

## VerticalChange Customer Agreement

Last updated December 6, 2016

This Customer Agreement (the "Agreement") contains the terms and conditions that govern for the use by the undersigned customer ("you" or "your") of the VerticalChange Software Products (as defined below). It is an agreement between Subvertical LLC ("Subvertical," "we," "us," or "our"), and shall be effective upon your executing and returning this Agreement to Subvertical (the "Effective Date"). You represent to us that you are lawfully able to enter into contracts. If you are entering into this Agreement for an entity, such as the agency or company you work for, you represent to us that you have legal authority to bind that entity to these terms. In that case, "you" and "your" will refer and apply to legal entity. If your agency or company has a current Agreement to use the VerticalChange Software Products, you agree to these Terms on behalf of your own usage, in compliance with the current Agreement.

### Section 1. Definitions.

Whenever used in this Agreement with initial letters capitalized, the following terms shall have the following specified meanings:

*"Affiliate"* means, with respect to a party, an entity that directly or indirectly controls, is controlled by or is under common control with such party.

*"Documentation"* means the user guides, reference guides, and other technical and operations manuals and specifications for the Software.

*"Effective Date"* means the date this Agreement is countersigned.

*"End User"* means an individual who is authorized by You to use the VerticalChange Software Products under your account.

*"Policies"* means the provisions or terms referenced in or incorporated into this Agreement.

*"Subvertical Software Products," "VerticalChange Software Products," "Software Products," or "Software"* means the products and services that we make available through [www.verticalchange.com](http://www.verticalchange.com) and / or other web pages designated by us.

*"Subvertical Confidential Information"* means all nonpublic information disclosed by us or our employees that is designated as confidential or

that, given the nature of the information or circumstances surrounding its disclosure, reasonably should be understood to be confidential. Subvertical Confidential Information includes: (a) nonpublic information relating to our technology, customers, business plans, promotional and marketing activities, finances and other business affairs; (b) third-party information that we are obligated to keep confidential; and (c) the nature, content and existence of any discussions or negotiations between you and us.

*"Subvertical Intellectual Property"* means any creation, design (including, without limitation, any technology including proprietary software, inventions, discoveries, works of authorship or other prior creation) that was created by or for Subvertical (alone or with others).

*"Subvertical Product Content"* means all publicly accessible content of the Subvertical Software Product, including, but not limited to, promotional copies, graphics, official rules, legal disclaimers, entry forms, and other content or items used in or in connection with the Product(s).

*"Subvertical Marks"* means any trademarks, service marks, service or trade names, logos, and other designations of Subvertical that we may make available to you in connection with this Agreement.

*"Term"* means the period of time beginning on the Effective Date and ending when terminated pursuant to Section 5 hereunder.

*"We," "Us" or "Our"* means Subvertical LLC, our Affiliates, and our business partners.

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

*"Your Data"* means all electronic data or information entered by You into the Subvertical Software Products, as well as any information generated from that data.

## **Section 2. Use of the Software Products.**

2.1 Generally. You may access and use the Software Products in accordance with this Agreement. Service Level Agreements may apply to certain Software Products. You will adhere to all laws, rules, and regulations applicable to your use of the Software Products, including the service terms and the other policies defined in this Agreement.

2.2 Software Products License. Under the Terms and Conditions of this Agreement, We grant you a non-exclusive right to access and use the

Subvertical Software Products during the Term.

2.3 License Restrictions. Neither you nor any End User may use the Software Products in any manner or for any purpose other than as expressly permitted by this Agreement. You may not resell or sublicense the Software Products. You may not reverse engineer, modify, or otherwise create derivative works of the Software Products, and you may not use the Software Products in a way intended to avoid legitimate fees. All licenses granted to you in this Agreement are conditional on your continued compliance this Agreement, and will immediately terminate if you do not comply with any of its terms or conditions.

2.4 Proprietary Rights. We retain all rights, titles, and interest in the Subvertical Software Products and all Subvertical Intellectual Property Rights therein. This includes all names, logos, and graphics used in the Software. The names of actual companies and products mentioned herein may be the trademarks of their respective owners. The example people and organizations depicted in the Software are fictitious; no association with any real person or organization is intended or should be inferred.

2.5 Your Account. To access the Software, you must create an account associated with a valid e-mail address. You are responsible for all activities that occur under your account, regardless of whether the activities are undertaken by you, your employees or a third party (including your contractors or agents) and, except to the extent caused by our breach of this Agreement, we are not responsible for unauthorized access to your account. You will contact us immediately if you believe an unauthorized party is using your account. You may terminate your account and this Agreement at any time in accordance with Section 5.1.

2.6 Support to You. If you would like support for the Software other than the support we generally provide to other users of the Software without charge, you may contact us to discuss a separate support agreement.

2.7 Maintenance. As part of keeping the Software updated and functional, Subvertical may perform both routine and urgent maintenance. We will attempt to perform such maintenance at times that will minimize downtime, but we reserve the right to perform this maintenance at any time and for any period of time.

2.8 Changes. We may change, discontinue, or deprecate any of the Software Products (including the Software Products as a whole) or

change or remove features or functionality of the Software Products from time to time. We will notify you of any material change to or discontinuation of the Software Products. We may make upgrades, modifications or improvements to the Software at any time, as long as the above modifications do not breach our representations and warranties in this Agreement.

### **Section 3. Data Ownership and Security**

3.1 Data Ownership. You own all data entered into, and derived from, your use of Subvertical Software Products. Subvertical has access to Your Data only to provide the functionality of the Subvertical Software Products and enforce our rights under this Agreement. Your Data will not be disclosed to any third party by Subvertical unless required by court order, law, or governmental or regulatory agency. You are solely responsible and liable for ensuring that the collection and use of Your Data fully complies with all applicable laws and regulations.

3.2 Data Security. We will implement reasonable and appropriate measures designed to help you secure Your Data against accidental or unlawful loss, access or disclosure. The Subvertical Software Products regularly undergo quality assurance checks to ensure that they conform to industry-standard physical and electronic security measures.

3.3 Facilities and Data Transfer. All facilities used to store and process Your Data will adhere to reasonable security standards no less protective than the security standards at facilities where Subvertical stores and processes its own information of a similar type. Subvertical has implemented, at a minimum, industry standard systems and procedures to ensure the security and confidentiality of Your Data, protect against anticipated threats or hazards to the security or integrity of Your Data, and protect against unauthorized access to or use of Your Data.

3.4 End User Access. You are responsible for End Users' use of Your Data and the Software Products. You will ensure that all End Users comply with your obligations under this Agreement.

3.5 End User Support. You are responsible for providing any necessary training or customer service to End Users.

### **Section 4. Payment and Taxes**

4.1 Compensation Amount. We calculate and bill fees and charges monthly. You will pay us in accordance with the rates, charges and

other amounts specified in your contract, within 15 days of the date due. We may charge you interest at the rate of 1.5% per month (or the highest rate permitted by law, if less) on all late payments.

4.2 Taxes. The fees payable to us under this Agreement are exclusive of taxes. You will pay all taxes and other government charges (except for taxes on Subvertical's income), and reasonable expenses and outside attorneys' fees we incur in collecting late payments that are not disputed in good faith. If you are legally entitled to an exemption from any sales, use, or similar transaction tax, you are responsible for providing us with tax exemption certificates for each applicable taxing jurisdiction.

## **Section 5. Term and Termination**

5.1. Term. The term of this Agreement will commence on the Effective Date and will remain in effect until terminated by you or us in accordance with Sections 5.2 through 5.4. User subscriptions purchased by you commence on the date of the subscription and continue on a monthly basis until terminated. The price for each renewal Term will be the same as for the prior Term unless we have given you notice of a price increase at least 30 days before the end of the prior Term.

5.2 Termination for Convenience. You may terminate this Agreement for any reason by providing us 15 days advance notice. We may terminate this Agreement for any reason by providing you 30 days advance notice.

5.3 Termination for Cause. Either party may terminate this Agreement for cause upon 30 days advance notice to the other party if there is any material default or breach of this Agreement by the other party, unless the defaulting party has cured the material default or breach within the 30 day notice period. We may also terminate the Agreement if our relationship with a third party partner who provides software or other technology we use to provide the Software Products expires, terminates or requires us to change the way we provide the Software or other technology as part of the Software or if we believe providing the Software could create a substantial economic or technical burden or material security risk for us.

5.4. Suspension for Improper Use. Subvertical may, with notice to you, suspend your access to the Software if we reasonably conclude that you are using the Software to engage in illegal activity or if your use of the Software is causing material harm to Subvertical or others.

5.5. Effect of Termination. Upon any termination of this Agreement, all your rights under this Agreement immediately terminate. We will, for a period of 30 days after the termination, maintain a copy of Your Data so that a download can be made available to you as specified in section 5.7.

5.6. Payments upon Termination. Upon any termination for cause by you, we will refund any prepaid fees covering the remainder of the term of all subscriptions after the effective date of termination. Upon any termination for cause by us, you shall pay any unpaid fees covering the remainder of the term after the effective date of termination. In no event shall any termination relieve you of the obligation to pay any fees payable to us for the period prior to the effective date of termination.

5.7. Return of Your Data. Upon request by you made within 30 days after the effective date of termination, we will make available to you for download a file of Your Data in a non-proprietary format. After such 30-day period, we will (unless legally prohibited) delete all of Your Data in our systems.

## **Section 6. Indemnification.**

6.1. General. You will defend, indemnify, and hold harmless us, our licensors, and each of their respective employees, officers, directors, and representatives from and against any claims, damages, losses, liabilities, costs, and expenses (including reasonable attorneys' fees) arising out of or relating to any third party claim concerning: (a) your or any End Users' use of the Software Products (including any activities under your account and use by your employees and personnel); (b) breach of this Agreement or violation of applicable law by you or any End User; (c) Your Data or the combination of Your Data with other applications, content or processes, including any claim involving alleged infringement or misappropriation of third-party rights by Your Data or by the use of Your Data; or (d) a dispute between you and any End User. If we are obligated to respond to a third party subpoena or other compulsory legal order or process described above, you will also reimburse us for reasonable attorneys' fees, as well as our employees' and contractors' time and materials spent responding to the third party subpoena or other compulsory legal order or process at our then-current hourly rates.

6.2. Process. We will promptly notify you of any claim subject to Section 6.1, but our failure to promptly notify you will only affect your obligations under Section 6.1 to the extent that our failure prejudices your ability to defend the claim. You may: (a) use counsel of your own

choosing (subject to our written consent) to defend against any claim; and (b) settle the claim as you deem appropriate, provided that you obtain our prior written consent before entering into any settlement. We may also assume control of the defense and settlement of the claim at any time.

#### **Section 7. Disclaimers.**

THE SUBVERTICAL SOFTWARE PRODUCTS ARE PROVIDED "AS IS." WE MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE REGARDING THE SOFTWARE PRODUCTS, INCLUDING ANY WARRANTY THAT THE SOFTWARE PRODUCTS WILL BE UNINTERRUPTED, ERROR FREE OR FREE OF HARMFUL COMPONENTS, OR THAT ANY CONTENT, INCLUDING YOUR DATA, WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED. EXCEPT TO THE EXTENT PROHIBITED BY LAW, WE AND OUR LICENSORS DISCLAIM ALL WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR QUIET ENJOYMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE.

#### **Section 8. Limitations of Liability.**

WE WILL NOT BE LIABLE TO YOU FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES (INCLUDING DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, OR DATA), EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. FURTHER, WE WILL NOT BE RESPONSIBLE FOR ANY COMPENSATION, REIMBURSEMENT, OR DAMAGES ARISING IN CONNECTION WITH: (A) YOUR INABILITY TO USE THE SERVICES, INCLUDING AS A RESULT OF ANY (I) TERMINATION OR SUSPENSION OF THIS AGREEMENT OR YOUR USE OF OR ACCESS TO THE SOFTWARE PRODUCTS, (II) OUR DISCONTINUATION OF ANY OR ALL OF THE SOFTWARE PRODUCTS, OR, (III) WITHOUT LIMITING ANY OBLIGATIONS UNDER THE SLAS, ANY UNANTICIPATED OR UNSCHEDULED DOWNTIME OF ALL OR A PORTION OF THE SERVICES FOR ANY REASON, INCLUDING AS A RESULT OF POWER OUTAGES, SYSTEM FAILURES OR OTHER INTERRUPTIONS; (B) THE COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; (c) ANY INVESTMENTS, EXPENDITURES, OR COMMITMENTS BY YOU IN CONNECTION WITH THIS AGREEMENT OR YOUR USE OF OR ACCESS TO THE SOFTWARE PRODUCTS; OR (D) ANY UNAUTHORIZED ACCESS TO, ALTERATION OF, OR THE DELETION, DESTRUCTION, DAMAGE, LOSS OR FAILURE TO STORE ANY OF YOUR

DATA OR OTHER DATA. IN ANY CASE, OUR LIABILITY UNDER THIS AGREEMENT WILL BE LIMITED TO THE AMOUNT YOU ACTUALLY PAY US UNDER THIS AGREEMENT FOR THE SERVICE THAT GAVE RISE TO THE CLAIM DURING THE 12 MONTHS PRECEDING THE CLAIM.

## **Section 9. Modifications to the Agreement.**

We reserve the right to change the terms, conditions, and notices under which the Subvertical Software Products are offered. We may modify this Agreement at any time by notifying you in accordance with Section 11.7. The modified terms will become effective as stated in the email message. By continuing to use the Software Products after the effective date of any modifications to this Agreement, you agree to be bound by the modified terms.

## **Section 10. Business Associate Agreement.**

If you are a "covered person" under HIPPA, then as a condition of your using our Software Products, you must sign our standard Business Associate Agreement in connection with you accepting these Terms of Service.

## **Section 11. General Provisions**

11.1 Confidentiality. You may use Subvertical Confidential Information only in connection with your use of the Subvertical Software Products as permitted under this Agreement. You will not disclose Subvertical Confidential Information during the Term or at any time during the 5 year period following the end of the Term.

11.2 Publicity. Neither party may make any public statement regarding the relationship contemplated by this Agreement without the other party's prior written consent. Notwithstanding the foregoing, you can state publicly that you are a customer of Subvertical and you consent to Subvertical's use of your name in a general customer list.

11.3 Force Majeure. We will not be liable for any delay or failure to perform any obligation under this Agreement where the delay or failure results from any cause beyond our reasonable control (for example, a storm or other natural disaster, riot, act of war or terrorism, governmental action, or internet disturbance).

11.4 Relationship of the Parties. We and you are independent contractors. This Agreement does not create a partnership, joint venture, agency, fiduciary, or employment relationship between the



parties. Neither party is an agent of the other for any purpose or has the authority to bind the other.

11.5 No Third Party Beneficiaries. This Agreement does not create any third party beneficiary rights in any individual or entity that is not a party to this Agreement.

11.6 Export Compliance. Your rights to use Subvertical Software Products are subject to all applicable export laws and regulations.

11.7 Notice. We can provide any notice to you under this Agreement by posting a notice on the Software website or sending a message to the email address associated with your account. You are responsible for keeping your email address current. To provide any notice to us under this Agreement, you must contact us at [support@verticalchange.com](mailto:support@verticalchange.com).

11.8 Assignment. You may not assign this Agreement or sublicense any of your rights under this Agreement without prior written consent from us.

11.9. Waiver. No failure or delay by us to exercise any right under this Agreement shall constitute a waiver of that right.

11.10 Severability. If any provision of this Agreement is found by a court of competent jurisdiction to be unenforceable, the remaining portions of the Agreement will remain in full force and effect.

11.11 Governing Law. Any dispute that might arise between you and us will be governed by the laws of the State of California. Any dispute relating to the Subvertical Software Products or to this Agreement, where a party seeks aggregate relief in excess of \$5,000, will be adjudicated in any state or federal court in Santa Barbara County, California. You consent to exclusive jurisdiction and venue in those courts. We may seek injunctive or other relief in any state, federal, or national court of competent jurisdiction for any infringement of our intellectual property or other proprietary rights.

11.12 Entire Agreement. This Agreement (and, if applicable under Section 10, above, the Business Associate Agreement) includes the Policies and is the entire agreement between you and us regarding the subject matter of this Agreement. This Agreement (and, if applicable under Section 10, above, the Business Associate Agreement) supersedes all prior or contemporaneous representations, understandings, agreements, or communications between you and us, whether written or verbal, regarding the subject matter of this Agreement. Notwithstanding any other agreement between you and

us, the security and data privacy provisions in Section 3 of this Agreement contain our entire obligation regarding the security, privacy and confidentiality of Your Data. We will not be bound by, and specifically object to, any term, condition or other provision which is different from or in addition to the provisions of this Agreement (whether or not it would materially alter this Agreement) and which is submitted by you in any order, receipt, acceptance, confirmation, correspondence or other document.

For information about how to contact VerticalChange, please visit our [contact page](#)