|  |  |
| --- | --- |
| C:\Users\DTollen\My ShareSync\Law Practice\Tech Contracts Academy\Admin\Identity\Logo\TCA_TM Logo_FINAL\PNG\Tech-Contracts-Academy-Logo_TM_Color_FINAL.png  <https://TechContracts.com/> | **THE TECH CONTRACTS HANDBOOK**  **Cloud Computing Agreements, Software Licenses, and Other IT Contracts for Lawyers and Businesspeople**  Second Edition  **by David W. Tollen**  (ABA Publishing - Intellectual Property Law Section of the American Bar Association; 2015) |

***Form Contract***

**End-User Software License (EULA) w/ Maintenance**

***On-Premise Software; Vendor-Friendly; Maintenance Plan; Source Code Escrow***

*You may use the form contract below subject to the “Terms of Use” posted at* [*https://techcontracts.com/terms-of-use-and-privacy-policy/*](https://techcontracts.com/terms-of-use-and-privacy-policy/)*. In addition to the Terms of Use, PLEASE READ THE FOLLOWING DISCLAIMER BEFORE USING THE FORM CONTRACT:*

***NEITHER TECH CONTRACTS ACADEMY, LLC™ NOR THE AUTHOR OR PUBLISHER, OR ANYONE AFFILIATED WITH THEM, REPRESENTS THAT THE FORM CONTRACT BELOW WILL MEET YOUR SPECIFIC GOALS, PROTECT YOUR SPECIFIC INTERESTS, OR WITHSTAND CHALLENGES TO ITS LEGAL OR FACTUAL SUFFICIENCY. The form contract below is general in nature and may not be sufficient for a specific contractual, technological, or legal problem or dispute. THE FORM IS NOT PROVIDED WITH ANY GUARANTY, WARRANTY, OR REPRESENTATION AS TO QUALITY OR SUITABILITY FOR ANY PARTICULAR PURPOSE. Publication of the form does not constitute the practice of law and is not legal counsel or advice. Neither Tech Contracts Academy, LLC™ or the author or the publisher of this website or* The Tech Contracts Handbook*, or anyone affiliated with them, is rendering a legal or other professional service. The form should not be relied upon as a substitute for consultation with an attorney.***

*Note that this document uses Microsoft Word multi-level bullets/numbering for section numbers and cross-referencing features for section references.*

*Please delete all text above the following dotted line, as well as the line itself and the page-break following it, before using this form.*

------------------------------------

**END-USER LICENSE AGREEMENT**

This End-User License Agreement (this “Agreement”) is entered into as of \_\_\_\_\_\_\_\_\_\_\_, 20\_\_ (the “Effective Date”) by and between \_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_ (“Vendor”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_ (“Customer”).

RECITALS

Vendor provides an on-premise software application known as \_\_\_\_\_\_\_\_\_\_\_ (the “Software”), and the parties have agreed that Vendor will provide the Software to Customer and also provide maintenance services related to the Software. Therefore, in consideration of the mutual covenants, terms, and conditions set forth below, including those outlined on Attachment A (which are incorporated into this Agreement by this reference), the adequacy of which consideration is hereby accepted and acknowledged, the parties agree as set forth below.

TERMS AND CONDITIONS

1. **DEFINITIONS.** The following capitalized terms shall have the following meanings whenever used in this Agreement.
   1. “Documentation” means the Software’s standard user manual.
   2. “Maintenance Term” is defined in Subsection 3.1 below.
   3. “Software” means Vendor’s \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ software, in object code format.
   4. “Specifications” means Vendor’s standard specifications for the Software set forth in its then-current Documentation and at \_\_\_\_\_\_\_\_\_\_.
   5. “Term” is defined in Section 12.1 below.
   6. “Upgrade” means a new versions, updates, or upgrades of the Software, in object code format.
2. **LICENSES & DELIVERY.**
   1. License. Vendor hereby grants Customer a nonexclusive license to reproduce and use \_\_ copies of the Software during the Term, provided Customer complies with the restrictions set forth in Section 2.2 below.
   2. Restrictions on Software Rights. Copies of the Software created or transferred pursuant to this Agreement are licensed, not sold, and Customer receives no title to or ownership of any copy or of the Software itself. Furthermore, Customer receives no rights to the Software other than those specifically granted in Section 2.1 above. Without limiting the generality of the foregoing, Customer shall not: (a) modify, create derivative works from, distribute, publicly display, publicly perform, or sublicense the Software; (b) use the Software for service bureau or time-sharing purposes or in any other way allow third parties to exploit the Software; or (c) reverse engineer, decompile, disassemble, or otherwise attempt to derive any of the Software’s source code.
   3. Documentation: Customer may reproduce the Documentation as reasonably necessary to support internal use of the Software.
   4. Delivery. Vendor shall provide the Software and Documentation to Customer, through a reasonable system of electronic download, within \_\_\_\_\_ days of the Effective Date.
3. **MAINTENANCE.**
   1. Provision of Maintenance. During each Maintenance Term, Vendor shall maintain the Software according to its \_\_\_\_ [Platinum, Gold, Tinfoil, etc.] Maintenance Plan, as further described at \_\_\_\_\_\_\_\_\_\_\_. “Maintenance Term” refers to the \_\_\_\_\_\_\_ period following the Effective Date. The Maintenance Term shall renew automatically for a period of the same duration unless Customer gives written notice of its intent not to renew \_\_\_\_ days before the end of the current Maintenance Term. After the \_\_\_\_\_\_\_ [2nd, 3rd, 4th …] renewal of the Maintenance Term, Vendor may refuse further renewal by written notice \_\_\_\_\_ days before the next renewal date.
   2. Upgrades. During each Maintenance Term, Vendor shall provide Customer with copies of all Upgrades, without additional charge, promptly after commercial release. Upon delivery to Customer, each Upgrade will constitute an element of the Software and will thereafter be subject to this Agreement’s terms regarding Software, including without limitation license, warranty, and indemnity terms.
4. **FEES & REIMBURSEMENT.**
   1. Fees. Customer shall pay Vendor as follows:
      1. *License Fees*. For the licenses granted in Section 2.1 above, $\_\_\_\_\_\_\_\_\_\_\_ (“License Fees”) per Term (initial or renewal, as set forth below in Section 12.1 below), with each payment due \_\_ days before the start of such Term; and
      2. *Maintenance Fees*. For Maintenance (as defined in Section 3.1), $\_\_\_\_\_\_\_\_\_\_ (“Maintenance Fees”) per Maintenance Term, with each payment due \_\_ days before the start of such Maintenance Term.
   2. Invoices. Payment against all invoices will be due within 30 days thereof.
   3. Fees for Renewed Terms. Vendor may increase the License Fee and/or Maintenance Fee by an amount not to exceed up to Licensor’s prevailing prices to its customers generally for such products or services, not to exceed the rate of increase of the Consumer Price Index plus \_\_\_%, for each renewed Term or Maintenance Term, provided Vendor gives Customer written notice of such increase \_\_\_ or longer before the end of the applicable current Term or Maintenance Term. (“Consumer Price Index” refers to the United States Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers, All U.S. Cities Average, published by the Bureau of Labor Statistics of the United States Department of Labor, or such successor index, appropriately converted to an equivalent reference base, as shall be published by the Bureau of Labor Statistics.) No license rights for a renewed Term, and no new Maintenance Term, will go into effect before payment of the applicable License Fees or Maintenance Fees.
   4. Taxes. Amounts due under this Agreement are payable to Vendor without deduction and are net of any tax, tariff, duty, or assessment imposed by any government authority (national, state, provincial, or local), including without limitation any sales, use, excise, ad valorem, property, withholding, or value added tax withheld at the source. If applicable law requires withholding or deduction of such taxes or duties, Customer shall separately pay Vendor the withheld or deducted amount. However, the prior two sentences do not apply to taxes based on Vendor’s net income.
5. **IP & FEEDBACK.**
   1. IP Rights in the Software. Vendor retains all right, title, and interest in and to the Documentation and Software, including without limitation Upgrades, except to the extent of the limited licenses specifically set forth in Sections 2.1 (*Licenses*), 2.3 (*Documentation*), and 8.3 (*Escrow License*). Customer recognizes that the Software and its components are protected by copyright and other laws.
   2. Feedback. Customer hereby grants Vendor a perpetual, irrevocable, worldwide license to use any Feedback (as defined below) Customer communicates to Vendor during the Term, without compensation, without any obligation to report on such use, and without any other restriction. Vendor’s rights granted in the previous sentence include, without limitation, the right to exploit Feedback in any and every way, as well as the right to grant sublicenses. Notwithstanding the provisions of Article 6 (*Confidential Information*) below, Feedback will not be considered Customer’s Confidential Information. (“Feedback” refers to any suggestion or idea for modifying any of Vendor’s products or services, including without limitation all intellectual property rights in any such suggestion or idea.)
6. **CONFIDENTIAL INFORMATION.** 
   1. Confidential Information Defined. “Confidential Information” refers to the following one party to this Agreement (“Discloser”) discloses to the other (“Recipient”): (a) any document Discloser marks “Confidential”; (b) any information Discloser orally designates as “Confidential” at the time of disclosure, provided Discloser confirms such designation in writing within \_\_ business days; (c) the non-public features and functions of the Software, for which Vendor is Discloser; and (d) any other nonpublic, sensitive information Recipient should reasonably consider a trade secret or otherwise confidential. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in Recipient’s possession at the time of disclosure; (ii) is independently developed by Recipient without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of Recipient’s improper action or inaction; or (iv) is approved for release in writing by Discloser. Recipient is on notice that the Confidential Information may include Discloser’s valuable trade secrets.
   2. Nondisclosure*.* Recipient shall not use Confidential Information for any purpose other than to facilitate the transactions contemplated by this Agreement (the “Purpose”). Recipient: (a) shall not disclose Confidential Information to any employee or contractor of Recipient unless such person needs access in order to facilitate the Purpose and executes a nondisclosure agreement with Recipient with terms no less restrictive than those of this Article 6; and (b) shall not disclose Confidential Information to any other third party without Discloser’s prior written consent. Without limiting the generality of the foregoing, Recipient shall protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. Recipient shall promptly notify Discloser of any misuse or misappropriation of Confidential Information that comes to Recipient’s attention. Notwithstanding the foregoing, Recipient may disclose Confidential Information as required by applicable law or by proper legal or governmental authority. Recipient shall give Discloser prompt notice of any such legal or governmental demand and reasonably cooperate with Discloser in any effort to seek a protective order or otherwise to contest such required disclosure, at Discloser’s expense.
   3. Injunction. Recipient agrees that breach of this Article 6 would cause Discloser irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, Discloser will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.
   4. Termination & Return. With respect to each item of Confidential Information, the obligations of Section 6.2 above (*Nondisclosure*) will terminate \_\_\_\_\_\_\_\_\_\_\_ after the date of disclosure; provided that such obligations related to Confidential Information constituting Discloser’s trade secrets shall continue so long as such information remains subject to trade secret protection pursuant to applicable law. Upon termination of this Agreement, Recipient shall return all copies of Confidential Information to Discloser or certify, in writing, the destruction thereof.
   5. Retention of Rights. This Agreement does not transfer ownership of Confidential Information or grant a license thereto. Discloser will retain all right, title, and interest in and to all Confidential Information.
   6. Exception & Immunity. Pursuant to the Defend Trade Secrets Act of 2016, 18 USC Section 1833(b) (the “DTSA”), Recipient is on notice and acknowledges that, notwithstanding the foregoing or any other provision of this Agreement:
      1. *IMMUNITY*. An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that- (A) is made- (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.
      2. *USE OF TRADE SECRET INFORMATION IN ANTI-RETALIATION LAWSUIT*. An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual- (A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order.
7. **SOFTWARE AUDIT.** During the Term of this Agreement and at any time during the \_\_\_\_\_\_\_\_\_ thereafter, Vendor may audit Customer’s use of Licensed Software on \_\_\_ days’ advance written notice. Customer shall cooperate with the audit, including by providing access to any books, computers, records, or other information that relate or may relate to use of Licensed Software. Such audit shall not unreasonably interfere with Customer’s business activities. If Vendor discovers unauthorized use, reproduction, distribution, or other exploitation of Licensed Software, in excess of \_\_\_% of the copies or fees that would have applied to authorized exploitation, Customer shall reimburse Vendor for the reasonable cost of the audit, or of the next audit in case of discovery without an audit, in addition to such other rights and remedies as Vendor may have. Vendor may not conduct an audit more than once per year.
8. **SOURCE CODE ESCROW.**
   1. Escrow Agreement. Concurrent with execution of this Agreement, the parties shall execute a third party escrow agreement in the form attached hereto as *Attachment A* (the “Escrow Agreement”), in conjunction with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Escrow Agent”).
   2. Deposit & Verification.
      1. *Deposit*. Within \_\_\_ business days of the Effective Date, Vendor shall deposit with the Escrow Agent, pursuant to the procedures of the Escrow Agreement, the source code for the Software, as well as the Documentation. Promptly after delivery of any Upgrade, Vendor shall deposit updated source code and Documentation with the Escrow Agent. (“Deposit Material” refers to material required to be deposited pursuant to this Subsection 8.2(a).).
      2. *Verification*. At Customer’s request and expense, the Escrow Agent may at any time verify the Deposit Material, including without limitation by compiling source code, comparing it to the Software, and reviewing the completeness and accuracy of any and all material. In the event that the Deposit Material does not conform to the requirements of Subsection 8.2(a) above, Vendor shall promptly deposit conforming Deposit Material.
   3. Escrow License. Vendor hereby grants Customer a license to use, reproduce, and create derivative works from the Deposit Material, provided Customer may not distribute or sublicense the Deposit Material or make any use of it whatsoever except for such internal use as is necessary to maintain and support the Software. Copies of the Deposit Material created or transferred pursuant to this Agreement are licensed, not sold, and Customer receives no title to or ownership of any copy or of the Deposit Material itself. The Deposit Material constitutes Confidential Information of Vendor pursuant to Article 6 (*Confidential Information*) above (provided no provision of Article 6 calling for return of Confidential Information before termination of this Agreement will apply to the Deposit Material).
   4. Escrow Release Conditions. The term “Release Conditions,” as used in the Escrow Agreement, refers to any of the following: (a) material breach by Vendor of Section 3.1 (*Provision of Maintenance*) above, if such breach remains uncured \_\_\_ or more business days after Customer’s written notice; (b) any failure of Vendor to function as a going concern; (c) appointment, application for, or consent to a receiver, trustee, or other custodian for Vendor or its assets; (d) Vendor becomes insolvent or unable to pay its debts as they mature in the ordinary course or makes an assignment for the benefit of creditors; (e) Vendor is liquidated or dissolved; or (f) any proceedings are commenced with regard to Vendor under any bankruptcy, insolvency, or debtor’s relief law, and such proceedings are not dismissed within 60 days.
9. **REPRESENTATIONS & WARRANTIES.** 
   1. From Vendor.
      1. *Re Function*. Vendor represents and warrants that, during the \_\_\_\_\_\_\_\_\_ period following delivery, the Software will perform materially as described in its Specifications.
      2. *Re IP Rights in the Software*. Subject to the next sentence, Vendor represents and warrants that it is the owner of the Software and of each and every component thereof, or the recipient of a valid license thereto, and that it has and will maintain the full power and authority to grant the rights granted in this Agreement without the further consent of any third party. Vendor’s representations and warranties in the preceding sentence do not apply to the extent that the infringement arises out of any of the conditions listed in Subsections 10.1(a) through 10.1(e) below. In the event of a breach of the warranty in this Subsection 9.1(b), Vendor, at its own expense, will promptly take the following actions: (i) secure for Customer the right to continue using the Software; (ii) replace or modify the Software to make it noninfringing, provided such modification or replacement will not materially degrade any functionality listed in the Specifications; or (iii) refund \_\_% of the licensee fee paid for the Software for every month remaining in the Term, in which case Vendor may terminate any or all Customer licenses to the Software granted in this Agreement and require return or destruction of copies thereof. In conjunction with Customer’s right to terminate for breach where applicable and the provisions of Section 10.1 below (*Indemnified Claims*), the preceding sentence states Vendor’s sole obligation and liability, and Customer’s sole remedy, for breach of the warranty in this Subsection 9.1(b) and for potential or actual intellectual property infringement by the Software.
   2. From Both Parties. Each party represents and warrants that it has the full right and authority to enter into, execute, and perform its obligations under this Agreement and that no pending or threatened claim or litigation known to it would have a material adverse impact on its ability to perform as required by this Agreement.
   3. Warranty Disclaimers. Except for the express warranties in Sections 9.1 and 9.2 above, VENDOR MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Vendor does not warrant that the Software will perform without error or that it will run without immaterial interruption. Vendor provides no warranty regarding, and will have no responsibility for, any claim arising out of: (a) a modification of the Software made by anyone other than Vendor, unless Vendor approves such modification in writing; or (b) use of the Software in combination with any operating system not authorized in the Specifications or Documentation or with hardware or software specifically forbidden by the Specifications or Documentation.
10. **INDEMNIFICATION.**
    1. Indemnified Claims. Vendor shall defend and indemnify Customer and Customer’s Associates (as defined below) against any “Indemnified Claim,” meaning any third party claim, suit, or proceeding arising out of, related to, or alleging direct infringement of any patent, copyright, trade secret, or other intellectual property right by the Software. Vendor’s obligations set forth in this Section 10.1 do not apply to the extent that an Indemnified Claim arises out of: (a) Customer’s breach of this Agreement; (b) revisions to the Software made without Vendor’s written consent; (c) Customer’s failure to incorporate Upgrades that would have avoided the alleged infringement, provided Vendor offered such Upgrades without charges not otherwise required pursuant to this Agreement; (d) Vendor’s modification of Software in compliance with specifications provided by Customer; or (e) use of the Software in combination with hardware or software not provided by Vendor. In the event of an Indemnified Claim, Vendor may exercise the remedies in Subsections 9.1(b)(i) through 9.1(b)(iii) above, including without limitation its right therein to terminate licenses and require return of the Software. (As used in this Article 10, Customer’s “Associates” are its officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns.)
    2. Litigation & Additional Terms. Vendor’s obligations pursuant to Section 10.1 above will be excused to the extent that Customer’s or any of Customer’s Associates’ failure to provide prompt notice of the Indemnified Claim or reasonably to cooperate materially prejudices the defense. Vendor will control the defense of any Indemnified Claim, including appeals, negotiations, and any settlement or compromise thereof; provided Customer will have the right, not to be exercised unreasonably, to reject any settlement or compromise that requires that it admit wrongdoing or liability or subjects it to any ongoing affirmative obligations.
11. **LIMITATION OF LIABILITY.**
    1. Dollar Cap. VENDOR’S CUMULATIVE LIABILITY FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED $\_\_\_\_\_\_.
    2. Exclusion of Consequential Damages. IN NO EVENT WILL VENDOR BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT.
    3. Clarifications & Disclaimers. THE LIABILITIES LIMITED BY THIS ARTICLE 11 APPLY: (a) TO LIABILITY FOR NEGLIGENCE; (b) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE; (c) EVEN IF VENDOR IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (d) EVEN IF CUSTOMER’S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. If applicable law limits the application of the provisions of this Article 11, Vendor’s liability will be limited to the maximum extent permissible. For the avoidance of doubt, Vendor’s liability limits and other rights set forth in this Article 11 apply likewise to Vendor’s affiliates, licensors, suppliers, advertisers, agents, sponsors, directors, officers, employees, consultants, and other representatives.
    4. Exceptions to Limitation of Liability. Sections 11.1 (*Dollar Cap*) and 11.2 (*Exclusion of Consequential Damages*) above do not apply to: (a) claims pursuant to Article 10 above (*Indemnification*); or (b) claims for attorneys’ fees and other litigation costs recoverable by the prevailing party in any action.
12. **Term & Termination.**
    1. Term. This Agreement will remain in effect for \_\_\_\_\_ from the Effective Date (the “Term”). Thereafter, the Term will renew for successive \_\_\_\_\_ periods, unless either party refuses such renewal by written notice 30 or more days before the end of the current Term
    2. *Termination for Cause*. Either party may terminate this Agreement for the other’s material breach by written notice specifying in detail the nature of the breach, effective in 30 days unless the other party first cures such breach, or effective immediately if the breach is not subject to cure.
    3. Effects of Termination. Upon termination of this Agreement, Customer shall cease all use of the Software and delete, destroy, or return all copies of the Documentation and Deposit Material (as defined in Subsection 8.2(a) above) in its possession or control. The following provisions will survive termination or expiration of this Agreement: (a) any obligation of Customer to pay fees incurred before termination; (b) Articles and Sections 2.2 (*Restrictions on Software Rights*) 5 (*IP & Feedback*), 6 (*Confidential Information*), 7 (*Software Audit*), 9.2 (*Warranty Disclaimers*), 10 (*Indemnification*), and 11 (*Limitation of Liability*); and (c) any other provision of this Agreement that must survive to fulfill its essential purpose.
13. **MISCELLANEOUS.**
    1. Independent Contractors. The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other, and neither may make commitments on the other’s behalf.
    2. Notices. Notices pursuant to this Agreement shall be sent to the addresses below, or to such others as either party may provide in writing. Such notices will be deemed received at such addresses upon the earlier of (a) actual receipt or (b) delivery in person, by fax with written confirmation of receipt, or by certified mail return receipt requested. For Vendor: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. For Customer: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.
    3. Force Majeure. No delay, failure, or default, other than a failure to pay fees when due, will constitute a breach of this Agreement to the extent caused by acts of war, terrorism, hurricanes, earthquakes, other acts of God or of nature, strikes or other labor disputes, riots or other acts of civil disorder, embargoes, or other causes beyond the performing party’s reasonable control.
    4. Assignment & Successors. Customer may not assign this Agreement or any of its rights or obligations hereunder without Vendor’s express written consent. Except to the extent forbidden in this Section 13.4, this Agreement will be binding upon and inure to the benefit of the parties’ respective successors and assigns.
    5. Severability. To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.
    6. No Waiver. Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than by an authorized representative in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any other breach of this Agreement.
    7. U.S. Government Restricted Rights. The Software and Documentation are commercial items, as that term is defined in 48 CFR 2.101, consisting of commercial computer software and commercial computer software documentation, as those terms are used in 48 CFR 12.212. If the Software or Documentation is acquired by or on behalf of the U.S. government or by a U.S. government contractor (including without limitation prime contractors and subcontractors at any tier), then in accordance with 48 CFR 227.7202-4 (for Department of Defense licenses only) and 48 CFR 12.212 (for licenses with all federal government agencies), the government’s rights to the Software and Documentation are limited to the commercial rights specifically granted in this Agreement, as restricted by this Agreement. The rights limited by the preceding sentence include, without limitation, any rights to reproduce, modify, perform, display, disclose, release, or otherwise use the Software or Documentation. This Section 13.7 does not grant Customer any rights not specifically set forth in this Agreement.
    8. Bankruptcy Rights. The rights and licenses granted to Customer in Sections 2.1 (*License*), 2.3 (*Documentation*), and 8.3 (*Escrow License*) above (collectively, the “License Provisions”) are licenses to “intellectual property” rights, as defined in Section 365(n) of the United States Bankruptcy Code (11 U.S.C. Sections 101*, et seq.*). If Vendor is subject to any proceeding under the United States Bankruptcy Code, and Vendor as debtor in possession or its trustee in bankruptcy rejects this Agreement, Customer may, pursuant to 11 U.S.C. Section 365(n)(1) and (2), retain any and all rights granted to it under the License Provisions to the maximum extent permitted by law. This Section 13.8 will not be construed to limit or restrict any right or remedy not set forth in this Section 13.8, including without limitation the right to retain any license or authority this Agreement grants pursuant to any provision other than the License Provisions.
    9. Choice of Law & Jurisdiction: This Agreement will be governed solely by the internal laws of the State of \_\_\_\_\_\_\_\_\_\_\_\_, including without limitation applicable federal law, without reference to: (a) any conflicts of law principle that would apply the substantive laws of another jurisdiction to the parties’ rights or duties; (b) the 1980 United Nations Convention on Contracts for the International Sale of Goods; or (c) other international laws. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of \_\_\_\_\_\_\_\_\_\_ [city or county], \_\_\_\_\_\_\_\_\_ [state]. This Section 13.9 governs all claims arising out of or related to this Agreement, including without limitation tort claims.
    10. Conflicts. In the event of any conflict between *Attachment A* and this main body of this Agreement, this main body will govern.
    11. Construction. The parties agree that the terms of this Agreement result from negotiations between them. This Agreement will not be construed in favor of or against either party by reason of authorship.
    12. Technology Export. Customer shall not: (a) permit any third party to access or use the Software in violation of any U.S. law or regulation; or (b) export the Software or otherwise remove it from the United States except in compliance with all applicable U.S. laws and regulations. Without limiting the generality of the foregoing, Customer shall not permit any third party to access or use the Software in, or export it to, a country subject to a United States embargo (as of the Effective Date, Cuba, Iran, North Korea, Sudan, and Syria).
    13. Entire Agreement. This Agreement sets forth the entire agreement of the parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to its subject matter. Neither party has relied upon any such prior or contemporaneous communications.
    14. Execution in Counterparts. This Agreement may be executed in one or more counterparts. Each counterpart will be an original, but all such counterparts will constitute a single instrument.
    15. Amendment. This Agreement may not be amended except through a written agreement by authorized representatives of each party.

IN WITNESS THEREOF, the parties have executed this Agreement as of the Effective Date.

|  |  |
| --- | --- |
| **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ CUSTOMER** | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ VENDOR** |
|  |  |
| By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (signature) | By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (signature) |
| Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (print) | Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  (print) |
| Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**ATTACHMENT A  
Escrow Agreement**

***[Insert.]***