



## Software Distribution Agreement

**Document 4042B**

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## SOFTWARE DISTRIBUTION AGREEMENT

THIS SOFTWARE DISTRIBUTION AGREEMENT (this “**Agreement**”) is entered into by and between [NAME OF LICENSOR], a [\_\_\_\_] corporation (“**Licensor**”), and [NAME OF LICENSEE], a [\_\_\_\_] corporation (“**Licensee**”), as of [\_\_\_\_], 20[\_] (the “**Effective Date**”).

WHEREAS, Licensor has developed the software product described in Schedule A attached hereto (the “**Licensed Product**”); and

WHEREAS, Licensor and Licensee agree that Licensee shall become a distributor of the Licensed Product;

NOW THEREFORE, in consideration of the premises and the mutual covenants contained in this Agreement, the parties agree as follows:

### 1. License Grant and Deliverables.

#### 1.1 Reseller License; Sublicenses.

(a) Subject to the terms and conditions of this Agreement, Licensor hereby grants to Licensee, for the term of this Agreement, a [worldwide,] non-transferable license to use, market and distribute the Licensed Product and related documentation (the “**Documentation**”), including all modifications, enhancements, upgrades, and new versions and releases thereof (the “**Upgrades**”), or any component thereof [, solely in [DESCRIBE TERRITORY],] [,] [together with the right to sublicense and, as and to the extent expressly provided herein, make modifications of and derivative works based upon the Licensed Product].

[(b) The form of each sublicense for the Licensed Product entered into by Licensee with its end users [or any sub-distributor] shall be subject to the prior written approval of Licensor. Licensee shall use reasonable commercial efforts to enforce the terms of each sublicense and promptly inform Licensor of any breach of any such sublicense of which it becomes aware.]

[(b) Each end user license agreement (“**End User License**”) shall be directly between Licensor and the end user and shall be in the form of Exhibit A attached hereto. The terms of the End User License shall be subject to change by Licensor, at its sole discretion, upon reasonable notice to Licensee.]

[(c) Licensee may not sublicense the Licensed Product to sub-distributors.]

1.2 Ownership. Except as expressly provided in this Agreement, Licensor shall retain all right, title and interest, including all intellectual property rights, in and to the Licensed Product, the Documentation and any Upgrades, and the symbols, trademarks and service marks adopted by Licensor to identify the Licensed Product (the “**Trademarks**”).

1.3 Licensor Deliverables. Licensor agrees as follows:

[(a) Initial Release. Licensor shall use its best efforts to complete the beta testing for the Licensed Product and release a version of the Licensed Product meeting reasonable commercial standards (the “**Initial Release**”) as soon as practicable after the Effective Date and in any event no later than [\_\_\_\_], 20[\_\_\_]. Licensor shall also use its best efforts to identify any material bugs in the current beta version of the Licensed Product and ensure that any necessary or appropriate bug fixes identified in beta testing are incorporated into the Initial Release. Licensor shall also consider and incorporate any suggested bug fixes or enhancements to the Initial Release that Licensee may reasonably request.]

[(a) Initial Release. Licensor shall deliver the current commercial release of the Licensed Product (the “**Initial Release**”) to Licensee on the Effective Date.]

[(b) Enhancements and New Releases. Licensor shall use its best efforts to upgrade the Licensed Product and incorporate new features, functionality or bug fixes that may be reasonably requested by Licensee or its customers on a periodic basis and to make such new versions or releases available to Licensee hereunder.]

[(c) Documentation. Licensor shall publish and make available to Licensee the Documentation for the Initial Release contemporaneously therewith, and revise the Documentation in a timely manner to accurately reflect all Upgrades.

[(d) Training. Licensor shall be responsible for initial training of Licensee’s sales force and professional services and support personnel with respect to the Licensed Product prior to the date of the Initial Release (the “**Initial Training**”) and for providing periodic training to appropriate training personnel of Licensee on all Upgrades so that such training personnel of Licensee may train other employees of Licensee on all such Upgrades. Licensor shall also be responsible for providing both on-line training and in-person training, at Licensor’s offices, for all customers of the Licensed Product.]

[(e) Implementation and Integration. Licensor shall assist Licensee in integrating the Licensed Product and any Upgrades into any product or service offerings by Licensee or its strategic partners, distributors or resellers and conducting any initial implementation diagnostics on the Initial Release and all Upgrades that may be necessary or appropriate in connection with such integration efforts. If required for integration by Licensee into any of its product or service offerings, Licensor will grant access to Licensor personnel and to the source code for the Licensed Product and any Upgrades.]

[(f) Customer Support. Licensee shall be responsible for “level one” customer support (subject to Licensor providing appropriate product documentation and training), and Licensor shall be responsible for higher levels of customer support based upon criteria and escalation procedures to be mutually agreed upon by the parties prior to [DATE].]

[(g) Upgrade Access. Licensor shall provide Licensee with access to all alpha and beta versions of any Upgrades and shall consider and incorporate any bug fixes, enhancements or modifications to such Upgrades that Licensee may reasonably request. In the event that Licensor does not incorporate bug fixes, enhancements or modifications as requested by Licensee, Licensee will have the right to develop, at [its] [Licensor’s] expense, such bug fixes,

enhancements or modifications and Licensor will grant to Licensee personnel access to the source code for the Licensed Product and any Upgrades for such purpose.]

[(h) Marketing Materials. Licensor shall provide Licensee with such promotional materials for the Licensed Product in camera-ready or electronic format as Licensor generally makes available to its resellers and distributors, including technical specifications, prices, drawings, and advertisements. Licensee may reproduce such promotional materials as reasonably required in connection with its promotional, advertising and marketing activities in connection with the Licensed Product. Such promotional materials, including all copies and reproductions made by Licensee, shall remain the property of Licensor and, except insofar as they are distributed by Licensee in the course of its performance of its duties under this Agreement, must be promptly returned to Licensor upon the expiration or termination of this Agreement. Licensee may develop its own promotional materials for the Licensed Product, provided that such materials may be used only with the prior written consent of Licensor in its sole discretion.]

[(i) Web Hosting. If requested in writing by Licensee, Licensor shall provide, or contract for the provision of, web hosting for any Licensed Product offered by Licensee or its strategic partners, distributors, resellers or customers hereunder, in each case at Licensee's expense.]

1.4 Source Code Escrow. [Prior to the date of the Initial Release] [On the Effective Date], Licensor and Licensee shall use their best efforts to enter into a source code escrow agreement (the "**Escrow Agreement**") with an independent third-party escrow agent whose principal business is providing intellectual property escrow services (the "**Escrow Agent**"), selected by Licensee in its sole discretion. The Escrow Agreement shall provide as follows:

(a) Licensor shall deposit the source code for the Licensed Product and any Upgrades thereto, as well as all other related intellectual property of Licensor, with the Escrow Agent. The Escrow Agreement shall provide that Licensor shall deposit complete source code for each Upgrade with the Escrow Agent within [NUMBER (\_\_\_)] days after the first commercial release of such Upgrade. Each source code deposit shall include written documentation sufficient to identify the deposit recording media format, operating system, and any other information necessary to enable machine reading of the deposit media.

(b) The Escrow Agent shall release Licensor's source code to Licensee if:

- (i) this Agreement is rejected or not assumed in any bankruptcy or reorganization proceeding;
- (ii) Licensor fails or is unable to support the Licensed Product in accordance with its obligations hereby (which failure or inability continues after written notice and reasonable opportunity to cure), becomes insolvent or admits in writing that it cannot pay its debts as they become due;
- (iii) Licensor ceases to do business for any reason; or

- (iv) Licensors commences proceedings to dissolve, wind up, or terminate its business, or appoints a receiver or similar officer.

(c) Upon the release of Licensors source code from escrow, Licensee shall have a worldwide, non-exclusive, paid-up and royalty-free, perpetual, nontransferable license to use, reproduce and modify such source code solely for the purpose of supporting and maintaining the Licensed Product (including any Upgrades thereto); provided, however, that Licensee shall remain obligated to pay the royalties due on Net Revenues under Section 3 (Warranties of Licensors).

(d) Each of Licensors and Licensee shall pay one half of all reasonable fees and expenses for such escrow arrangement, including set-up fees and annual maintenance fees.

### 1.5 Limited Exclusivity Provisions.

[(a) Reseller Exclusivity. During the term of this Agreement, Licensors shall not sell, license or otherwise make available the Licensed Product or any Upgrade or component thereof [to any of [LIST OF LICENSEE'S COMPETITORS], or any of their respective successors, assigns and affiliates,] provided, however, that the exclusivity provisions of this Section 1.5(a) (Limited Exclusivity Provisions) shall terminate:

- (i) on the first anniversary of either (A) the receipt of the Initial Release by Licensee or (B) Licensors fulfillment of its Initial Training obligations with respect to the Initial Release under Section 1.3(d) (Licensors Deliverable) above, whichever occurs later (the later of (A) or (B), the "**Launch Date**"), if Licensee has not, directly or indirectly, licensed or sold Licensed Product with an aggregate sale price of at least \$[\_\_\_\_];
- (ii) on the second anniversary of the Launch Date if Licensee has not, directly or indirectly, licensed or sold Licensed Product during the second year following the Launch Date with an aggregate sale price of at least \$[\_\_\_\_];  
or
- [(iii) [NUMBER (\_\_\_)] days following Licensors notice to Licensee of its reasonable determination that Licensee is in breach of its obligations under Section 4.2 (Obligations of Licensee; Marketing) hereof, if Licensee has not cured such breach during such [NUMBER (\_\_\_)] day period.]]

[(b) Reciprocal Licensee Restrictions. For so long as the exclusivity provisions of Section 1.5(a) (Limited Exclusivity Provisions) are in effect and Licensors is in compliance with such provisions, Licensee shall not offer or license any product which has substantially all of the material features and functionality of the Licensed Product and is reasonably perceived by end users as a comprehensive replacement or substitute for the Licensed Product.]

[(c) Portal Exclusivity. Licensors shall not sell, license or otherwise make available the Licensed Product to [LIST PORTALS] or any of their respective successors, assigns or affiliates (each a "**Major Portal**" and collectively, the "**Major Portals**") during the period from the Effective Date through the [first] anniversary of the Launch Date. The foregoing restriction shall

automatically renew for successive one-year periods after such first anniversary so long as, during the twelve-month period immediately preceding the applicable anniversary date, Licensee enters into an agreement for the placement of the Licensed Product on at least one Major Portal (net of any Major Portals that cancelled or terminated agreements for such placement which had previously been entered into with Licensee).]

## 2. License Fees, Royalties and Other Fees.

[2.1 Advance. On the Effective Date, Licensee shall advance \$[\_\_\_\_\_] to Licensor (the “**Advance**”) as a refundable prepayment against royalties due from Licensee pursuant to Section 2.2 (Royalties) below. [In the event that the Advance has not been fully applied by Licensee on or prior to the earlier of (a) the third anniversary of the Effective Date and (b) any bankruptcy, liquidation, merger or sale of Licensor or all or substantially all of its assets or the acceleration of any indebtedness for money borrowed by Licensor (the “**Repayment Date**”), Licensor shall repay the unapplied amount of the Advance, together with accrued but unpaid interest thereon at a rate of [\_\_]% per annum (based on a 365-day year and compounded quarterly) from the Effective Date.]]

### 2.2 Royalties.

(a) Licensee shall pay to Licensor, within [NUMBER (\_\_\_)] days following the end of each calendar [month] [quarter] (the “**Royalty Period**”), royalties equal to [\_\_]% of all Net Revenues (as hereinafter defined) generated from the sale or license of the Licensed Product by Licensee (“**Royalties**”) pursuant to this Agreement during such Royalty Period.

(b) As used in this Agreement, “**Net Revenues**” shall mean revenues recognized by Licensee in accordance with generally accepted accounting principles as consistently applied by Licensee, net of return reserves and allowances[, and less fees and expenses payable for web hosting fees, and other similar fees and expenses incurred in connection with the offering of the Licensed Product by Licensee hereunder. In the event that such fees and expenses are incurred by Licensor pursuant to Section 1.3(h) (Licensor Deliverables), Licensee shall reimburse Licensor for the documented and reasonable amount of such fees and expenses within [NUMBER (\_\_\_)] days after the end of each Royalty Period, so long as the amount of such fees does not exceed the gross revenues received by Licensee]. No credit will be permitted for cash or early payment discounts or allowances. No other costs incurred in the manufacturing, selling, advertising, and distribution of the Licensed Products, or for any taxes or fees imposed on Licensee in connection with its distribution of Licensed Products, shall be deducted, nor shall any deduction be allowed for any uncollectible accounts or allowances.

[(c) A royalty obligation shall accrue upon the sale of a Licensed Product regardless of the time of collection by Licensee and whether or not Licensee has actually received payment for such Licensed Product. A Licensed Product shall be considered sold when such Licensed Product is billed, invoiced, shipped, or paid for, whichever occurs first. ]

(d) Licensee will provide Licensor, contemporaneously with each royalty payment pursuant to Section 2.2(a) (Royalties), a royalty statement in a form acceptable to Licensor. Such royalty statement shall be certified as accurate by a duly authorized officer of Licensee

reciting[, on a country-by-country basis,] the stock number, item, units sold, description, quantity shipped, gross invoice amount, and amount billed customers less discounts, allowances and returns for each Licensed Product. Such royalty statements shall be furnished to Licensor regardless of whether any Licensed Products were sold during the applicable Royalty Period or whether any actual Royalty was owed with respect to such Royalty Period.

[(e) Licensee agrees to pay to Licensor a minimum of \$[ ] per Royalty Period regardless of Licensee's actual Net Revenues during such Royalty Period.]

[(f) If Licensee sells any Licensed Product to any affiliated or related party at a price less than the regular price charged to other parties, the royalty applicable to such sale shall be computed based upon the regular price.]

[(g) The receipt or acceptance by Licensor of any royalty statement or payment shall not prevent Licensor from subsequently challenging the validity or accuracy of such statement or payment.]

(h) Licensee's obligations for the payment of Royalties shall survive expiration or termination of this Agreement and will continue to accrue for so long as Licensee continues to sell any Licensed Products.

(i) All payments due to Licensor shall be made in United States currency by check drawn on a United States bank unless otherwise specified by Licensor.

(j) Late payments shall incur interest at the rate of [ ]% per month from the date such payments were originally due.

2.3 Pledge. Licensor hereby grants to Licensee a security interest in all of Licensor's intellectual property and other technology, together with all "proceeds" of such intellectual property and other technology (as such term is defined in Section 9-102 of Revised Article 9 of the Uniform Commercial Code), as security for the prompt repayment of the Advance as required by Section 2.1 (Advance)).

2.4 UCC-1 Financing Statements; Termination. Licensor hereby agrees to file, effective as of the Effective Date, UCC-1 Financing Statements and all other appropriate filings, in all applicable jurisdictions, in order to grant a security interest to Licensee in all of Licensor's intellectual property and other technology as security for the prompt repayment of the Advance. Licensee agrees to release the security interest granted to it hereunder, and execute and file any and all termination statements required to be executed and filed in order to terminate the UCC-1 Financing Statements made by Licensee pursuant to this Section 2.4 (UCC-1 Financing Statements), at the time that aggregate royalties earned by Licensor pursuant to Section 2.2 (Royalties) equal or exceed \$[ ].]

2.5 Audit. Licensee shall maintain accounting records, in accordance with generally accepted accounting principles, to support and document Royalties payable or subject to offset in connection with this Agreement. Such records shall be retained for a period of [NUMBER ( )] years after the royalties which relate to such records have been accrued and paid or offset. Licensee shall, upon written request from Licensor, provide access to such records to an

independent accounting firm of nationally recognized standing chosen by Licensor and whose fees are not contingent on the outcome of such audit and shall, except as provided below, be paid by Licensor for the purposes of auditing the royalties due hereunder. Such audits may be conducted no more frequently than once every twelve months and shall be subject to the auditors executing a confidentiality agreement in form and substance reasonably acceptable to Licensee. If any such audit conclusively establishes a shortfall in payment to Licensor of more than [ ]% of the amount actually due, Licensee agrees to pay Licensor the amount of such shortfall plus the expenses of such audit.

### **3. Warranties of Licensor.**

3.1 Ownership of Intellectual Property. Licensor warrants that it owns all right, title and interest in the Licensed Product and the Documentation and that it has the right to grant the licenses described in Section 1 (Grant of License, Deliverables) [and the security interest contemplated in Section 2 (License Fees, Royalties and Other Fees)] without the consent of any other person. Licensor represents that it is not aware of any pending or threatened legal proceedings against it with respect to ownership or title in or to the Licensed Product or the Documentation. Licensor shall indemnify and hold Licensee harmless from and against any loss, cost, liability and expenses (including reasonable attorneys fees) without limitation as to amount (but subject to the provisions of Section 8 (Limitation of Liability)) arising out of any breach or claimed breach of this warranty. [During the pendency of any injunction issued by a court of competent jurisdiction against Licensor or Licensee with respect to Licensor's ownership of the Licensed Product or its authority to grant the licenses granted hereunder, Licensee may withhold payment of any money otherwise required to be paid hereunder.]

3.2 Limited Warranty. Licensor warrants that [throughout the term of this Agreement] [for a period of [NUMBER ( )] days following delivery to Licensee of the Initial Release and each Upgrade], the Licensed Product [embodied in such release] will perform substantially in accordance with the Documentation. Licensor does not warrant that the Licensed Product will be error-free or will operate without interruption. The foregoing warranty shall run to Licensee, its successors, assigns, and sub-licensees, and shall survive inspection, test, acceptance, and payment by Licensee. In the event of breach of the foregoing warranty, at [Licensor's] [Licensee's] option, Licensor shall either (a) refund any royalty payments made with respect to the defective or non-conforming Licensed Product or (b) use reasonable efforts to correct such problem. Licensee's remedies under this Section 3.2 (Limited Warranty) shall be cumulative with any other remedy of Licensee under this Agreement.

3.3 Disclaimer. *Except as expressly provided in this Section 3 (Warranties of Licensor) and Section 5 (Indemnification), Licensor hereby disclaims all other warranties to Licensee or its customers, express, implied, statutory or otherwise, with respect to the Licensed Product and the Documentation, including implied warranties of merchantability or fitness for a particular purpose.*

### **4. Obligations of Licensee; Marketing.**

#### **4.1 Trademarks.**



(a) Licensee shall retain all of Licensor's copyright and trademark notices on any embodiments of the Licensed Product and the Documentation used by Licensee and shall take such other steps as may be reasonably necessary to protect Licensor's intellectual property rights in the Licensed Product. [All advertisements and promotional materials, packaging and anything else bearing a Trademark shall identify Licensor as the Trademark owner and as the manufacturer of the Licensed Product.] Licensee shall not represent or imply that it is Licensor or is affiliated with Licensor in any manner other than as a licensee.

(b) Upon expiration or termination, Licensee will take all action necessary to transfer and assign to Licensor, or its nominee, any right, title or interest in or to any of the Trademarks, and the goodwill related thereto, which Licensee may have acquired in any manner as a result of the marketing and distribution of the Licensed Product under this Agreement, and Licensee shall cease using any Trademark.

(c) Licensee acknowledges and agrees that all use of the Trademarks by Licensee shall inure to the benefit of Licensor. Licensee agrees not to apply for registration of any Trademarks anywhere in the world or for any mark confusingly similar thereto. Licensor may elect to apply for registration of one or more of the Trademarks anywhere in the world at its expense and, in such event, it shall so notify Licensee and Licensee shall assist and cooperate with Licensor in connection therewith. Licensee also agrees not to use or contest, during or after the term of this Agreement, any Trademark, name, mark or designation used by Licensor anywhere in the world (or any name, mark or designation similar thereto).

[4.2 Packaging. Licensee shall ensure that each copy of the Licensed Product distributed by or through Licensee to end users shall include all components of the Licensed Product as prepackaged by Licensor, including (a) diskettes or other media bearing labels, (b) Licensor's end user manuals and documentation, [(c) a copy of the End User License,] and (d) at the option of Licensor advertising and promotional materials supplied by Licensor. [Notwithstanding the preceding sentence, Licensor agrees and acknowledges that Licensee may modify, summarize or make extracts of the Documentation to be included in the end-user documentation for the Licensed Product.]] [Licensee shall obtain Licensor's prior written consent before adding any product claim, label, instructions, packaging or the like to any copy of the Licensed Product.]

[4.3 Licensee Marketing Obligations. Licensee shall commit sufficient resources to fulfill its obligations under this Agreement, and shall use [its best] [commercially reasonable] efforts to market, promote, distribute and support the Licensed Product as contemplated in this Agreement. Without limiting the generality of the foregoing, Licensee agrees to:

- (a) diligently solicit orders for the Licensed Product;
- (b) diligently conduct demonstrations of the Licensed Product at prospective customer sites or at Licensee's offices, as appropriate;
- (c) diligently engage in public relations activities to encourage the publication of articles and other publicity regarding the Licensed Product;

- (d) assist Licensor in participating in trade shows as reasonably requested by Licensor;
- (e) maintain an adequate staff of personnel highly trained and qualified in the marketing, use and support of the Licensed Product;
- (f) perform installation, support and maintenance services in connection with the Licensed Product in a professional and timely manner; and
- (g) apply the highest ethical standards in conducting its business.]

[4.4 Web Sites.

(a) Hypertext Links. If Licensee has a web site, Licensee shall establish a hypertext link to Licensor's web site within thirty (30) days of the Effective Date. With respect to each hypertext link linking users of Licensee's web site to Licensor's web site, Licensee shall not alter the look, feel, or functionality of Licensor's web site and shall not act to prevent the look and feel of Licensor's web site (including page format, navigational bars, colors, fonts, Licensor's trademarks, all hyperlinks appearing on Licensor's web site or the overall design of Licensor's web site) from being displayed.

(b) Responsibilities. Each party shall be solely responsible for the development, operation, and maintenance of its own web site and for all materials that appear on its web site, including (i) the technical operation of its web site and all related equipment, (ii) the accuracy and appropriateness of materials posted on its web site, and (iii) ensuring that materials posted on its web site do not violate any law, rule, or regulation, or infringe upon the rights of any third party and are not defamatory, obscene or otherwise illegal. Each party disclaims all liability for all such matters with respect to the other's web site.]

[4.5 Advertising. Licensee may advertise the Licensed Product in appropriate periodicals in a manner ensuring proper and adequate publicity for the Licensed Product. Licensee shall notify Licensor promptly of all such advertising, specifying the name and date of the applicable periodical.

4.6 Third-Party Infringement. Licensee shall notify Licensor promptly of any infringement of any copyrights, Trademarks, or other intellectual property or proprietary rights relating to the Licensed Product. Licensor may, in its sole discretion, take or not take whatever action it believes is appropriate in connection with any such infringement. If Licensor elects to take any such action, Licensee agrees to reasonably cooperate, at no expense to Licensee, in connection therewith. If Licensor initiates and prosecutes any action with respect to infringement of any copyrights, Trademarks, or other proprietary rights relating to the Licensed Product, Licensor shall be entitled to retain all amounts (including court costs and attorneys' fees) awarded by way of judgment, settlement, or compromise with respect thereto.

4.7 Compliance. Licensee shall ascertain and comply with all applicable federal, state and local laws and regulations and standards of industry or professional conduct, including those applicable to product claims, labeling, approvals, registrations, notifications, and the Internet Assigned Numbers Authority and Internet community standards (INTERNIC).

[4.8 Export Control. Licensee shall not export or re-export the Licensed Product outside the United States without Licensor's express written consent. In the event such consent is received, Licensee shall comply with the US Foreign Corrupt Practices Act and all export laws, restrictions, national security controls and regulations of the United States and other applicable foreign agencies or authorities, and shall not export or re-export, or allow the export or re-export of, the Licensed Product, any component of the Licensed Product, any other product or confidential information of Licensor or any copy or direct product of any of the foregoing in violation of any such laws, restrictions, controls or regulations, or to Cuba, Libya, North Korea, Iran, Iraq, Rwanda or to any Group D:1 or Group E:2 country (or any national of such country) specified in the then current Supplement No. 1 to Part 740, or in violation of the embargo provisions in Part 746 of the US Export Administration Regulations (or any successor regulations or supplement), except in compliance with, and with all licenses and approvals required under, applicable export laws and regulations, including those of the US Department of Commerce.]

[4.9 Press Releases. At a mutually agreed time, but in any event no later than [\_\_\_\_, 20\_\_], Licensee and Licensor shall issue a joint press release announcing the relationship contemplated by this Agreement in a form reasonably agreed upon by both parties in advance of release. Thereafter, each party shall obtain the other party's prior written approval of all press releases that such party proposes to issue with respect to this Agreement and the transactions contemplated by this Agreement. Licensee also shall obtain Licensor's prior written approval of all other press releases that Licensee proposes to issue with respect to the Licensed Product.]

[4.10 Reports and Records.

(a) Reports. Licensee shall keep complete records concerning all copies of the Licensed Product provided to, or downloaded by, end users. Within ten (10) business days of the end of each month during the term of this Agreement, Licensee shall complete and forward to Licensor a monthly report summarizing such information.

(b) Audit. Licensee agrees to maintain copies of all documentation relating to the distribution of the Licensed Product under this Agreement. If requested in writing by Licensor, Licensee shall permit Licensor to have access to such documentation at Licensee's place of business during ordinary business hours. Licensee agrees to keep for three (3) years after termination of this Agreement records of all copies of the Licensed Product provided to or downloaded by End Users sufficient to adequately administer a recall of any release of the Licensed Product and to fully cooperate in any decision by Licensor to recall, retrieve or replace any release of the Licensed Product.]

## **5. Indemnification.**

### **5.1 Indemnification of Licensee.**

(a) Generally. Licensor shall defend Licensee against any claim that the Licensed Product used within the scope of this Agreement infringes any patent, invention registration, copyright, trade secret or mask work right of any third party, or that any Trademark infringes any registered trademark, service mark, trade dress, or other common law trade identity right of any

third party, and shall pay any settlements entered into or damages awarded against Licensee to the extent based on such a claim, regardless of the form of award (and specifically including any award of attorneys fees or costs); provided, however, that (i) Licensee notifies Licensor promptly in writing of the claim; (ii) Licensor has sole control of the defense and all related settlement negotiations, except that Licensor shall not enter into any settlement agreement materially affecting the rights of Licensee without Licensee's express consent; and (iii) Licensee provides Licensor with all reasonably necessary or desirable assistance, information, and authority to perform the above.

(b) Exclusions. Licensor shall have no liability for any claim of infringement based on (i) use of any release of the Licensed Product other than the latest release provided to Licensee, if the infringement would have been avoided by use of the latest release and Licensor enables end users of earlier releases of the Licensed Product to migrate to the latest release; (ii) modification of the Licensed Product by Licensee, if the infringement would have been avoided without such modification; or (iii) the combination or use of the Licensed Product with materials not furnished by Licensor, if such infringement would have been avoided by use of the Licensed Product alone and such combination or joint use was not agreed to by Licensor.

(c) Alternatives. If any settlement agreement or judgment with respect to the Licensed Product results in a final injunction against Licensor or a final loss of Licensee's ability to use or distribute the Licensed Product as provided hereunder, or if Licensor believes that the Licensed Product is likely to infringe the rights of a third party or become subject to such an injunction or loss, Licensor shall have the right, at its sole option and expense, to (i) substitute for or modify the Licensed Product so that it is non-infringing; (ii) obtain for Licensee a license to continue using and distributing the Licensed Product; or (iii) if neither (i) nor (ii) is reasonably practicable, terminate this Agreement and refund to Licensee all Royalties paid by Licensee hereunder.

(d) Sole Obligation. The foregoing states the sole obligation and exclusive liability of Licensor (express, implied, statutory, or otherwise) for any infringements or claims of infringement of any patent, copyright, trademark, trade secret, or other intellectual property right with respect to the Licensed Product.

[5.2 Indemnification of Licensor. If notified promptly in writing of any action (and all prior claims relating to such action) against Licensor based on a claim arising from (a) infringement of any patent or other intellectual property right which results from activities of Licensee described in clauses (i), (ii) or (iii) of Section 5.1(b) (Exclusions); (b) Licensee's grant of a warranty to any end user exceeding the limited warranty set forth in Section 3.2 (Limited Warranty), (c) Licensee's material breach of this Agreement, or (d) Licensee's negligence or willful misconduct, Licensee shall indemnify Licensor and hold Licensor harmless from and against any judgment, damage, liability, or expenses, including reasonable attorneys fees, arising out of any such claim, provided that Licensee shall have had sole control of the defense of any such action and all negotiations for its settlement or compromise, and, provided further, that no cost or expense shall be incurred for the account of Licensee without its prior written consent.]

## 6. Term and Termination.

6.1 Initial Term. This Agreement shall become effective on the Effective Date, and shall remain in effect for an initial period of [NUMBER (\_\_\_)] years after the Launch Date, subject to renewal for successive [NUMBER (\_\_\_)] year terms at the option of Licensee, unless the Agreement is earlier terminated as provided in Section 6.2 (Termination).

### 6.2 Termination.

(a) If either party defaults in a payment or other material obligation under this Agreement and continues in default for a period of [NUMBER (\_\_\_)] days after written notice of default is given to it by the other party, the other party may terminate and cancel this Agreement, in accordance with the provisions of this Section 6 (Term and Termination), immediately upon written notice of termination given to the defaulting party.

(b) Either party may terminate and cancel this Agreement immediately by notice to the other if:

- (i) the other ceases to carry on its business; or
- (ii) a receiver or similar officer is appointed for the other and is not discharged within [NUMBER (\_\_\_)] days; or
- (iii) the other becomes insolvent, admits in writing its inability to pay debts as they mature, is adjudicated bankrupt, or makes an assignment for the benefit of its creditors or another arrangement of similar import; or
- (iv) proceedings under bankruptcy or insolvency laws are commenced by or against the other and are not dismissed within [NUMBER (\_\_\_)] days.

6.3 Effect of Termination. Upon termination of this Agreement (but subject to Section 6.4 (Survival)): (a) the rights and licenses granted to Licensee pursuant to this Agreement shall immediately terminate, and (b) Licensee shall cease to use market, distribute and sell the Licensed Product. Within [NUMBER (\_\_\_)] days of termination, Licensee shall provide to Licensee a final royalty report and pay all royalties accrued through the date of termination. All end user sublicenses properly granted pursuant to Section 1 (Grant of License; Deliverables) shall survive termination. [In the case of termination by Licensee for breach by Licensor pursuant to Section 6.2(a) (Termination) or Licensor's insolvency pursuant to Section 6.2(b) (Termination), Licensor shall refund the remaining unapplied balance of the Advance, together with interest thereon, after adjustment for all royalties accrued through the date of termination.]

6.4 Survival. The provisions of Section 1.2 (Ownership), Section 3 (Warranties of Licensor), Section 5 (Indemnification), Section 7 (Confidentiality), Section 8 (Limitation of Liability), Section 9 (Relationship of Parties), Section 10 (Arbitration) and Section 11 (Miscellaneous Provisions) shall survive the termination or cancellation of this Agreement for any reason.

## 7. Confidentiality.

7.1 General Provisions. Each party acknowledges and agrees that it has or may receive hereunder information which is marked or orally designated “confidential” and constitutes the proprietary confidential information of the disclosing party, and that the other party’s protection thereof is essential to this Agreement. Each party shall retain in strict confidence and not disclose any such information to any third party (except as authorized by this Agreement) without the other party’s express written consent. [The prohibitions contained in this Section 7.1 (General Provisions) preclude dissemination of such information to Licensee’s subsidiaries or affiliates.]

[7.2 Confidentiality. Each party acknowledges and agrees that the terms and conditions of this Agreement shall be treated as confidential information and that no reference to the terms and conditions of this Agreement or to activities pertaining thereto can be made in any form without the prior written consent of the other party; provided, however, that the general existence of this Agreement shall not be treated as confidential information, and that either party may disclose the terms and conditions of this Agreement:

- (a) as required by any court or other governmental body or as otherwise required by law;
- (b) to legal counsel, accountants, banks, proposed investors, and financing sources of the parties and their advisors;
- (c) in confidence, in connection with the enforcement of this Agreement or rights under this Agreement; or
- (d) in confidence, in connection with a merger or acquisition or proposed merger or acquisition, or the like.]

7.3 Exceptions. Each party shall be relieved of its obligation of confidentiality hereunder to the extent any such information:

- (a) was in the public domain at the time of disclosure or has become in the public domain through no fault of such party;
- (b) was known to such party, without restriction, at the time of disclosure as shown by its files in existence at the time of disclosure;
- (c) was disclosed by such party with the prior written approval of the other party;
- (d) was independently developed by such party without any use of the other party’s confidential information; or
- (e) becomes known to such party, without restriction, from a source other than the other party and without breach of this Agreement.

7.4 **Source Code Protections.** Licensee shall not under any circumstances attempt, or knowingly permit others to attempt, to (a) decompile, decipher, disassemble, reverse engineer or otherwise determine the source code, structure, algorithms or ideas underlying the Licensed Product, except as and to the extent contemplated by [Section 1.3(e) (Licensor Deliverables) and] Section 1.4(c) (Source Code Escrow), (b) alter or modify the Licensed Product, or (c) attempt to disable any security devices or codes incorporated in the Licensed Product.

7.5 **Injunctive Relief.** Each party acknowledges that any breach of any of its obligations with respect to confidentiality or use of the other party's confidential information hereunder is likely to cause or threaten irreparable harm to the other party, and, accordingly, it agrees that in the event of such breach the other party shall be entitled to equitable relief to protect its interest therein, including but not limited to preliminary and permanent injunctive relief, as well as money damages.

**8. Limitation of Liability.** *Except for breaches of Section 7 (Confidentiality), in no event shall either party have any liability for any indirect, incidental, special or consequential damages, however caused and on any theory of liability, arising out of this Agreement, including loss of anticipated profits, even if such party has been advised of the possibility of such damages. These limitations shall apply notwithstanding any failure of essential purpose of any limited remedy.*

**9. Relationship of Parties.** Licensee is an independent contractor of Licensor and nothing contained in this Agreement shall be construed to constitute either party as a partner, joint venturer, co-owner, employee, or agent of the other party, and neither party shall hold itself out as such. Neither party has any right or authority to incur, assume or create, in writing or otherwise, any warranty, liability or other obligation of any kind, express or implied, in the name of or on behalf of the other party, it being intended by both Licensor and Licensee that each shall remain an independent contractor responsible for its own actions. Licensee agrees to indemnify and hold the Company harmless from and against any damage or expenses, including reasonable attorneys fees, arising out of Licensee's breach of the provisions of this Section 9 (Relationship of Parties).

**[10. Arbitration.**

(a) All disputes, claims, or controversies arising out of or relating to this Agreement or any other agreement executed and delivered pursuant to this Agreement or the negotiation, validity or performance hereof and thereof or the transactions contemplated hereby and thereby that are not resolved by mutual agreement shall be resolved solely and exclusively by binding arbitration to be conducted before [\_\_\_\_\_] or its successor (the "**Arbitrator**"). The arbitration shall be held in [LOCATION] before a single arbitrator and shall be conducted in accordance with the rules and regulations promulgated by the Arbitrator unless specifically modified herein.

(b) The parties covenant and agree that they will participate in the arbitration in good faith. In the case of temporary or preliminary injunctive relief any party may proceed in court without prior arbitration for the limited purpose of avoiding immediate and irreparable harm. The provisions of this Section 10 (Arbitration) shall be enforceable in any court of competent jurisdiction.

(c) Each of the parties hereto irrevocably and unconditionally consents to the exclusive jurisdiction of the Arbitrator to resolve all disputes, claims or controversies arising out of or relating to this Agreement or any other agreement executed and delivered pursuant to this Agreement or the negotiation, validity or performance hereof and thereof or the transactions contemplated hereby. Each party further irrevocably waives any objection to proceeding before the Arbitrator based upon lack of personal jurisdiction or to the laying of venue and further irrevocably and unconditionally waives and agrees not to make a claim in any court that arbitration before the Arbitrator has been brought in an inconvenient forum. Each of the parties hereto hereby consents to service of process at the address to which notices are to be given. Each of the parties hereto agrees that its submission to jurisdiction and its consent to service of process are made for the express benefit of the other party hereto.]

**11. Miscellaneous Provisions.**

11.1 Governing Law. This Agreement will be construed in accordance with and governed by the laws of the [STATE], without giving effect to the conflict of law principles of the [STATE].

11.2 Successors and Assigns. Except as otherwise expressly provided in this Agreement, this Agreement will be binding on, and will inure to the benefit of, the successors and permitted assigns of the parties to this Agreement[, provided that Licensee shall not assign its rights and obligations under this Agreement without the prior written consent of Licensor]. Nothing in this Agreement is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights or obligations under or by reason of this Agreement, except as expressly provided in this Agreement.

11.3 Notices. All notices and other communications required or permitted hereunder will be in writing and will be delivered by hand or sent by overnight courier, fax or e-mail to:

if to Licensor:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

fax: \_\_\_\_\_

e-mail: \_\_\_\_\_

Attention: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

fax: \_\_\_\_\_

e-mail: \_\_\_\_\_

Attention: \_\_\_\_\_

if to Licensee:



\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
fax: \_\_\_\_\_  
e-mail: \_\_\_\_\_  
Attention: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
fax: \_\_\_\_\_  
e-mail: \_\_\_\_\_  
Attention: \_\_\_\_\_

Each party may furnish an address substituting for the address given above by giving notice to the other parties in the manner prescribed by this Section 11.3 (Notices). All notices and other communications will be deemed to have been given upon actual receipt by (or tender to and rejection by) the intended recipient or any other person at the specified address of the intended recipient.

11.4 Severability. In the event that any provision of this Agreement is held to be unenforceable under applicable law, this Agreement will continue in full force and effect without such provision and will be enforceable in accordance with its terms.

11.5 Construction. The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (a) references to the plural include the singular, the singular the plural, and the part the whole, (b) references to one gender include all genders, (c) “or” has the inclusive meaning frequently identified with the phrase “and/or,” (d) “including” has the inclusive meaning frequently identified with the phrase “including but not limited to” or “including without limitation,” and (e) references to “hereunder,” “herein” or “hereof” relate to this Agreement as a whole. Any reference in this Agreement to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time.

11.6 Entire Agreement. This Agreement embodies the entire agreement and understanding between the parties hereto with respect to the subject matter of this Agreement and supersedes all prior or contemporaneous agreements and understandings other than this Agreement relating to the subject matter hereof.

11.7 Amendment and Waiver. This Agreement may be amended only by a written agreement executed by the parties hereto. No provision of this Agreement may be waived except by a written document executed by the party entitled to the benefits of the provision. No waiver of a provision will be deemed to be or will constitute a waiver of any other provision of this

Agreement. A waiver will be effective only in the specific instance and for the purpose for which it was given, and will not constitute a continuing waiver.

11.8 Counterparts. This Agreement may be in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one instrument.

[The remainder of this page has been intentionally left blank.]

IN WITNESS WHEREOF, the undersigned have executed this Software Distribution Agreement as of date first written above.

LICENSOR

[NAME OF LICENSOR]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

LICENSEE

[NAME OF LICENSEE]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**SCHEDULE A**

**LICENSED PRODUCT**

**FORM OF END USER LICENSE**