data Exporter of its inability to comply, in which case the Data Exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the Data Exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the Data Exporter as soon as it is aware, in which case the Data Exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (c) that it has implemented the technical and organisational security measures specified in Appendix 2 before processing the personal data transferred;
- (d) that it will promptly notify the Data Exporter about:
  - (i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;



**TERMS OF USE**

**Exhibit E440**

- (ii) any accidental or unauthorised access; and
- (iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;
- (e) to deal promptly and properly with all inquiries from the Data Exporter relating to its processing of the personal data subject to the transfer and to abide by the advice of the supervisory authority with regard to the processing of the data transferred;
- (f) at the request of the Data Exporter to submit its data-processing facilities for audit of the processing activities covered by the Clauses which shall be carried out by the Data Exporter or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the Data Exporter, where applicable, in agreement with the supervisory authority;
- (g) to make available to the data subject upon request a copy of the Clauses, or any existing contract for sub-processing, unless the Clauses or contract contain commercial information, in which case it may remove such commercial information, with the exception of Appendix 2 which shall be replaced by a summary description of the security measures in those cases where the data subject is unable to obtain a copy from the Data Exporter;
- (h) that, in the event of sub-processing, it has previously informed the Data Exporter and obtained its prior written consent;
  - (i) that the processing services by the sub-processor will be carried out in accordance with Clause 11;
  - (j) to send promptly a copy of any sub-processor agreement it concludes under the Clauses to the Data Exporter.

**Clause 6**

**Liability**

1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the Data Exporter for the damage suffered.
2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the Data Exporter, arising out of a breach by the Data Importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the Data Exporter has factually disappeared or ceased to exist in law or has become insolvent, the Data Importer agrees that the data subject may issue a claim against the Data Importer as if it were the Data Exporter, unless any successor entity has assumed the entire legal obligations of the Data Exporter by contract or by operation of law, in which case the data subject can enforce its rights against such entity.

The Data Importer may not rely on a breach by a sub-processor of its obligations in order to avoid its own liabilities.

3. If a data subject is not able to bring a claim against the Data Exporter or the Data Importer referred to in paragraphs 1 and 2, arising out of a breach by the sub-processor of any of their obligations referred to in Clause 3 or in Clause 11 because both the Data Exporter and the Data Importer have factually disappeared or ceased to exist in law or have become insolvent, the sub-processor agrees that the data subject may issue a claim against the data sub-processor with regard to its own processing operations under the Clauses as if it were the Data Exporter or the Data Importer,



unless any successor entity has assumed the entire legal obligations of the Data Exporter or Data Importer by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The liability of the sub-processor shall be limited to its own processing operations under the Clauses.

***Clause 7***

**Mediation and jurisdiction**

1. The Data Importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the Data Importer will accept the decision of the data subject:
  - (a) to refer the dispute to mediation, by an independent person or, where applicable, by the supervisory authority;
  - (b) to refer the dispute to the courts in the Member State in which the Data Exporter is established.
2. The parties agree that the choice made by the Data Subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

***Clause 8***

**Cooperation with supervisory authorities**

1. The Data Exporter agrees to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under the applicable data protection law.
2. The parties agree that the supervisory authority has the right to conduct an audit of the Data Importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the Data Exporter under the applicable data protection law.
3. The Data Importer shall promptly inform the Data Exporter about the existence of legislation applicable to it or any sub-processor preventing the conduct of an audit of the Data Importer, or any sub-processor, pursuant to paragraph 2. In such a case the Data Exporter shall be entitled to take the measures foreseen in Clause 5(b).

***Clause 9***

**Governing law**

The Clauses shall be governed by the law of the Member State in which the Data Exporter is established.

***Clause 10***

**Variation of the contract**

The parties undertake not to vary or modify the Clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Clause.

***Clause 11***



**Sub-processing**

1. The Data Importer shall not subcontract any of its processing operations performed on behalf of the Data Exporter under the Clauses without the prior written consent of the Data Exporter. Where the Data Importer subcontracts its obligations under the Clauses, with the consent of the Data Exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the Data Importer hereunder. Where the sub-processor fails to fulfil its data protection obligations under such written agreement the Data Importer shall remain fully liable to the Data Exporter for the performance of the sub-processor's obligations under such agreement.
2. The prior written contract between the Data Importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the Data Exporter or the Data Importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the Data Exporter or Data Importer by contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
3. The provisions relating to data protection aspects for sub-processing of the contract referred to in paragraph 1 shall be governed by the law of the Member State in which the Data Exporter is established.
4. The Data Exporter shall keep a list of sub-processing agreements concluded under the Clauses and notified by the Data Importer pursuant to Clause 5(j), which shall be updated at least once a year. The list shall be available to the Data Exporter's data protection supervisory authority.

**Clause 12**

**Obligation after the termination of personal data-processing services**

1. The parties agree that on the termination of the provision of data-processing services, the Data Importer and the sub-processor shall, at the choice of the Data Exporter, return all the personal data transferred and the copies thereof to the Data Exporter or shall destroy all the personal data and certify to the Data Exporter that it has done so, unless legislation imposed upon the Data Importer prevents it from returning or destroying all or part of the personal data transferred. In that case, the Data Importer warrants that it will guarantee the confidentiality of the personal data transferred and will not actively process the personal data transferred anymore.
2. The Data Importer and the sub-processor warrant that upon request of the Data Exporter and/or of the supervisory authority, it will submit its data-processing facilities for an audit of the measures referred to in paragraph 1.



**APPENDIX 1 TO THE STANDARD CONTRACTUAL CLAUSES**

**PROCESSING DETAILS**

This Appendix forms part of the Clauses and must be completed and signed by the parties.

The Member States may complete or specify, according to their national procedures, any additional necessary information to be contained in this Appendix.

**PURPOSE OF THE PROCESSING**

The Personal Data Processed by the Data Processor are processed for the following purpose(s)

The provision of a cloud-based data management software for functional cellular metabolism analysis.

**PROCESSING OPERATIONS**

The Personal Data Processed by the Data Processor will be subject to the following basic Processing activities

Cellular metabolism personal data analysis

**Data Exporter**

The data exporter is (please specify briefly your activities relevant to the transfer):

An academic, government or pre-clinical (i.e. hospital) research institution, or public or private laboratory using the Agilent Seahorse XF Analyzer to perform cell-based assays for cellular metabolism analysis.

**Data Importer**

The Data Importer's activities relevant to the transfer:

The Data Importer designs, develops, produces, services, and supports cloud-based cell analysis software.

**Data Subjects**

The Personal Data transferred includes the following categories of Data Subjects (please specify):

Individual users of the cell analysis platform, specifically employees, contractors and agents of Data Exporter using the cell analysis platform.

**Categories of data**

The personal data transferred concern the following categories of data (please specify):

Individual users of the cell analysis platform's names, email addresses and other contact information required to access the platform and their account

**Special categories of data (if appropriate)**

The personal data transferred concern the following special categories of data (please specify):

None

**Processing operations**

The personal data transferred will be subject to the following basic processing activities (please specify):





Assay performance analysis



**APPENDIX 2 TO THE STANDARD CONTRACTUAL CLAUSES**

This Appendix forms part of the Clauses and must be completed and signed by the parties.

**Description of the technical and organisational security measures implemented by the data importer in accordance with Clauses 4(d) and 5(c) (or document/legislation attached):**

The technical and organisational measures implemented by the data importer are described in the *Agilent Seahorse Analytics Security White Paper*.

The Data Importer measures are contained within the same Quality and Information Security Management System as the Data Exporter.

**APPENDIX 3 TO THE STANDARD CONTRACTUAL CLAUSES**

**Authorised Subcontractors**

<b>Subcontractors</b>	<b>Services provided</b>
Amazon	Hosting- cell analysis platform