



BD Access Portal, FlowJo Portal, & FlowJo End-User License Agreement

This End-User License Agreement (the “Agreement”), is entered into by and between Becton, Dickinson and Company (together with its Affiliates, “BD”) and Customer (defined below), each a “Party” and, collectively, the “Parties.”

The Parties agree as follows:

GENERAL TERMS AND CONDITIONS.

THIS AGREEMENT TAKES EFFECT WHEN CUSTOMER CHECKS THE BOX STATING “I HAVE READ AND AGREED TO THE END-USER LICENSE AGREEMENT SHOWN ABOVE” AND CLICKS THE “I AGREE” BUTTON OR BY ACCESSING OR USING THE SERVICES (the “Effective Date”). BY CLICKING ON THE “OK” BUTTON OR BY ACCESSING OR USING THE SERVICES YOU (A) ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND THIS AGREEMENT; (B) REPRESENT AND WARRANT THAT YOU HAVE THE RIGHT, POWER, AND AUTHORITY TO ENTER INTO THIS AGREEMENT AND, IF ENTERING INTO THIS AGREEMENT FOR AN ORGANIZATION, THAT YOU HAVE THE LEGAL AUTHORITY TO BIND THAT ORGANIZATION; AND (C) ACCEPT THIS AGREEMENT AND AGREE THAT YOU ARE LEGALLY BOUND BY ITS TERMS. IF CUSTOMER DOES NOT ACCEPT THESE TERMS, CUSTOMER MAY NOT ACCESS OR USE THE SERVICES.

1. Definitions. Capitalized terms have the meanings set forth below in this Section 1 or as defined in the Agreement.

- 1.1. “**Authorized User**” means Customer and, as applicable, Customer’s employees, consultants, contractors, and agents (a) who are authorized by Customer to access and use the Services under the rights granted to Customer pursuant to this Agreement and (b) for paid Services, for whom access to the Services has been purchased hereunder.
- 1.2. “**Beta Services**” means new or improved services or functionality offered by BD and incorporated into the Services that may be made available to Customer to try at its option and which are designated as beta, pilot, limited release, developer preview, non-production, evaluation, or by a similar description.
- 1.3. “**Customer**” means an individual accepting this Agreement on his or her own behalf or on the behalf of the institution, partnership, corporation, or other entity entering into this Agreement.
- 1.4. “**Customer Data**” Customer Personal Data and Product Data uploaded, entered, stored, created within, created as a result of use of, or otherwise provided by Customer in order to use, the Services.
- 1.5. “**Customer Experimental Data**” means the results of tests, analyses, or experiments performed by Customer, including FCS files of flow cytometry data or any genomic information generated by sequencing instruments and further analysis or processing conducted on such information.
- 1.6. “**Customer Personal Data**” means personal information about an Authorized User including name, address, emails, telephone numbers, and other identifying or personal information.
- 1.7. “**Product Data**” means data and information related to Customer’s software, this includes, without limitation, Mac address, browser type and version, operating system and interface, software version, underlying license information, date and time of software usage.
- 1.8. “**Documentation**” means the user manuals, handbooks, and guides relating to the Services provided by BD to Customer either electronically or in hard copy form, as updated from time to time, accessible via login to the Services or by written request to BD.
- 1.9. “**Malicious Code**” means code, files, scripts, agents or programs intended to harm, including, viruses, worms, time bombs and Trojan horses.
- 1.10. “**Parent License**” means an agreement entered into with BD, or an affiliate, for paid access to Services that may include additional storage and usage limits and/or access to additional features and functions.



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- 1.11. “Services”** means the Software that is accessed by Customer, and made available to Customer by registering, installing and using the Software, in object-code form only, and specifically excludes Third Party Software.
- 1.12. “Software”** means the BD owned FlowJo software you are licensing and the FlowJo Portal server-based licensing system.
- 1.13. “Third Party Software”** means software (e.g., application software, embedded and/or integrated software, interface software, customer drivers, and the like) owned by a third party.

2. Services

- 2.1. Access to the Services.** Subject to and conditioned on Customer’s payment of any fees, if applicable, and compliance with all terms and conditions of this Agreement, BD hereby grants Customer a revocable, non-exclusive, non-transferable, non-sublicensable, limited right to access and use the Services during the term solely for Customer’s business operations by the number of Authorized Users agreed in a relevant FlowJo order in accordance with the terms and conditions herein. BD shall provide Customer the necessary passwords and access credentials to allow Authorized Users to access the Services. Customer or Authorized Users shall not share credentials used to access Services with anyone, including individuals within your organization. Customer agrees that creation and use of an account is not contingent on the delivery of any future functionality or features, or dependent on any oral or written public comments made by BD regarding future functionality or features.
- 2.2. Documentation.** Subject to the terms and conditions contained in this Agreement, BD hereby grants Customer a non-exclusive, non-sublicensable, non-transferable license for Authorized Users to use the Documentation during the term solely for Customer’s business purposes in connection with use of the Services.
- 2.3. Customer Responsibilities.** Customer will (a) be responsible for its, and its Authorized Users’, compliance with this Agreement, and any Documentation, (b) be responsible for (i) the accuracy, quality and legality of Customer Data, (ii) BD’s authorization to store and process the Customer Data in accordance with the terms of this Agreement, (iii) the means by which Customer acquired Customer Data, (iv) Customer’s use of Customer Data with the Services, and (v) the interoperation of any Third Party Software with which Customer uses the Services, (c) use commercially reasonable efforts to prevent unauthorized access to or use of the Services and to notify BD promptly of any such unauthorized access or use of the Services of which Customer becomes aware, (d) use the Services only in accordance with and comply with this Agreement, the, Documentation, and applicable laws and government regulations, (e) comply with terms of service of any Third Party Software with which Customer uses in conjunction with the Services, (f) be responsible for maintaining adequate security, protection and backup for the customer owned device(s) on which any Software is installed and (g) if Customer is creating an account pursuant to a Parent License, comply with the terms of such Parent License.

Customer will be responsible for the creating, validating, and loading of any data that may be required for certain features or functions of the Services to operate in accordance with their intended use and in accordance with the Documentation. Customer shall be responsible for ensuring that Customer Data is accurate and does not contain errors or omissions which could impact the performance or reliability of features or functions of the Services and will use commercially reasonable efforts to ensure that no Customer Data causes errors or malfunctions of the Services. Customer will use the Services only for their intended purposes in accordance with the Documentation and this agreement. Any use of the Services in breach of the foregoing by Customer that in BD’s judgement threatens the security, integrity or availability of the Services may result in BD’s immediate suspension of Customer’s account and access to the Services.

- 2.4. Usage Restrictions.** Customer will not (a) make the Services available to any third party, (b) sell, resell, license, sublicense, distribute, make available, rent or lease the Services or include the Services in a service bureau or outsourcing offering (the foregoing does not include intra-institutional charges allocated under a Parent License), (c) attempt to gain unauthorized access to the Services or its related systems or networks, (d) permit direct or indirect access to or use of the Services in a way that circumvents a contractual usage limit, or use the Services to access or use any of BD intellectual property except as



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permitted under this Agreement, (g) modify, copy, adapt or merge the Software into another program or create derivative works based on the Services or any part, feature, function or user interface thereof, (h) copy any content found in the Services except as permitted herein, (l) except to the extent permitted by applicable law, disassemble, reverse engineer, or decompile the Services, (m) remove or destroy any of the Software's copyright notices, trademark notices or other proprietary markings, (n) install, copy or use the Services on a virtual machine, (o) use the Software in concurrent sessions or command-line instances, (p) use a terminal server to share a license, even if use is non-concurrent, (q) share FlowJo Portal accounts (r) access the Services to (1) design or build any product or provide any service for sale to or use by any third party, (2) build a product or service using similar ideas, features, functions or graphics of the Services, (3) copy any ideas, features, functions or graphics of the Services, or (4) determine whether the Services are within the scope of any patent.

- 2.5. Competitive Use.** Use of the Services by any third party that has or may be developing a product or service that is competitive to the Services is a violation of this Agreement. As such, BD will periodically review account holder information and may, in its sole discretion, terminate or suspend any account bearing an email from any such third party. Questions regarding termination or suspension of an account under this [Section 2.5](#) can be sent to flowjosupport@bd.com.
- 2.6. No Third Party Personal Data.** You agree that you will not provide any personally identifying information or personal information or personal data as defined by applicable law (e.g. HIPAA, EU General Data Protection Regulation) relating to any third parties, in particular relating to patients. For example, you will not provide the name, date of birth, address, social security, government issued identification number, or any other information that could directly or indirectly identify the individual from whom any genomic or other information was derived.
- 2.7. Security of Customer Data.** While BD uses industry standard security, no system can perfectly guard against risks of intentional or inadvertent disclosure of Customer Data. When using the Services, Customer Data will be transmitted over a medium that is beyond the control of BD. You expressly assume the sole risk of any unauthorized disclosure or intentional intrusion, or of any delay, failure, loss, interruption or corruption of Customer Data or other information transmitted in connection with the use of the Services.
- 2.8. Third Party Software.** BD and third parties may make available third-party products or services through the Services. Any access or acquisition by Customer of such Third Party Software, and any exchange of data between Customer and such third party is solely between Customer and the third party. BD is not responsible for and does not warrant or support Third Party Software, whether or not they are designated by BD as "certified", "compatible" or otherwise. BD is not responsible for any disclosure, modification or deletion of Customer Data resulting from access by such Third Party Software or the third party.
- 2.9. Integration with Third Party Software.** The Services may contain features designed to interoperate with Third Party Software. BD cannot guarantee the continued availability of such features and may cease providing such features without notice to Customer.
- 2.10. Third Party Licenses.** BD makes use of third-party libraries. A full list of those third-party libraries is available at flowjo.com/third-party-licenses for each Software product. Where source was modified, it can be obtained from BD by request at flowjo@bd.com. If you cannot resolve the general license pointers in that list using a web search, please contact us and we will help you find it.

You will not and will not allow anyone else to reverse engineer, decompile, disassemble, translate, modify, adapt, or enhance such software or create any derivative works of such software, or extract ideas, algorithms, procedures, workflows, or system architecture from such Software. You will not remove, obscure, or alter any proprietary rights notices (including copyright and trademark notices) that may be affixed to or contained within the software. Some software may be provided by a third party, and that third party may require you to agree to terms of use or license terms applicable to their software. You must agree to such terms of use or license in order to use such third-party software. Some of the software may be offered under an open-source license. There may be provisions in such open-source license that expressly override some of the terms of this Agreement. If that is the case, only those terms of this Agreement that are in conflict with the open-source license will be overridden.



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2.11. Ownership. Any license granted under this Agreement does not constitute a transfer or sale of any ownership rights in the Software. Except for the limited right to access and use the Services granted in Paragraph 2.1 above, as between You and BD, BD owns all right, title and interest in the Software. The Software is protected by applicable intellectual property laws, including United States copyright laws and international treaties.

3. BD Responsibilities

- 3.1. Provision of Purchased Products or Services.** BD will (a) make the Services available to Customer pursuant to this Agreement, (b) provide applicable BD standard support for the Services, and (c) use commercially reasonable efforts to make the Services available 24 hours a day 7 days week, except for (1) planned downtime, and (2) any unavailability caused by circumstances beyond BD's reasonable control, including, for example, and act of God, act of government, flood, fire, earthquake, civil unrest, act of terror, strike or other labor problem, internet service provider failure or delay, non-BD application, or denial of service attack.
- 3.2. Customer Data.** Please review the [FlowJo Data Privacy Notice](#) for details regarding how BD collects, uses, and discloses personal information, including Customer Personal Data. Please also note that the FlowJo Data Privacy Notice is not a contract and does not create any contractual rights or obligations. BD will comply with all applicable data protection and data privacy laws and any applicable data security addendum executed between BD and Customer for the specific purpose of providing the Services to Customer.
- 3.3. Beta Services.** From time to time, at BD's discretion, BD may make Beta Services available to Customer at no charge. Customer may choose to try such Beta Services or not, in its sole discretion. Any use of Beta Services may be subject to additional terms and conditions. Section 5.2 will apply to all Feedback in connection with the Beta Services.

BD ACCEPTS NO RESPONSIBILITY FOR, AND CUSTOMER ACKNOWLEDGES THAT IT IS SOLELY RESPONSIBLE FOR, ANY CUSTOMER DATA OR CUSTOMER EXPERIMENTAL DATA ENTERED ONTO THE SERVICES DURING A BETA TRIAL, ANY CUSTOMER DATA CUSTOMER ENTERS INTO BETA SERVICES, OR ANY CUSTOMIZATIONS MADE TO THE BETA SERVICES BY OR FOR CUSTOMER, AND ANY SUCH DATA MAY BE PERMANENTLY LOST UPON THE EXPIRATION OF THE TERM FOR USE OF THE BETA SERVICES.

NOTWITHSTANDING THE "USE, WARRANTY AND DISCLAIMERS" IN [SECTION 4](#) AND "INDEMNIFICATION" IN [SECTION 7](#) BELOW, BETA SERVICES ARE PROVIDED "AS-IS" WITHOUT ANY WARRANTY AND BD SHALL HAVE NO INDEMNIFICATION OBLIGATIONS NOR LIABILITY OF ANY TYPE WITH RESPECT TO THE BETA SERVICES DURING OR AFTER THEIR USE BY CUSTOMER, UNLESS SUCH EXCLUSION OF LIABILITY IS NOT ENFORCEABLE UNDER APPLICABLE LAW IN WHICH CASE BD'S LIABILITY WITH RESPECT TO THE BETA SERVICES PROVIDED SHALL NOT EXCEED \$100.00. WITHOUT LIMITING THE FOREGOING, BD AND ITS AFFILIATES AND ITS LICENSORS DO NOT REPRESENT OR WARRANT TO CUSTOMER THAT: (A) CUSTOMER'S USE OF THE BETA SERVICES WILL MEET CUSTOMER'S REQUIREMENTS, (B) CUSTOMER'S USE OF THE BETA SERVICES WILL BE UNINTERRUPTED, TIMELY, SECURE OR FREE FROM ERROR, OR (C) DATA PROVIDED IN RELATION TO BETA SERVICES WILL BE ACCURATE. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE "LIMITATION OF LIABILITY" IN [SECTION 8](#) BELOW, CUSTOMER SHALL BE FULLY LIABLE UNDER THIS AGREEMENT TO BD AND ITS AFFILIATES FOR ANY DAMAGES ARISING OUT OF CUSTOMER'S USE OF THE BETA SERVICES, ANY BREACH BY CUSTOMER OF THIS AGREEMENT AND ANY OF CUSTOMER'S INDEMNIFICATION OBLIGATIONS HEREUNDER.

CUSTOMER SHALL REVIEW THE APPLICABLE DOCUMENTATION RELATED TO A BETA SERVICES AND BECOME FAMILIAR WITH THE FEATURES AND FUNCTIONS OF THE BETA SERVICE BEFORE ACCESSING OR USING SUCH BETA SERVICES.



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The value of any rebates, discounts or incentives provided to Customers may constitute a “discount or other reduction in price” under Section 1128B(b)(3)(A) of the Social Security Act [42 U.S.C. Sec. 1320a-7b(b)(3)(A)]. Customers will satisfy any and all requirements imposed on buyers relating to discounts or reductions in price, including, when required by law, to disclose all discounts or other reductions in price received from BD and to accurately report under any state of federal health care program the net cost actually paid by Customers. Customers acknowledge that BD may be subject to federal and state laws that require BD to disclose to federal or state government agencies the existence of this Agreement and the value received by Customers from the use of the Software and Services hereunder and that such government agencies may make public the information included in such disclosures. Such laws include without limitation the so-called Federal Sunshine Law at 42 U.S.C. 1320a-7h and similar state transparency and disclosure laws (as such laws may be amended, supplemented and/or superseded from time to time).

- 3.4 Enhancements.** From time to time, BD may enhance, modify, discontinue, or provide new features or functions for the Services. Some enhancements, modifications and new features or functions may require use of additional Customer Data or other information. Additional hardware, software or other BD products or services may be required for new features or functions related to the Services, for which BD may charge additional fees.
- 3.5 Discontinued Features.** Notwithstanding anything to the contrary herein, BD may in its sole discretion discontinue, remove, delete, alter or otherwise materially lessen core features or functions of the Services (a) in order to comply with any applicable law, order, regulation or statute, (b) in order to avoid infringement of third party intellectual property that BD reasonably believes will be infringed by continued use of such feature or function, or (c) if, in BD’s sole discretion, such feature or function could contribute to an adverse event. In the event of any of the foregoing, BD shall use commercially reasonable efforts to provide Customer with advance written notice of any changes to such features or functions, or in any event provide notice to Customer as reasonably practicable.

4. Use, Warranty and Disclaimers

- 4.1. Warranty Disclaimer.** THE SERVICES ARE PROVIDED UNDER THIS AGREEMENT ON AN “AS IS” BASIS WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, WARRANTIES THAT THE SERVICES ARE FREE OF DEFECTS, MERCHANTABLE, FIT FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT. EXCEPT TO THE EXTENT PROHIBITED BY APPLICABLE LAW, BD DISCLAIMS AND EXCLUDES ALL WARRANTIES, WHETHER STATUTORY, EXPRESS OR IMPLIED (INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR ARISING UNDER USAGE OF TRADE OR COURSE OF PERFORMANCE). WITHOUT LIMITING THE FOREGOING, BD AND ITS AFFILIATES AND ITS LICENSORS DO NOT REPRESENT OR WARRANT TO CUSTOMER THAT: (A) CUSTOMER’S USE OF THE SERVICES WILL MEET CUSTOMER’S REQUIREMENTS, (B) CUSTOMER’S USE OF THE SERVICES WILL BE UNINTERRUPTED, TIMELY, SECURE OR FREE FROM ERROR; AND (C) DATA OR INFORMATION PROVIDED PURSUANT TO THE SERVICES WILL BE ACCURATE. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS SECTION, CUSTOMER SHALL BE FULLY LIABLE UNDER THIS AGREEMENT TO BD AND ITS AFFILIATES FOR ANY DAMAGES ARISING OUT OF CUSTOMER’S USE OF THE SERVICES, ANY BREACH BY CUSTOMER OF THIS AGREEMENT AND ANY OF CUSTOMER’S INDEMNIFICATION OBLIGATIONS HEREUNDER.

5. Customer Data and Intellectual Property Ownership

- 5.1. Customer Data.** (a) Customer grants BD the perpetual and irrevocable right to access and use (and for BD’s third party service providers and trading partners to access and use) Customer Data in order to



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provide the Services, including but not limited to, (1) Processing license authorizations; (2) Creating an account; (3) Enabling the use of certain features of the Software for Your benefit; and (4) To comply with BD's legal obligations, resolve disputes between You and BD, and enforce this Agreement. (b) Customer grants BD a right to use, access, store and scan Customer Personal Data in order to communicate with Customer, offer Customer other services or products, and to perform targeted or generic advertising; and (c) Customer grants BD a right to use, access, store, and scan Customer Product Data but not Customer Experimental Data, which BD does not have access to through The Services, and use anonymized Customer Product Data for BD product development and improvement purposes, including to make decisions regarding product development and improvement of BD products or services. Further, Customer authorizes BD to (i) process or maintain Customer Data as set forth herein; (ii) retain and employ another service provider as a subcontractor; (iii) for use by BD to build or improve the quality of its services; (iv) to detect data security incidents or protect against fraudulent or illegal activity; and (v) as otherwise required or permitted by applicable laws, Customer agrees that no Customer Data shall contain patient health information as defined by Applicable Law. Customer further agrees that Customer Data shall not contain any Protected Health Information as defined by 45 C.F.R. § 160.103, unless specifically approved by BD and Customer in a signed Business Associate Agreement that constitutes a written addendum to this Agreement. Customer shall notify BD immediately in the event Customer or any Authorized User discovers or reasonably suspects that any Customer Data includes Protected Health Information and provide reasonable cooperation and support to BD in connection with the identification and destruction of any such Protected Health Information. Customer acknowledges that access to Customer Data is essential to the delivery and performance of the Services. Accordingly, Customer hereby authorizes BD to access and use such Customer Data for the delivery of Services and further authorizes BD to use de-identified Customer Data for the improvement and development of the Services, other BD products and services, and for any other purposes as allowed under Applicable Law.

- 5.2. Intellectual Property Ownership.** All right, title, and interest in the intellectual property embodied in the Services, Software, and Documentation (including, without limitation, all copyrights, patents, trademarks, trade secrets, trade names, and trade dress) belong solely and exclusively to BD and its licensors. If Customer or any of its Authorized Users, employees, contractors, or agents sends or transmits any communications or materials to BD by mail, email, telephone, or otherwise, suggesting or recommending changes to the Services or Software, including without limitation, new features or functionality relating thereto, or any comments, questions, suggestions, or the like ("Feedback"), BD is free to use such Feedback irrespective of any other obligation or limitation between the Parties governing such Feedback. All Feedback is and will be treated as non-confidential. Customer hereby assigns to BD, and shall cause its employees, contractors, and agents to assign, all right, title, and interest in, and BD is free to use, without any attribution or compensation to Customer or any third party, any ideas, know-how, concepts, techniques, or other intellectual property rights contained in the Feedback, for any purpose whatsoever, although BD is not required to use any Feedback. BD reserves all rights not expressly granted to Customer in this Agreement. Except for the limited rights and licenses expressly granted under this Agreement, nothing in this Agreement grants, by implication, waiver, estoppel, or otherwise, to Customer or any third party any intellectual property rights or other right, title, or interest in or to the Services, Software, or Documentation.

6. Data Security

- 6.1. Security Incidents and Breaches.** If BD becomes aware of confirmed unauthorized or unlawful access to Customer Data processed by BD ("Security Incident"), BD will promptly notify customer of the incident and take reasonable steps to mitigate the effects to minimize and damage resulting from the Security Incident. If a Security Incident involves Customer Personal Data, BD will cooperate with Customer to comply with reporting obligations of applicable data protection and privacy laws.

7. Indemnification

- 7.1. Mutual Indemnification.** Customer will indemnify and defend BD against any demand, action, claim, suit or proceeding ("Claims") asserted against BD by a third party for losses, injuries, expenses (including reasonable attorneys' fees) or damages caused by Customer's breach of this Agreement. In addition, each



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Party (“Indemnifying Party”) will defend the other Party (the “Indemnified Party”) against any Claim asserted against the Indemnified Party by a third party for losses, injuries, expenses (including reasonable attorneys’ fees) or damages caused by the Indemnifying Party’s grossly negligent acts or omissions.

- 7.2. Intellectual Property Indemnity.** BD will defend Customer against any claim filed in a court of competent jurisdiction in the United States brought by a third party against Customer alleging that the Services used by Customer in accordance with this Agreement infringes a valid U.S. patent, copyright, trade secret or other proprietary right of a third party (each, an “Infringement Claim”). As a condition to receiving the defense, Customer will (a) provide written notice to BD promptly after Customer becomes aware of the Infringement Claim, (b) allow BD to have sole control of the defense and any related settlement negotiations, and (c) provide reasonable cooperation upon request. BD will: (i) pay any damages and costs (including reasonable attorneys’ fees) assessed against Customer (or payable by Customer pursuant to a settlement agreement agreed to in writing by BD) arising out of the Infringement Claim; and (ii) reimburse Customer for its reasonable costs and expenses associated with providing reasonable cooperation as requested by BD. If BD determines that the Services might infringe a third party’s intellectual property right, then BD will have the option, at its expense and in its sole discretion, to: (1) replace the Services with substantially equivalent non-infringing Services; (2) modify the Services to remove the infringing Services or features or functionality thereof; (3) obtain a license to permit Customer to continue using the Services; or (4) terminate this Agreement, upon which Customer shall cease all use of the Services. This Section states Customer’s exclusive remedy and BD’s total liability to Customer for an Infringement Claim.

8. Limitation of Liability

- 8.1 Limitation of Liability and Exclusion of Consequential Damages.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER PARTY NOR ANY OF EITHER PARTY’S RESPECTIVE AFFILIATES OR LICENSORS WILL BE LIABLE TO THE OTHER PARTY FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR SPECIAL DAMAGES OR EXEMPLARY DAMAGES, WHETHER BASED IN CONTRACT, TORT (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE), OR OTHERWISE, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, INCLUDING DAMAGES ASSOCIATED WITH: LOSS OF PROFITS OR GOODWILL; UNAVAILABILITY OR NON-PERFORMANCE OF ANY OR ALL OF THE SERVICES; INVESTMENTS, EXPENDITURES OR COMMITMENTS RELATED TO USE OR ACCESS TO THE SERVICES; COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, UNAUTHORIZED ACCESS TO, COMPROMISE, ALTERATION OR LOSS OF DATA; OR COST OF REPLACEMENT OR RESTORATION OF ANY LOST OR ALTERED DATA. THESE LIMITATIONS OF LIABILITY WILL APPLY EVEN IF THERE IS A FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY IN THIS AGREEMENT. BD IS NOT RESPONSIBLE FOR, AND DISCLAIMS ANY AND ALL LIABILITY RESULTING FROM OR RELATED TO, UNSCHEDULED DOWNTIME, CUSTOMER SYSTEM ISSUES, CUSTOMER DATA ISSUES OR MISUSE OF SERVICES.

9. Term and Termination

- 9.1 Term.** The term of this Agreement begins on the Effective Date and continues until the earlier of (a) notification that BD is discontinuing the Services, (b) the term set forth in an applicable Parent License is terminated or expired, or (c) the Agreement is terminated earlier as set forth herein.
- 9.2 Termination without Notice.** BD may terminate a Customer account and access to the Services without notice if (a) Customer is in material breach of this Agreement or any applicable Parent License, (b) providing a notice would compromise BD’s ability to provide the Services to others, or (c) providing a notice is prohibited by law.
- 9.3 Effects of Termination.** Upon termination of this Agreement, Customer shall immediately discontinue use of the Services. No expiration or termination of this Agreement will affect Customer’s obligation to pay all fees that may have become due before such expiration or termination, or entitle Customer to any refund. All provisions which by their nature should survive termination or expiration of this Agreement,



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shall survive such termination or expiration, including provisions related to limitations on liability, confidentiality and intellectual property ownership.

10. Compliance with Laws and Policies

10.1. Compliance with Laws. Each Party will comply with all applicable federal and state laws and regulations of the United States and other applicable laws related to such Party and its obligations under this Agreement, including but not limited to export laws and regulations of the United States.

10.2. Proper Reporting of Discounts and Pricing. The prices for the Services may reflect "discounts or other reduction in price" as that term is used in the "safe harbor" regulations in the Medicare/Medicaid Anti-Kickback Statute, 42 C.F.R. § 1001.952(h). The Parties hereto shall: (a) comply with all applicable laws and regulations relating to the accounting, application, and proper reporting of discounts and pricing for the Services, including but not limited to the requirements of the discount "safe harbor" located at 42 C.F.R. § 1001.952(h); (b) properly report and appropriately reflect all prices paid for the Services net of all discounts as required by applicable laws and regulations, including but not limited to on Medicare, Medicaid and state agency cost reports; and (c) retain a copy of this Agreement and all other documentation regarding this Agreement, together with the invoices for purchase of the Services thereunder and shall permit representatives of the U.S. Department of Health & Human Services or any relevant state agency access to such records upon request.

10.3. Customer Policies. Any customer policies that are in addition to or are in conflict with this Agreement will have no force or effect unless adopted via a written amendment to this Agreement signed by each Party.

11. Miscellaneous

11.1. Performance. Each Party will bear the cost of its performance of its obligations under this Agreement.

11.2. Trademarks. BD, the BD logo, FlowJo and SeqGeq are trademarks of Becton, Dickinson and Company or its affiliates. Certain of the product names and FlowJo name used in this Agreement, the Software and/or the documentation may constitute trademarks. You are not authorized to use any such trademarks.

11.3. Confidentiality. Neither Party will disclose to a third party the terms of, nor issue any public statement regarding, this Agreement without the other Party's prior written approval, except as required by law. If Customer receives a Freedom of Information Act or state open records law request relating to this Agreement, Customer will promptly notify BD and provide reasonable assistance in opposing such request.

11.4. Force Majeure. If a Party is reasonably prevented from performing an obligation because of fire, flood, wind, earthquake, explosion or other disaster, acts of military authorities, acts of civil authorities unrelated to any violation of law by the Party, war, pandemic, riot, insurrection, act of terrorism or other cause beyond the Party's reasonable control (collectively, a "Force Majeure Event"), then the affected Party will not be in breach during the period that Party is prevented from performing such obligation, provided that the affected Party: (a) uses commercially reasonable efforts to deliver notice to the other Party identifying the Force Majeure Event; and (b) uses commercially reasonable efforts to perform the obligation as soon as practical.

11.5. Notices. BD may from time-to-time update the terms and conditions of this Agreement by providing Customer with notice of such updates via email using the contact information provided upon Customer registration for the Services. Customer hereby consents to receiving electronic communications from BD. These electronic communications may include notices about applicable fees and charges, transactional information, and other information concerning or related to the Services. Customer agrees that any notices, agreements, disclosures, or other communications that BD sends to Customer electronically will satisfy any legal communication requirements, including that such communications be in writing. Customer may contact BD with questions regarding the Services at flowjosupport@bd.com. Any notices to BD must be sent to 385 Williamson Way, Ashland, Oregon 97520 with copy to the law group at 155 McCarthy Blvd. Milpitas, California 95035 and must be delivered either in person, by certified or registered mail, return



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receipt requested and postage prepaid, or by recognized overnight courier service, and are deemed given upon receipt by FlowJo/BD.

- 11.6. Assignment.** This Agreement is personal to Customer and may not be assigned or transferred for any reason whatsoever without BD's prior written consent and any action or conduct in violation of the foregoing will be void and without effect. BD expressly reserves the right to assign this Agreement and to delegate any of its obligations hereunder.
- 11.7. Severability.** If a court or other body of competent jurisdiction declares any term of this Agreement invalid or unenforceable, then the remaining terms will continue in full force and effect.
- 11.8. Waiver.** No right created by this Agreement will be deemed waived unless specifically and expressly waived in a writing signed by the Party possessing the right.
- 11.9. Governing Law.** This Agreement will be governed by the laws of the State of Delaware, without reference to its conflict of laws principles unless laws applicable to You require that the laws of the state in which You are headquartered govern.
- 11.10. Survival.** The rights granted to BD under [Section 5.1](#) above shall survive termination or expiration of this Agreement along with any other obligations set forth in this Agreement that by their nature continue and survive will survive any termination or expiration hereof.
- 11.11. Amendment/Additional Terms.** Subject to the terms of an applicable Parent License governing Customer's account, this Agreement sets forth the entire agreement and understanding of the Parties related to the subject matter hereof and supersedes all prior written and oral agreements, representations, proposals, and understandings between the Parties regarding the subject matter of this Agreement, except that no prior confidential disclosure agreement or contract of a similar nature will be superseded. Any requests for information, requests for proposal, responses to requests for proposals, sales collateral and other information provided by either Party are not binding unless explicitly incorporated by reference into a written document signed by each Party. BD may from time-to-time update the terms and conditions of this Agreement by providing Customer with notice of such updates as set forth in Section 11.4 above.

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