



## Physical Co-location Service Agreement

**Term.** If Customer subscribes to the following services, Business Continuity (the "Services"), the terms and conditions below apply to Customer's use of the Services in addition to the terms of the Agreement.

Sections 1. And 2. Are only applicable to customers who choose Physical Co-location

### 1. Grant of Access: Customer Equipment.

**a. Customer Equipment.** Subject to the terms and conditions of this Agreement, commencing on the Requested Service Date set forth in Service Order Form and subject to IEVOLVE approval, IEVOLVE agrees to allow Customer to place certain equipment which is not provided to Customer by IEVOLVE (the "Customer Equipment") in the Co-location Space located at 501 John James Audubon Parkway, Amherst, New York 14228 (the "Premises"). Customer's right to occupy the Co-location Space shall commence on the Requested Service date as set forth on Service Order Form or the date on which IEVOLVE completes the build-out of the Premises, whichever is later. The rights granted pursuant to this Section 1(a) are subject to the terms and conditions of any underlying lease or other superior right by which IEVOLVE has acquired its interest in the Premises. Customer agrees that this Agreement shall not grant to Customer any property rights in any of the Premises. In the event, however, that this Agreement is constructed by an IEVOLVE lessor to grant property rights to any premise, Customer agrees either to obtain the consent of the IEVOLVE lessor to this Agreement and, if so required, to enter into an agreement approved by the IEVOLVE lessor, or upon request of IEVOLVE to immediately remove its Customer Equipment from the Premises. Customer shall be responsible for paying any fees or charges imposed by the IEVOLVE lessor as a condition of granting its consent.

**b. Installation and Removal of Customer Equipment.** Customer shall arrange for delivery of each unit of Customer Equipment to the Co-location space at Customer's expense. Customer shall provide IEVOLVE with no less than one (1) week prior to written notice of the actual delivery date. Unless otherwise agreed in writing, Customer shall install the Customer Equipment at the Co-location Space and shall be responsible for any necessary cabling from the junction panel provided by IEVOLVE to the Customer Equipment. Customer may not install any equipment at the Co-location Space, other than the Customer Equipment, without IEVOLVE's prior written approval. Customer shall provide IEVOLVE with written notification two (2) days before Customer removes any Customer Equipment and such removal shall be subject to IEVOLVE's verification that there are no outstanding charges due and payable by Customer to IEVOLVE.

**c. Use of Customer Equipment.** Customer shall utilize the Co-location Space only for interconnection of the Customer Equipment with the Connectivity Services to be provided herein by IEVOLVE to Customer, unless IEVOLVE otherwise agrees in writing in advance.

**d. Responsibility for Customer Equipment and Co-location Space.** Customer shall be solely responsible for the Customer Equipment, which shall remain Customer's sole property, and all software and data stored thereon (the "Stored Information"). Unless otherwise specifically agreed in writing or Customer subscribes to other IEVOLVE services where administration is required, IEVOLVE shall have no duty to monitor, maintain or care for the Customer Equipment or Stored Information. Customer shall protect, maintain and keep in good order the Co-location

Space and the Customer Equipment, and shall ensure that neither Customer nor its agents or contractors damage any part of the Premises, the Co-location Space or any equipment located on or about the Premises.

**e. Acceptance of Co-location Space.** The installation and operation of the Customer Equipment by Customer shall be conclusive evidence that Customer accepts the Co-location Space "as is," and that the Co-location Space is in satisfactory condition and is suitable for the use intended by the Customer.

### 2. Use of Co-location Space.

**a. Access and Security.** Before beginning any delivery, installation, alteration, replacement or removal work in the Co-location Space, Customer shall obtain IEVOLVE's prior written approval of Customer's employees, agents, and contractors who will be accessing the Co-location Space ("Approved Personnel"). IEVOLVE shall have the right to require the removal of any Approved Personnel, such right not to be unreasonably exercised. Approved Personnel may access the Co-location Space on reasonable advance notice to IEVOLVE in accordance with Schedule 1, attached hereto. Approved Personnel shall at all times while on the Premises comply with IEVOLVE's and IEVOLVE's lessor's current security and safety procedures. IEVOLVE does not guarantee the safety or security of the Co-location Space or of the Customer Equipment.

**b. Alterations and Removal.** Customer shall not make any construction changes or material alterations (collectively "alterations") to the Co-location Space, including cabling and power supplies, without IEVOLVE's prior written consent. All fixtures, alterations, additions, repairs, improvements and/or appurtenances attached to or built into, on or about the Co-location Space, (collectively "fixtures") shall be and remain part of the Co-location Space and shall not be removed by Customer unless so required by IEVOLVE or its lessor, in which event the items required to be removed shall be removed at Customer's sole cost and expense. Upon termination or expiration of this Agreement (other than termination pursuant to Section 5 (b)(ii) hereof), but subject to paragraph (h) of this Section 2, Customer shall remove all Customer Equipment, except fixtures, within thirty (30) days from the date of such termination or expiration of this Agreement ("removal period"). Within this same thirty (30) days Customer shall restore the Co-location Space, at its expense, to the condition that it was in before installation of such Customer Equipment. In the event of a termination of this Agreement pursuant to Section 5(b)(ii) hereof, but subject to paragraph (h) of this section 2, Customer shall remove all Customer Equipment (other than fixtures) from the Co-location Space within forty-eight (48) hours and shall complete restoration work within seven (7) days of termination. Any items and/or Customer Equipment remaining after the removal periods set forth in this paragraph may, at IEVOLVE's discretion, be removed, stored or disposed of, and such removal or disposal shall be at IEVOLVE's discretion and need not be undertaken in a commercially reasonable fashion. The proceeds, if any, from the sale of such equipment shall be applied to the outstanding invoices of Customer, if any. Customer shall be responsible for all costs associated with removal, disposal and storage of the items and/or Customer Equipment and for the cost of restoration of the Co-location Space. Customer shall return to IEVOLVE at the end of the removal period, all access key cards and other security devices that have been provided to Customer.

**c. Inspection.** IEVOLVE and its designees may inspect or observe the Customer Equipment at any time. If the Customer Equipment is located in

a security enclosure, Customer shall furnish to IEVOLVE the appropriate keys or information needed to enter into the enclosure.

**d. Compliance with Laws and Regulations.** Customer shall comply at all times with all applicable laws, regulations and ordinances relating to its use of the Co-location Space, the Customer Equipment, and the Stored Information and shall also comply with IEVOLVE's rules and regulations relating to the Premises and to the provision by IEVOLVE of the Services hereunder, including IEVOLVE's Acceptable Usage Policy (the "Usage Policy") outlined in Section 11.

**e. Relocation.** In the event that relocation is due to an event involving damage, destruction or condemnation of the Premises or Co-location Space, relocating the Customer Equipment shall become the responsibility of IEVOLVE. IEVOLVE reserves the right to move Customer equipment as its discretion. Customer may request in writing and IEVOLVE, in its sole discretion, may agree to relocate the Customer Equipment to another location of Customer's choice. IEVOLVE may condition its approval of such relocation to Customer's acceptance of additional terms and conditions. In the event that IEVOLVE agrees to relocate the Customer Equipment as a result of Customer's request, all costs of the relocation shall be borne by Customer.

**f. Third Parties.** Customer may not permit any other person to occupy or use the Co-location Space (including by placing such person's equipment in the Co-location Space) without first obtaining IEVOLVE's prior written consent, which consent may be withheld or conditioned in IEVOLVE's sole discretion.

**g. Use of Capacity.** Customer's electrical usage is billed at 20 cents per KWH. Usage is factored into the monthly invoice. Reports of usage are not standard but can be requested by contacting the IEVOLVE Offices.

**h. Lien.** IEVOLVE may exercise a right of lien over the Customer Equipment to secure payment of any charges due and payable by Customer to IEVOLVE that remain unpaid after the due date.

### 3. Services

**a.** During the term (as set out in the Service Order Form) of this Agreement, and subject to the terms and conditions of this Agreement, IEVOLVE will provide to Customer the Co-location, Connectivity, and related Services (the "Services"). The Services shall be performed in accordance with IEVOLVE's then applicable policies and specifications and, unless expressly stated otherwise, shall be provided at the Co-location Space and under the direction of Customer. **b. Connectivity Services.**

**i. Right to Modify.** IEVOLVE reserves the right to modify its network and facilities used to provide the Connectivity Services for purposes including but not limited to accommodating evolving technology and increased network demand, and providing enhanced services. IEVOLVE shall use reasonable efforts to notify Customer of any planned changes to IEVOLVE's network or facilities that may adversely affect the Services provided hereunder

**ii. IEVOLVE-Provided Equipment.** IEVOLVE is acting only as a reseller and/or provider of any hardware, software, circuit and equipment (collectively, the "IEVOLVE-Provided Equipment") offered under this Agreement that was manufactured by a third party. IEVOLVE shall not be responsible for any changes in Service(s) that cause IEVOLVE-Provided Equipment to become obsolete, require modification or alteration, or otherwise affect the performance of the Service(s). Any malfunction or manufacturer's defects of the IEVOLVE-Provided Equipment either sold or provided by IEVOLVE to Customer or purchased directly by Customer used in connection with the Service(s) will not be deemed a breach of IEVOLVE's obligations under this Agreement. Any rights or remedies Customer may have regarding the performance or compliance of IEVOLVE-Provided Equipment are limited to those rights extended to Customer by the manufacturer of such IEVOLVE-Provided Equipment. Customer is entitled to use any IEVOLVE Provided Equipment only in connection with Customer permitted use of the Service(s). Customer shall

not resell, transfer, export or re-export any Customer-Provided Equipment, or any technical data derived there from, in violation of any applicable United States or foreign law.

### 4. Charges, Payments, and Taxes

**a. Charges.** The Company's fees and charges are set forth in the Appendix A and the Master Services Agreement. IEVOLVE'S fees and charges may be changed by IEVOLVE from time to time upon reasonable notice to Customer. The Customer will be billed for Services, Equipment costs (including shipping), installation fees, taxes and other recurring charges, in advance. However usage charges, termination charges and other charges may be billed in arrears, as IEVOLVE shall determine. Based on the fees set forth in the Plan, Customer is responsible for paying the first and last months of service in advance.

**b. Late Fees.** Amounts that are posted to the Customer's account will be deemed late if not paid within 10 days from the date of posting and will bear interest at the greater of the rate of 1.5% per month or the maximum rate allowed by law.

**c. Assurances.** If in its reasonable judgment IEVOLVE determines that Customer is not creditworthy or financially secure, IEVOLVE may require full payment in advance or other assurances to secure Customer's payment obligation hereunder.

**d. Taxes.** IEVOLVE may invoice and Customer shall pay all taxes, fees or assessments and other charges imposed on or required to be collected by IEVOLVE by any governmental agency that may result from this Agreement, or any of the activities contemplated hereunder. Customer shall also be responsible for paying all taxes, fees or assessments and other charges imposed on Customer by any governmental agency that may result from this Agreement, or any of the activities contemplated hereunder.

**e. Power.** IEVOLVE will continually investigate obtaining the best price for delivery of electric. If the supply of electrical service rises above the normal averages, IEVOLVE reserves the right to increase the fee paid for power by the Customer upon reasonable notice to Customer.

### 5. Relocation.

Should the Customer relocate facilities during the term of this Agreement, a new service agreement will be required to implement new services at the Customer's new facilities. Installation and move fees may apply and are solely at IEVOLVE's discretion. Customer agrees to give IEVOLVE ninety (90) days notice of any facilities move. However, IEVOLVE in no way warrants that the Services are guaranteed to be delivered to Customer's new facilities at any date as Services are dependent on construction.

### 6. Amendment

IEVOLVE may amend, modify or update this Agreement or the Usage Policy at any time in its sole discretion. IEVOLVE will provide electronic and written notice of any amendment, modification or update of this Agreement or the Usage Policy. If any material modification to this Agreement or the Usage Policy is unacceptable to Customer, Customer may terminate Customer subscription and a prorated refund for the duration remaining will be sent to Customer. However, if Customer does not terminate the Agreement, or if Customer continues to use the Services following effectiveness of the modification, Customer's continued use will mean that Customer have accepted that modification.

### 7. Quality of Service.

(VoIP Services) i-Communicate and i-Connect service are dependent upon installation of recommended i-Comply gateway device and Customer ordering broadband services through IEVOLVE or one of

IEVOLVEs recommended broadband providers throughout the term of this Agreement.

## 8. Representations and Warranties.

**a. Customer Warranties.** Customer represents and warrants to IEVOLVE: (i) that it owns or has the legal right and authority, and will continue to own or maintain the legal right and authority during the term, to place and use the Customer Equipment in the Co-location Space; (ii) that Customer's services, products, materials and the Customer Equipment (collectively, "Customer's Business") do not and will not operate in any manner that would violate any applicable law or regulation or this Agreement.

**b. Disclaimers by IEVOLVE.** THE CO-LOCATION SPACE AND THE SERVICES ARE PROVIDED "AS IS" AND IEVOLVE DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY AND ALL EXPRESS AND/OR IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND TITLE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. IEVOLVE DOES NOT WARRANT THAT THE CO-LOCATION SPACE AND/OR THE SERVICES WILL BE AVAILABLE UNINTERRUPTED, ERROR-FREE OR IN A COMPLETELY SECURE BASIS. IT IS INTENDED THAT THE FEES AND CHARGES PAYABLE BY CUSTOMER HEREUNDER SHALL BE A NET RETURN TO IEVOLVE, FREE OF EXPENSE, CHARGE, OFFSET, DIMINUTION OR OTHER DEDUCTION WHATSOEVER ON ACCOUNT OF THE PREMISES OR THE CO-LOCATION SPACE (EXCEPTING FEDERAL AND STATE INCOME TAXES OF GENERAL APPLICATION AND THOSE EXPENSES WHICH THIS AGREEMENT EXPRESSLY MAKES THE RESPONSIBILITY OF IEVOLVE). CUSTOMER HEREBY WAIVES ALL RIGHTS NOW OR HEREAFTER CONFERRED BY STATUTE TO MAKE REPAIRS TO THE CO-LOCATION SPACE OR THE PREMISES AT IEVOLVE'S OR IEVOLVE'S LESSOR'S EXPENSE.

## 9. Limitation of Liability.

**a. IEvolve Liability.** Customer agrees, to the extent not prohibited by law, that IEVOLVE shall not be liable for any claim involving, concerning, or related to the loss or destruction of Customer data or any portion thereof or for any damage either to person or property sustained by Customer or by other persons due to the Premises or Co-location Space or any part thereof becoming out of repair or due to the happening of any accident or event in or about the Premises or Co-location Space or due to the act or neglect of any occupant of the Premises or any other person, including, but not limited to damage caused by gas, electricity, power outage, snow, frost, steam, sewage, sewer gas or odors, fire, water or the bursting or leaking of pipes, faucets, sprinklers and plumbing fixtures (collectively, "excluded liability"), unless such excluded liability arose as the result of IEVOLVE's intentional misconduct or negligence.

**b. Limitation.** IN NO EVENT WILL IEVOLVE BE LIABLE TO CUSTOMER, ANY EMPLOYEE, AGENT OR CONTRACTOR OF CUSTOMER, OR ANY THIRD PARTY FOR ANY CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT, INCLUDING IN RELATION TO THE CO-LOCATION SPACE, THE EQUIPMENT, THE SERVICES, INCLUDING WITHOUT LIMITATION THE SERVICES SET FORTH IN THE SERVICE ORDER FORM AND SCHEDULE(S), CUSTOMER'S BUSINESS OR OTHERWISE, WHICH CLAIMS INVOLVE INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER UNDER THEORY OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, IEVOLVE'S MAXIMUM AGGREGATE LIABILITY TO CUSTOMER RELATED TO OR ARISING UNDER THIS AGREEMENT WILL BE LIMITED TO THE TOTAL AMOUNT PAID BY CUSTOMER TO IEVOLVE PURSUANT TO THIS AGREEMENT FOR THE TWELVE (12) MONTH PERIOD PRECEDING THE CLAIM.

## 10. Indemnity.

Customer shall indemnify, defend and hold harmless IEVOLVE from and against any and all claims, demands, actions, damages, liability, judgments, expenses and costs (including but not limited to reasonable attorney's fees) arising from (i) Customer's use of the Co-location Space, the Customer Equipment, the IEVOLVE Provided Equipment or the Services, (ii) Customer's Business, (iii) claims relating to a breach of the IEVOLVE Rules and Regulations, including but not limited to, (a) infringement or misappropriation of intellectual property rights, defamation, libel, slander, obscenity, pornography, or violation of rights of privacy and publicity, or (b) spamming, or any other offensive, harassing or illegal conduct, (iv) any breach by Customer of any warranty, covenant or obligation hereunder, (v) any injury to or death of any person or damage to any property occurring upon the, Co-location Space, the Premises, and/or the building or the land of which the Premises are a part, arising out of (or in connection with), or claimed to arise out of (or in connection with) Customer's use of the Co-location Space, the Customer Equipment, the IEVOLVE-Provided Equipment or the Services, or (vi) any action or inaction on the part of Customer that causes IEVOLVE to be in breach of any agreement with the IEVOLVE lessor, or (vii) the violation of any law or regulation by Customer.

## 11. Casualty or Eminent Domain.

In the event of any taking by eminent domain or damage by fire or other casualty to the Premises and/or the Co-location Space ("Event"), Customer shall be bound by any action taken by IEVOLVE and the owner of the Premises (if other than IEVOLVE) in relation to the Event. Customer shall have no claim against IEVOLVE in relation to an Event, including but not limited to a claim for relocation, expenses, the value of any unexpired term, or loss of business from full or partial interruption or interference due to the operation of this provision. Without limiting the foregoing, either party shall have the right to terminate this Agreement on the happening of an Event, without any liability to the other party.

## 12. Confidentiality.

Each party acknowledges that, in the course of the performance of this Agreement, it may have access to customer information and communications, including proprietary information claimed to be unique, secret, confidential, and which constitutes the exclusive property and trade secrets of the other party ("Confidential Information"). Except as provided in IEVOLVE's Usage Policy, each party agrees to maintain the confidentiality of the Confidential Information, to use the Confidential Information only to the extent necessary for legitimate business uses in connection with this Agreement. Upon request of either party or on termination or expiration of this Agreement, each party shall return the Confidential Information of the other party then in its possession. Nothing in this Agreement shall prohibit or limit either party's use of information which (a) is now, or hereafter becomes, publicly known or available through lawful means; (b) is rightfully in receiving party's possession, as evidenced by receiving party's records; (c) is disclosed to the receiving party without Confidential Information or proprietary restriction by a third party who rightfully possesses and rightfully discloses the information; (d) is independently developed by the receiving party without any breach of this Agreement; or (e) is the subject of a written permission to disclose provided by the disclosing party. Notwithstanding any other provision of this Section 11, IEVOLVE may disclose to IEVOLVE's lessor Confidential Information of Customer related to Customer's use of the Co-location Space, provided that IEVOLVE's lessor has agreed to protect the Confidential Information on terms consistent with the terms of this Section 11. Customer further agrees and acknowledges that IEVOLVE may disclose Customer's account information in accordance with IEVOLVE'S Usage Policy and Privacy Policy, located at [www.ievolve.com/company/Legal/other\\_policies.html](http://www.ievolve.com/company/Legal/other_policies.html), as amended from time to time by IEVOLVE effective upon posting of the revised policy at the URL.

## 13. Acceptable Usage Policy.

Customer and its employees are subject to this Usage Policy, and by virtue of using IEVOLVE'S Services, agree to be bound by this Usage Policy. IEVOLVE will revise this Usage Policy from time to time and notify the Customer of changes via email and postal mail. A Customer's use of the Services after notice of revisions to the Usage Policy will constitute such person's acceptance of any changes or additions to the Usage

Policy. Subscribers violate this Usage Policy when they (or their affiliates or customers) engage in the following prohibited activities.

#### **14. Violations of Intellectual Property Rights.**

Any violation of any person's intellectual property rights, rights of privacy, rights of publicity or other personal rights is prohibited. IEVOLVE is required by law to remove or block access to content appearing on or through the Services upon receipt of proper notice of copyright infringement (see "Copyright Infringement Notice Information" below).

#### **15. Spamming.**

IEVOLVE has zero tolerance for UBE/UCE (unsolicited bulk email/unsolicited commercial email). This policy protects our customers as well as the Internet community from the negative effects of "spam" related activity. IEVOLVE defines UBE/UCE as unsolicited broadcast or commercial email that is sent to addresses that do not affirmatively and verifiably request such material from that specific sender.

#### **16. Our Policies:**

**a.** IEVOLVE's customers, or any user of bandwidth and/or services on its network (herein described as 'users') are prohibited from sending UBE/UCE. Users may be asked to produce records that verify that explicit affirmative permission was obtained from a recipient before a mailing was sent. IEVOLVE may consider the lack of such proof of explicit affirmative permission of a questionable UBE/UCE at its sole discretion.

**b.** IEVOLVE's customers are prohibited from maintaining open mail relays on their servers. Ignorance of the presence or operation of an open mail relay is not and will not be considered an acceptable excuse for its (the open mail relay) operation. Multiple infractions of this policy will result in a discontinuation of service.

**c.** IEVOLVE's customers will be notified in the event that their sites are in violation of the above policy. Again, failure to rectify such situations may be cause for termination of service.

**d.** IEVOLVE's customers are prohibited from providing hosting services for websites that have been included in UBE/UCE. Hosting includes, but is not limited to, hosting website(s), providing DNS services as well as website redirect services.

**e.** Valid complaints received by IEVOLVE will be forwarded to the Customer for a response and resolution. If within twenty-four (24) hours there is no response, IEVOLVE may block traffic to and from the IP address involved in the UBE/UCE complaint until the problem is resolved and preventative measures have been implemented to prevent the violation from recurring. All users are responsible for maintaining a working email contact and updating that information with IEVOLVE when it changes

**f.** If IEvolve receives repeat complaints indicating that a problem has not been resolved, IEvolve reserves the right to suspend and/or cancel any and all services provided to the user after a notification of no less than two (2) hours. IEvolve will then forward mail to the company directly, bypassing the spam filtering. To report an incidence of abuse, please email [abuse@i-evolve.com](mailto:abuse@i-evolve.com).

#### **17. Misrepresentation of Transmission Information**

Forging, misrepresenting, omitting or deleting message headers, return mailing information and/or Internet protocol addresses to conceal or misidentify the origin of a message is prohibited.

#### **18. Viruses and Other Destructive Activities**

Use of the Services for creating or sending Internet viruses, worms or Trojan horses, or for pinging, flooding or mail bombing, or engaging in denial of service attacks is prohibited. It is also prohibited for Customer to engage in other activity that is intended to disrupt or interfere with, or that results in the disruption of or interference with, the ability of others to effectively use the Services (or any connected network, system, service or equipment) or conduct their business over the Internet.

#### **19. Hacking "Hacking" and related activities is prohibited.**

"Hacking" includes, but is not limited to, the following activities: illegally or without authorization accessing computers, accounts or networks, penetrating or attempting to penetrate security measures, port scans, stealth scans and other activities designed to assist in hacking.

#### **20. Export Control Violations**

The exportation of encryption software outside of the United States and/or violations of United States law relating to the exportation of software is prohibited.

#### **21. Child Pornography**

The use of the Services to store, post, display, transmit, advertise or otherwise make available child pornography is prohibited. IEvolve is required by law, and will, notify law enforcement agencies when it becomes aware of the presence of child pornography on, or being transmitted through, the Services.

#### **22. Other Illegal Activities**

The use of the Services to engage in any activities that are determined by IEvolve, in its sole and absolute discretion, to be illegal is prohibited. Such illegal activities include, but are not limited to, storing, posting, displaying, transmitting or otherwise making available ponzi or pyramid schemes, fraudulently charging credit cards or displaying credit card information of third parties without their consent, and failure to comply with applicable online privacy laws. IEvolve will cooperate fully with appropriate law enforcement agencies in connection with any and all illegal activities occurring on or through the Services.

#### **23. Obscene, Defamatory, Abusive or Threatening Language**

Use of the Services to store, post, transmit, display or otherwise make available obscene, defamatory, harassing, abusive or threatening language is prohibited.

#### **24. Other Activities**

Engaging in any activity that, in IEvolve's sole and absolute discretion, disrupts, interferes with or is harmful to (or threatens to disrupt, interfere with or be harmful to) the Services, IEvolve's business, operations, reputation, goodwill, customers and/or customer relations, or the ability of IEvolve's customers to effectively use the Services is prohibited. Such prohibited activities include making available any program, product or service that is designed to or could be used to violate this Usage Policy. In addition, the failure by Customer to cooperate with IEvolve in correcting or preventing violations of this Usage Policy by, or that result from the activity of, a Customer is a violation of this Usage Policy.

In general, IEvolve does not monitor Customer's websites or activities to determine whether it is in compliance with this Usage Policy. However, when IEvolve becomes aware of any violation of this Usage Policy or its User Agreement, IEvolve may take any action to stop or correct such violation, including, but not limited to, shutting down a website, denying access to the Services or to the Internet, and/or removing information. In addition, IEvolve may take action against Customer because of the

activities of such Customer. IEvolve reserves the right to take any such action even though such action may affect other customers of Customer.

IEvolve may disclose any information in its possession, including, without limitation, information about Customer, internet transmissions and website activity in order to comply with a court order, subpoena, summons, discovery request, warrant, statute, regulation or governmental request, to protect IEvolve or others from harm, and/or to ensure the proper operation of the Services. IEvolve has no obligation to notify any person, including Customer about whom information is sought, that IEvolve has provided the information.

**Copyright Notice Infringement Information.** In accordance with the Digital Millennium Copyright Act, IEvolve has adopted a policy that provides for termination of websites hosted by IEvolve that are found to infringe on copyrights of third parties. If a copyright holder believes that there has been a violation of his or her copyright on a website that is hosted by IEvolve or its subsidiaries, and the copyright holder wants IEvolve to remove the website or disable the material in question, IEvolve will remove the website or disable the material if the copyright holder provides IEVOLVE with all of the following information:

- a. A signature of a person authorized to act on behalf of the owner of the exclusive right that is allegedly infringed. Identification of the copyrighted work that is claimed is being infringed, or, in the case of claimed infringement of multiple copyrighted works, a representative list of such works.
- b. Identification of the material that is claimed to be infringing or is the subject of infringing activity and that should be removed or access to which should be disabled, with information reasonably sufficient to permit us to locate the material.
- c. Information reasonably sufficient to permit us to contact the person giving the notification, such as an address and telephone, and, if available, an electronic mail address at which such person may be contacted.
- d. A statement that the person giving the notification has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- e. A statement that the information in the notification is accurate, and under penalty of perjury, that the person giving the notification is authorized to act on behalf of the owner of the exclusive right that is allegedly infringed. Notices should be directed to: Legal Department IEvolve Inc. 501 John James Audubon Parkway Suite 201 Amherst, NY 14228

## 25. General Provisions

**a. No Third-Party Beneficiary.** It is the explicit intention of the parties hereto, that no person or entity other than the parties and their respective successors and assigns is or shall be entitled to bring any action to enforce any provision of this Agreement against either of the parties.

**b. Relationship of the Parties.** Customer and IEVOLVE are, and shall remain, independent contractors. Neither party will have the authority to make any representations, claims or warranties of any kind on behalf of the other party or on behalf of such party's licensors or suppliers.

**c. Privacy Statement.** IEvolve demonstrates its commitment to its customers' privacy by providing this statement. IEVOLVE will do everything in its power to ensure a customer's right to privacy. IEVOLVE is committed to developing long lasting relationships that are built on trust. IEvolve will never violate that trust.

**d. Confidentiality of Personal Information.** IEVOLVE will never provide or sell Customer's personal or business information to any third party.

**e. Policy Changes.** While IEvolve will provide its clients with reasonable notification, IEvolve reserves the right to change its policy at any time to meet the needs of its customers, changing laws and new technology.

**f. Force Majeure.** Subject to the next following sentence, neither party shall be deemed in default of this Agreement to the extent that

performance of its obligations (other than an obligation to pay for services rendered by the other party) or attempts to cure any breach are delayed or prevented by reason of any act of God, fire, natural disaster, accident, act of government, strikes, unavailability of material, facilities, telecommunications services or supplies or any other cause beyond the reasonable control of such party ("Force Majeure"). In the event of such a Force Majeure, the party shall give the other party prompt written notice within ten (10) days of the Force Majeure. In addition, the time for performance or cure shall be extended for a period equal to the duration of the Force Majeure but not in excess of three (3) months.

**g. Assignment.** This Agreement and the rights and obligations hereunder shall not be assigned or otherwise transferred by Customer without the prior written consent of IEVOLVE. A transfer or assignment of this Agreement shall include a sale of all or substantially all of the assets of Customer or a change in control of Customer. This agreement will inure to the benefit of and be binding upon the parties and their respective successors and permitted assigns.

**h. Notices.** All notices hereunder shall be delivered personally, made by certified or registered mail, return receipt requested, or sent by telecopy or facsimile transmission, answer back requested, and shall be sent to the parties at the following addresses:

IEvolve Inc.  
501 John James Audubon Pkwy  
Suite 201  
Amherst, New York 14228  
**Attention:** Legal Department  
**Telephone:** 716.505.8324  
**Facsimile:** 716.505.8325

Such notice will be effective, (i) if sent by telecopy or facsimile on the date of transmission unless transmitted after normal business hours, in which case on the following date; (ii) if mailed, five days after the date of posting; or (iii) as of the date delivered, if personally delivered.

**i. Waiver.** Any waiver of any right or default hereunder shall be effective only if given in writing and shall not operate as or imply a waiver of any similar right or default on any subsequent occasion.

**j. Severability.** No determination by a court of competent jurisdiction that any term or provision of this Agreement is invalid or otherwise unenforceable shall operate to invalidate or render unenforceable any other term or provision of this Agreement and all remaining provisions shall be enforced in accordance with their terms.

**k. Governing Law.** This Agreement will be governed by and construed under, and the legal relations between the parties and hereto will be determined in accordance with, the laws of the State of New York, without giving effect to such state's conflict of law principles.

**l. Customer Data.** Customer is responsible for its content residing on IEVOLVE servers, and except as otherwise agreed with IEVOLVE, for the backup thereof.

**m. IP Address Ownership.** IEVOLVE shall maintain and control ownership of all IP numbers and addresses that may be assigned to Customer by IEVOLVE and IEVOLVE reserves, in its sole discretion, the right to chance or remove any and all such IP numbers and addresses.

**n. Intellectual Property.** Customer represents and warrants that Customer's use of the Services shall not infringe the intellectual property or other proprietary rights of IEVOLVE or any third party. Customer further acknowledges that all right, title and interest in any and all technology, including the software that is part of or provided with the Services and any trademarks or service marks of IEVOLVE (collectively, "IEVOLVE Intellectual Property") is vested in IEVOLVE and/or in IEVOLVE's licensors. Unless otherwise specifically provided in this Agreement, Customer shall have no right, title, claims or interest in or to the IEVOLVE Intellectual Property. Customer may not copy, modify or translate the IEVOLVE Intellectual Property or related documentation, or decompile,

disassemble or reverse engineer the IEVOLVE Intellectual Property, to use it other than in connection with the Services, or grant any other person or entity the right to do so. Unless otherwise specifically provided in this Agreement, Customer is not authorized to distribute or to authorize others to distribute the IEVOLVE Intellectual Property in any manner without the prior written consent of IEVOLVE; provided, however, that nothing in this sentence would preclude Customer from using the IEVOLVE Intellectual Property as incorporated in the Services. This paragraph shall not operate to extinguish, restrict, vary, waive or affect in any manner whatsoever any right, title or interest with Customer may now have or hereafter acquires in, or in relation to, the third-party software that is part of or provided with the Services solely to the extent such third-party licensors publicly provide such rights, title or interest in the third-party software to Customer.

**o. No Photographs.** Customer may not photograph, or electronically or otherwise reproduce any part of the interior of the Co-location Space, without IEVOLVE's prior written permission.

**p. Entire Agreement; Amendments; Headings.** This Agreement, including the Service Order Form and Schedule(s) hereto, constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior or contemporaneous, written or parties respecting the subject matter of this Agreement. This Agreement may be modified only by an instrument in writing duly executed by both parties. The Section headings in this Agreement are inserted for convenience of reference only and shall not be used in interpreting this Agreement.

**q. Survival.** The rights and obligations of the parties in this Agreement that would by their nature or context be intended to survive the expiration or termination of this Agreement shall so survive.

**r. Increases in Service Fees.** Notwithstanding the terms and conditions set forth herein, after the expiration of the initial term of this Agreement, IEVOLVE may, at any time, increase the fees and charges upon giving the Customer notice in writing. In event Customer shall be unwilling to pay the increased monthly charge, the Customer may terminate this Agreement upon giving notice in writing to IEVOLVE. Failure to notify IEVOLVE within thirty (30) days will constitute Customer's consent to the increase and all other terms and conditions of the Agreement shall remain in full force and effect.

**s. Communications Circuits.** Customer is responsible for the cost and maintenance of all telephone or other communication circuits required for dutiful transmission and system access. All data files are transmitted over communication company circuits, which are wholly beyond the control and jurisdiction of IEVOLVE and are maintained by the Communications Company. If these communication circuits are not functional for any reason, the data files may not accurately or completely reach IEVOLVE facility or equipment. IEVOLVE cannot be responsible for the continued operation or neither functioning of these communication circuits nor the reliability of the data files being received over them.

**t. Password Security.** It is the FULL responsibility of Customer to write down the password that Customer chose during initial installation of Services. IEVOLVE will not be held responsible of loss of password and does NOT maintain client passwords. Customer understands that without the password, the encrypted stored data can not be retrieved and shall not hold IEVOLVE responsible in any way for any losses of any kind whatsoever.

**u. Termination.** If Customer terminates Service for convenience or Customer terminates Service for cause, Customer will pay IEVOLVE a termination fee (the Termination Fee") (which customer acknowledges is a reasonable approximation of damages and is not a penalty) as follows: (a) all unpaid amounts for Service provided through the date of termination;

plus (b) all previously waived charges for the Service; plus (c) 100% of the remaining monthly recurring charges (if any) for the Term; plus (d) if not recovered by the foregoing, any termination liability payable to third parties.

## 26. Proof of Insurance

Customer shall provide proof of insurance prior to installation of equipment in the Co-location Space and maintain such insurance at all times during the initial term and any renewal term of this Agreement and during any ten (10)-day removal period of the Equipment. Proof of insurance shall be provided by delivery of certificates of insurance to IEVOLVE showing the following types of insurance, in the following minimum amounts: (a) Worker's compensation insurance complying with the law of the state in which each Co-location Space used by Customer is situated, regardless of whether Customer is required by such law to maintain worker's compensation insurance, and employer's liability insurance with the limit of \$1 million per occurrence; (b) Occurrence form commercial general liability insurance including coverage for personal injury, bodily injury, death, contractual liability and broad form property damage, including loss of use of property, occurring in the course of or in any way related to Customer operations, in the amount not less than 1 million combined single limit per occurrence; (c) Standard form property and casualty insurance insuring against the perils of fire, vandalism, and malicious mischief extended coverage (all risk) covering Equipment located in the Space in an amount not less than its full replacement value; (d) Professional liability insurance (including Multimedia Errors and Omissions insurance) including coverage for losses attributable to damage, destruction, and/or fraudulent modification of electronic data; and (e) Excess or umbrella liability coverage with a combined single limit of \$1 million per occurrence to be excess of (a) and (b). IEVOLVE and its landlord shall not insure or be responsible for any loss or damage to property of any kind owned or leased by Customer or Customer's employees, servants, and agents, including but not limited to the Equipment. The maintenance of insurance by Customer shall not affect or limit the extent of its liability under this Agreement. IEVOLVE, except in the case of worker's compensation insurance, shall be named as an additional insured on the policies required above. The certificates of insurance shall show that the insurance is prepaid, and in full force and effect and that such insurance shall not be cancelled, non-renewed or decreased, during the initial term or any renewal term of the Agreement or during any ten (10)-day removal period, without at least thirty (30) days written notice to IEVOLVE. Any insurance policy covering the Equipment against loss or physical damage shall provide that such insurance shall be primary and noncontributing with any other insurance available to IEVOLVE.

## SCHEDULE 1- ACCESS TO THE PREMISES

### 1. Escorted Access:

Customer's Approved Personnel may access the Co-location Space, accompanied at all times by an IEVOLVE escort, for the purpose of installing, operating, maintaining, repairing or removing the Customer Equipment in accordance with the terms and conditions of the Agreement on reasonable advance notice to IEVOLVE. Reasonable advance notice means a minimum of (i) twenty-four (24) hours for routine maintenance; (ii) one (1) hours in the case of emergencies; and (iii) seven (7) days for installation or removal of Customer Equipment. [Changes for escort services are sixty dollars per hour (\$60/hour) with a one hour minimum.] Approved Personnel shall at all times while on the Premises comply with IEVOLVE's and IEVOLVE's lessor's security and safety procedures as amended from time to time.