



## ServePath Terms of Service

Posted/Revised November 30, 2006

READ THIS AGREEMENT CAREFULLY BEFORE USING ANY SERVEPATH SERVICE. THIS IS A LEGALLY BINDING AGREEMENT BETWEEN SERVEPATH AND YOU, INCLUDING ANY SERVEPATH CUSTOMER, USER, OR WEBSITE VISITOR, (collectively referred to herein as "**Customer**").

### Terms of Service

This agreement (this "**Agreement**") between ServePath, LLC, a Delaware limited liability company ("**ServePath**") and Customer governs provision of ServePath's Internet services, including any related professional services (the "**Service**"). This Agreement is effective as of the moment Customer indicates agreement at the ServePath Website, as of the moment the two parties sign a paper version, or as of the moment Customer uses any ServePath Website or element of the Service.

#### 1. The Service.

(a) ServePath will provide the Service pursuant to this Agreement and ServePath's then-standard policies and procedures. The Service includes the features and restrictions listed in Customer's initial quote or otherwise ordered or revised by Customer and accepted by ServePath in writing (Customer's "**Signup**").

(b) If included in Customer's Signup, the Service includes: (i) any storage, backup, security, attack protection, or monitoring services ServePath provides, and any other services ServePath designates as "managed services" or "special services" (collectively, "**Managed Services**"); and (ii) any professional services provided by ServePath ("**Professional Services**"). Except as specifically provided in Subsection 5(b) below, Managed Services and Professional Services are subject to the same terms and conditions as other elements of the Service, including without limitation the disclaimers and limitations of liability in Section 7 below. Each Professional Service is also subject to the terms and conditions of its statement of work (if any) executed by authorized representatives of both parties. Fees for Managed Services and Professional Services are in addition to Service fees required pursuant to Subsection 2(a) below. Customer will pay for Managed Services and Professional Services at ServePath's then-standard rates, unless the relevant statement of work, in the case of Professional Services, specifically provides for a different payment structure.

#### 2. Fees.

(a) Customer will pay for the Service pursuant to one of the following plans, as reflected in Customer's Signup:

(i) *Monthly Payment Plan*: Customer pays monthly.

(ii) *Prepayment Plan*: Customer pays annually or on such other periodic basis as is defined in Customer's Signup (Customer's "**Prepayment Period**"). In the event that Customer terminates this Agreement pursuant to Subsection 3(b) below before the end of the

Prepayment Period, Customer will receive a refund for the remainder of the Prepayment Period, minus an adjustment equal to: (1) the difference between the amount Customer has paid and the amount it would have paid pursuant to a Monthly Plan, plus (2) any set-up fees Customer would have paid pursuant to a Monthly Plan, per ServePath's standard policies and procedures. (For purposes of such calculations, Monthly Plan prices are set at ServePath's then-standard prices.)

(b) Customer will pay for the Service in advance. In addition, Customer will pay any set-up or other fees required pursuant to ServePath's standard policies. Customer will make all payments in U.S. dollars. ServePath is not required to issue refunds or credits except as specified in this Agreement.

(c) ServePath issues invoices through the ServePath customer portal, <https://my.ServePath.com> (the "**Customer Portal**"). At Customer's request, ServePath may issue invoices through another method, and may charge an extra fee for such method. Customer will maintain awareness of its usage levels and the fees it owes ServePath and will pay on or before their due-dates. Any payment not received when due will, at ServePath's option, bear interest at a rate of ten percent (10%) per year from the date due until paid, to compensate ServePath for the time-value of the unpaid fees. In addition, ServePath may charge a late fee of \$9.99 per week, as liquidated damages, starting on the first day after any payment is due, and may invoice such amounts in weekly increments. Such liquidated damages compensate ServePath for administrative expenses related to unpaid fees.

(d) If Customer exceeds its transfer allotment, bandwidth commitment, or other pre-paid Service allotment, ServePath may: (i) charge Customer for such overage immediately via credit card and will notify Customer in writing of such charge; or (ii) issue a one-time invoice for such overage, with payment due by wire transfer or direct deposit in seven (7) days. If ServePath concludes, in its sole discretion, that Customer's account reflects a pattern of repeated overage, ServePath may require prepayment, and Customer will pay for such overage on Customer's regular payment date or on a monthly basis. The provisions of this Subsection 2(d) apply regardless of the cause of overage, even if caused by hacker activity or other third party actions.

(e) ServePath may require that Customer maintain a valid credit card on file at all times. In such case: (i) ServePath may charge such card for Service fees or other fees on the first business day prior to any payment due-date; and (ii) Customer will update credit card information as necessary in the Customer Portal. ServePath may interrupt Service if any charge attempt is denied.

(f) A Returned check will constitute a material breach of this Agreement, and Customer will incur a \$50.00 returned check charge, as liquidated damages. Such liquidated damages compensate ServePath for administrative expenses related to returned checks. If ServePath concludes, in its sole discretion, that Customer's account reflects a pattern of repeated late, bounced, or incomplete payments, ServePath may require payment via wire transfer or direct deposit.

### **3. Termination.**

(a) This Agreement will continue until terminated by either party pursuant to the procedures set forth in this Section 3.

(b) Customer may terminate this Agreement on thirty (30) days' advanced written notice. However, if Customer's Signup designates an annual or other commitment period (a "**Commitment Period**"), termination will not become effective until the end of such Commitment Period.

(i) Customer will provide notice of termination through the online cancellation form in the Customer Portal, and if terminating pursuant to the SLA, will state: "termination per SLA." ServePath is not required to refund any payments in the event of termination by Customer except as specifically set forth in Subsection 2(a)(ii) above.

(ii) Upon completion, Customer and ServePath may renew a Commitment Period by written agreement.

(iii) Notwithstanding the foregoing, termination pursuant to the SLA (as defined in Subsection 5(a) below) does not require advanced notice and may become effective during a Commitment Period.

(c) ServePath may terminate this Agreement for convenience as of end of Customer's Commitment Period, or at any time in the absence of a Commitment Period. ServePath will provide thirty (30) days' advanced written notice of any termination for convenience. Upon such termination, ServePath will refund any amounts paid pursuant to a Prepayment Plan for Service not yet provided.

(d) In the event of any breach of this Agreement, including without limitation any breach of the provisions of the AUP (as defined in Subsection 4(a) below) or of the payment obligations set forth in Section 2, ServePath may terminate the Service, any portion thereof, or this Agreement, without advanced notice. ServePath is not required to refund any fees paid or prepaid after such termination.

#### **4. Acceptable Use & Privacy.**

(a) Customer represents that it has read ServePath's acceptable use policy ("**AUP**") and its privacy policy ("**Privacy Policy**"), currently posted at <http://www.servepath.com/about/aup.htm> and <http://www.servepath.com/about/PrivacyPolicy.htm>, respectively. The AUP and Privacy Policy are hereby incorporated into this Agreement, and both parties will adhere to each.

(b) Without limiting the generality of the provisions of Subsection 4(a) above, Customer will not allow the Service or ServePath equipment to be used for activities prohibited by the AUP. Third party violations of the AUP using Customer's Service, including any IP addresses, points of access to the Internet, systems, software, or equipment assigned to or belonging to Customer, will be considered violations by Customer.

(i) Notwithstanding any provision to the contrary in this Agreement, and without limiting any of ServePath's rights or remedies, ServePath may suspend Service in whole or in part, including without limitation by removing Customer's data and software from ServePath's equipment, without advanced notice in the event that ServePath reasonably suspects an AUP violation. Reasonable suspicion pursuant to the preceding sentence includes, without limitation, a third party notice or claim that Customer's use of the Service infringes on third party rights, if such claim complies with ServePath's policies for infringement notification. Suspension pursuant to this Subsection 4(b)(i) may continue so long as ServePath reasonably suspects an AUP violation. ServePath is not liable for any Service suspension authorized by this Subsection 4(b)(i), even if the suspected AUP violation did not occur.

(ii) Customer will reimburse ServePath for any expenses incurred as a result of Customer's violation of the AUP, including without limitation investigation fees, not to exceed \$500 per incident or claim investigated, and attorneys' fees. Investigation fees include fees of \$75.00 per half-hour for each ServePath staff-member. ServePath may require payment of such fees by wire transfer.

(iii) ServePath has no obligation to monitor the Service for AUP violations or for other illegal or improper conduct but may do so and may disclose information regarding use of the Service for any reason, including: to satisfy laws, regulations, or governmental, legal, or law-enforcement requests; to operate the Service properly; and to protect itself and its customers. ServePath may grant law enforcement agencies access to its equipment, including equipment used to provide Service to Customer.

(c) The Privacy Policy applies only to the Service and to ServePath's Website. ServePath is not responsible for use or misuse of data by any third party, including without limitation Customer or any other ServePath customer.

## **5. Service Levels & Remedies.**

(a) ServePath's standard service level agreement, posted at <http://www.servepath.com/sla>, (the "SLA") is hereby incorporated into this Agreement.

(b) The SLA does not apply to Managed Services or Professional Services. In the event that any Managed Service fails to perform according to its specifications, including without limitation as a result of ServePath's negligence or other fault, Customer's sole remedy for any resulting loss, and ServePath's maximum liability, will be a refund of any fees actually paid for such Managed Service, for the period during which it failed to operate. Managed Services and Professional Services are provided with no guarantees of any kind, including without limitation guarantees regarding security, reliability, protection from attacks, or data integrity.

(c) ServePath will not be liable for Service interruptions or any other Service failures except as specifically set forth in the SLA and in this Section 5. In the event that Customer is dissatisfied with the Service, Customer's sole remedies are those listed in the SLA and in this Section 5, or termination of this Agreement pursuant to the provisions of Section 3 above. Remedies listed in the SLA do not apply to any Service interruption authorized pursuant to this Agreement, and ServePath will not be liable for any such interruption.

## **6. Maintenance & Security.**

(a) ServePath may interrupt Service to perform maintenance on ServePath equipment or to address and/or mitigate the effects of security breaches, virus attacks, denial of service attacks, and other intentional interferences by third parties. ServePath will exercise reasonable efforts to inform Customer before interrupting Service and to repair the Service promptly.

(b) Customer is responsible for maintaining security, for maintaining patches and disaster recovery systems, and for maintaining backups, except to the extent ServePath specifically accepts such responsibility through provision of a Managed Service (subject to the limitations of liability in Subsection 7(c) and elsewhere in this Agreement). Customer will promptly report any Service failure to ServePath via the online ticketing system in the Customer Portal. ServePath is not responsible for providing physical access to or copies of software, data, or content stored on ServePath's equipment under any circumstances and is not required to provide network access (i) after any termination or suspension of Customer's Service or (ii) in the event of hardware failure, abuse by hackers or other third parties, improper administration by Customer, or other interruption of network access.

(c) ServePath is not required to reimburse any expenses Customer incurs for technology diagnosis or repair, including without limitation expenses for outside consultants.

## **7. Warranties, Disclaimers, & Limitations of Liability.**

(a) No communication between Customer and ServePath will create a warranty. As used in the previous sentence, "communications" include, without limitation, advice provided by ServePath or any of its representatives, quotes and other documents included in Signup, and representations in any work order or other ordering document. Except to the extent specifically provided in the SLA (if any):

(i) ServePath does not warrant that the Service will be uninterrupted, error-free, or free from viruses or other harmful components.

(ii) SERVEPATH MAKES NO EXPRESS OR IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION WARRANTIES OF TITLE, NONINFRINGEMENT, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE.

(iii) THE SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS.

(b) SERVEPATH WILL NOT BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, EXEMPLARY, PUNITIVE, OR MULTIPLE DAMAGES, EVEN IF ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH DAMAGES. SERVEPATH'S MAXIMUM LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED THE TOTAL AMOUNT OF FEES PAID BY CUSTOMER DURING THE TWELVE (12) MONTHS PRECEDING THE INJURY GIVING RISE TO THE CLAIM. THE LIABILITIES LIMITED BY THIS SUBSECTION 7(b) INCLUDE, WITHOUT LIMITATION, LIABILITY FOR NEGLIGENCE.

(c) Except to the extent specifically provided in Subsection 5(b) above, SERVEPATH WILL HAVE NO LIABILITY WHATSOEVER FOR ANY CLAIMS, LOSSES, ACTIONS, DAMAGES, SUITS, OR PROCEEDINGS RESULTING FROM ANY OF THE FOLLOWING OR FROM ANY SERVEPATH EFFORTS TO ADDRESS OR MITIGATE ANY OF THE FOLLOWING: (i) SECURITY BREACHES, INCLUDING WITHOUT LIMITATION EAVESDROPPING, THIRD PARTY ACCESS TO CUSTOMER DATA OR TO ASSIGNED COMPUTERS, THIRD PARTY ACCESS TO OR MISUSE OF PASSWORDS PROVIDED TO SERVEPATH, AND INTERCEPTION OF TRAFFIC SENT OR RECEIVED USING THE SERVICE; (ii) RELEASE OR EXPOSURE, FOR ANY OTHER REASON, OF PERSONALLY IDENTIFIABLE INFORMATION OR OTHER PRIVATE DATA, INCLUDING DATA BELONGING TO CUSTOMER'S OWN CUSTOMERS AND OTHER USERS; (iii) DENIAL OF SERVICE ATTACKS, VIRUSES, WORMS, AND OTHER INTENTIONAL INTERFERENCE BY THIRD PARTIES; (iv) LOSS OF DATA OR LOSS OF ACCESS TO DATA; (v) ACTIONS OF THIRD PARTIES, INCLUDING WITHOUT LIMITATION AGENTS OR CONTRACTORS OF SERVEPATH; (vi) ACTIONS OF SERVEPATH EMPLOYEES OUTSIDE THE SCOPE OF THEIR EMPLOYMENT; (vii) MISTAKES, OMISSIONS, INTERRUPTIONS, DELETIONS OF FILES, ERRORS, DEFECTS, DELAYS IN OPERATION, OR OTHER FAILURES OF PERFORMANCE OF THE SERVICE; AND (viii) THE ACCURACY, COMPLETENESS, AND USEFULNESS OF THE SERVICE. THE PROVISIONS OF THE PRECEDING SENTENCE APPLY, WITHOUT LIMITATION, TO LIABILITY FOR NEGLIGENCE, AND APPLY EVEN IF CUSTOMER PURCHASES MANAGED SERVICES OR PROFESSIONAL SERVICES ADDRESSING SECURITY, DATA INTEGRITY, DATA BACKUP, ATTACK PROTECTION, VIRUSES, SPAM, MONITORING, OR SYSTEM INTEGRITY. As used in the preceding sentence, "third parties" include other ServePath customers.

(d) ServePath's limitations and exclusions of liability set forth in this Section 7 and in this Agreement apply equally to ServePath's officers, employees, agents, contractors, representatives, suppliers, subsidiaries, parents, and affiliated companies.

## 8. Indemnity.

Customer will defend and indemnify ServePath (including its officers, employees, agents, contractors, representatives, suppliers, subsidiaries, parents, and affiliated companies) from a claim by any of Customer's customers or users, or any other third party, arising out of or related to Customer's use, misuse, or failure to use the Service, including without limitation: (i) alleged Customer conduct that would breach this Agreement, including without limitation alleged infringement of intellectual property or privacy rights and other AUP violations; (ii) security breaches or other alleged faults in the Service, including without limitation faults listed in the SLA and faults leading to the release or exposure of personally identifiable information or other private data (whether such data belongs to Customer, to one of Customer's customers, or to other third parties); and (iii) any action taken by ServePath as part of an investigation into a suspected violation of this Agreement or as a result of its conclusion that a violation has occurred. Such Customer obligation includes payment of losses, expenses, damages, and costs, including without limitation attorneys' fees.

## 9. Miscellaneous.

(a) All software, hardware and Internet protocol addresses provided by ServePath are licensed to Customer temporarily and remain ServePath's sole and exclusive property. Title and intellectual property rights to the Service are owned by ServePath, its agents, suppliers, or affiliates or their licensors. Nothing in this Agreement transfers to ServePath any copyright in, trademark on, or other ownership interest in any data or content of Customer posted at any Website. ServePath will not use Customer's name or trademarks on ServePath's company Website or on any materials published and made available to the general public, unless it receives Customer's advanced written consent.

(b) The parties agree that the fees listed as liquidated damages in Subsections 2(c), 2(f), and elsewhere in this Agreement do not constitute penalties and are reasonable in light of the harm that will be caused by breach, the difficulties of proof of loss, and the inconvenience and infeasibility of otherwise obtaining an adequate remedy.

(c) All written communications to Customer will be deemed delivered if sent to the contact points provided to ServePath at the time of order, or to such other contact points as Customer provides in writing. Customer will include a valid e-mail address with such contact points. All written communications to ServePath and all fees will be mailed to 360 Spear St., Suite 200, San Francisco, CA 94105, unless ServePath notifies Customer in writing of alternate contact information.

(d) ServePath may revise this Agreement, including the AUP, the Privacy Policy, the SLA, and the standard provisions of any payment plan, from time to time by posting a new version on the ServePath Website. Revised terms will become effective at the start of Customer's next Commitment Period or Prepayment Period, whichever is later, or in the absence of either, in thirty (30) days (collectively, Customer's "**Renewal Date**"). Customer will review the ServePath Website for any such revised terms on or before each Renewal Date. Customer's continued use of the Service after any Renewal Date will constitute acceptance of such revised terms. This Agreement may not be revised or amended in any other way, except through a written contract executed by authorized representatives of both parties.

(e) This Agreement is to be construed in accordance with and governed by the internal laws of the State of California without giving effect to any choice of law rule that would cause the application of the laws of any other jurisdiction other than the internal laws of the State of California to the rights and duties of the parties. The parties hereby consent to the personal and exclusive jurisdiction and venue of the federal and state courts of San Francisco, California.

(f) No delay, failure, or waiver of either party's exercise or partial exercise of any right or remedy under this Agreement will operate to limit, impair, preclude, cancel, waive, or otherwise affect such right or remedy.

(g) In the event of any conflict between this main body of this Agreement and any document incorporated by reference, or any ordering document or statement of work (including for Managed Services or Professional Services), this main body of this Agreement will govern.

(h) If any provision of this Agreement is held invalid, illegal, or unenforceable, such provision will be construed so as to come as close as possible to its intended meaning, and the validity, legality, or enforceability of the remaining provisions will in no way be affected or impaired.

(i) This Agreement, including those documents incorporated by reference, embodies the final, full, and exclusive statement of the agreement between the parties, and supersedes all prior agreements, negotiations, representations, and proposals, written or oral, relating to its subject-matter.