

## SUBSCRIPTION LICENSE AND SERVICES AGREEMENT

THIS SUBSCRIPTION LICENSE AND SERVICES AGREEMENT (the "Agreement") is between **Ephesoft Inc** ("Ephesoft") and ("Licensee") as of the Effective Date. The parties agree as follows:

### **1. Definitions.**

(a) "**Affiliate**" means any entity, directly or indirectly, controlling, controlled by, or under common control with, Ephesoft. "Control," for purposes of this definition, means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

(b) "**Authorized Users**" means: (i) Licensee's employees; and (ii) contractors authorized by Licensee to access the Subscription Software who, prior to obtaining access to the Subscription Software, have executed a non-disclosure agreement that protects Ephesoft's Confidential Information to the same extent as this Agreement, in each case registered in the database with a unique UserID and a unique password.

(c) "**Confidential Information**" means non-public information that is identified as or would be reasonably understood to be confidential and/or proprietary. Confidential Information of Ephesoft includes, without limitation, the Documentation and the Subscription Software, including any software code and all algorithms, methods, techniques, and processes revealed or utilized therein. Confidential Information of Licensee includes Licensee Data and Personal Information. Confidential Information does not include information that: (i) is or becomes known to the public without fault or breach of the Recipient; (ii) the Discloser regularly discloses to third parties without restriction on disclosure; (iii) the Recipient obtains from a third party without restriction on disclosure and without breach of a non-disclosure obligation known to Recipient; or (iv) is independently developed by the Recipient without use of Confidential Information.

(d) "**Customizations**" means any components deployed in the hosted environment for the Subscription Software other than the generally available Subscription Software or components that Licensee may deploy via the standard user interface or tools included in the generally available Subscription Software. Customizations may include, without limitation, code, databases or third party extensions that are not included in the generally available Subscription Software.

(e) "**Derivative Works**" for purposes of this Agreement shall mean and include the following: i) its standard definition as defined by common-law and industry standards; and, ii) a revision, enhancement, modification, translation, abridgment, condensation or expansion of the Subscription Software or Subscription Services or any other form in which such Subscription Software or Subscription Services may be recast, transferred or adapted contrary to the terms of this Agreement and/or without the express written consent of Ephesoft.

(f) "**Discloser**" means the party providing Confidential Information to the Recipient.

(g) "**Documentation**" means the then-current Ephesoft-provided documentation relating to the features, functions, and use of the Subscription Software.

(h) "**Documented Defect**" means a material deviation between the then-current, general release version of the Subscription Software and its Documentation.

(i) "**Effective Date**" means the date identified on the signature page of this Agreement as the Effective Date.

(j) "**Initial Subscription Term**" means the initial subscription period set forth on the applicable Order Form.

(k) "**Intellectual Property Rights**" means any and all rights in patents, copyrights, trademarks trade secrets (including Confidential Information and know-how), service marks and mask works associated with the Subscription Software and Subscription Services, including but not limited to third-party intellectual property and proprietary rights as licensed by and/or controlled by Ephesoft.

(l) "**Licensee Data**" means information provided, entered or uploaded for use by or with the Subscription Software by the Licensee or its Authorized Users.

(m) "**License Restriction**" means any limitation on the use of the Subscription Software identified in an Order Form (e.g., number of Authorized Users, locations, connections) and/or as set forth in this Agreement.

(n) "**Order Form**" means each order form between the parties incorporating the terms of this Agreement which shall contain, without limitation, a list of the Subscription Software and associated quantity and License Restriction, a description of the Subscription Services, Subscription Fees, and payment terms.

(o) "**Personal Information**" means information provided to Ephesoft by or at the direction of Licensee, or to which access was provided to Ephesoft in the course of Ephesoft's performance under this Agreement that: (i) identifies or can be used to identify an individual (including, without limitation, names, signatures, addresses, telephone numbers, e-mail addresses and other unique identifiers); or (ii) can be used to authenticate an individual (including, without limitation, employee identification numbers, government-issued identification numbers, passwords or PINs, financial account numbers, credit report information, biometric or health data, answers to security questions and other personal identifiers). Personal Information shall include any non-public personal information regarding any individual that is subject to applicable national, state, regional, and/or local laws and regulations governing the privacy, security, confidentiality and protection of non-public personal information.

(p) "**Recipient**" means the party receiving Confidential Information of the Discloser.

(q) "**Renewal Term**" means any renewal or extension of Licensee's license to use the Subscription Software following the expiration of the Initial Subscription Term.

(r) "**Residual Knowledge**" shall mean ideas, concepts, know-how or techniques related to the Discloser's technology and

Confidential Information that are retained in the unaided memories of the Recipient who had rightful access to Confidential Information.

(s) “**Service Level Description**” means the Service Level Description document applicable to the Subscription Services and attached as an exhibit to an Order Form.

(t) “**Subscription Fees**” means the fees for the Subscription Services set forth on the applicable Order Form.

(u) “**Subscription Services**” means the Subscription Software-related application hosting services and Support (as defined in Section 3(b)) that Ephesoft provides Licensee under this Agreement.

(v) “**Subscription Software**” means collectively or individually the computer software programs identified in the applicable Order Form for which Ephesoft is providing the Subscription Services.

(w) “**Subscription Term**” means the Initial Subscription Term or any Renewal Term, as applicable.

(x) “**Third Party Licensor**” means a third party whose software products (“**Third Party Products**”) have been made available to Ephesoft for distribution and licensing under the terms of its agreement with Ephesoft (a “**Third Party Agreement**”).

(y) “**Updates**” means generally available updates, enhancements or modifications to the then-current, general release version of the Subscription Software that are not separately priced or licensed as new products.

(z) “**UserID**” means a unique user identification credential used in combination with a unique password to access the Subscription Services.

**2. License.** Subject to the terms and conditions of this Agreement and the applicable Order Form, Ephesoft hereby grants to Licensee a non-exclusive, non-transferable, limited and restricted license (without the right to sublease or sublicense) to access and use the Subscription Software and the Subscription Services, during the Subscription Term, in an operating environment hosted by Ephesoft, for Licensee’s own internal use. Any and all rights not expressly granted in this Agreement are expressly reserved by Ephesoft.

(a) **Documentation.** Licensee may make a reasonable number of copies of the Documentation for the Subscription Software for its internal use in accordance with the terms of this Agreement.

(b) **License Restriction.** Licensee’s use of the Subscription Software and Subscription Services is subject to any License Restriction specified in the applicable Order Form and/or as set forth in this Agreement.

(c) **Additional Restrictions on Use of the Subscription Software and Subscription Services.** In no event shall Licensee or its Authorized Users access the Subscription Software on any environment outside the hosted environment selected by Ephesoft as part of the Subscription Services. In no event shall Licensee or its Authorized Users possess or control the Subscription Software or any related software code. Licensee and its Authorized Users are prohibited from causing or permitting the reverse engineering, disassembly or de-compilation of the Subscription Software. Licensee will not allow the Subscription Software to be used by, or disclose all or any part of the Subscription Software to, any person except Authorized Users. Licensee and its Authorized Users acknowledge and agree that U.S. export control laws and other

applicable export and import laws govern its use of the Subscription Software and Licensee and its Authorized Users will neither export or re-export, directly or indirectly, the Subscription Software, nor any direct product thereof in violation of such laws, or use the Subscription Software for any purpose prohibited by such laws. Ephesoft may, with reasonable contemporaneous telephonic and/or email notice to Licensee, suspend Licensee’s access to the Subscription Software and Subscription Services if Ephesoft reasonably concludes that Licensee is using the Service to engage in illegal activity, and/or Licensee’s use of the Service is causing immediate, material and ongoing harm to Ephesoft or others. If Ephesoft suspends Licensee’s access to the Service hereunder, Ephesoft will use commercially reasonable efforts to resolve the issue(s) causing the suspension of Service. Ephesoft shall not be liable for any suspension of the Service under this Section 2.

(d) **Intellectual Property Rights Notices.** Licensee is prohibited from removing or altering any of the Intellectual Property Rights notice(s) embedded in the Subscription Software or that Ephesoft otherwise provides with the Subscription Services. Licensee must reproduce the unaltered Intellectual Property Rights notice(s) in any full or partial copies that Licensee makes of the Documentation.

(e) **Ownership.** Use of the Subscription Software and Subscription Services does not grant any ownership rights in or to the Subscription Software, the Subscription Services, or the Documentation to Licensee. Licensee Data shall be the sole property of Licensee; however, Ephesoft may aggregate anonymous statistical data regarding use and functioning of its system by its various licensees, and all such data (none of which shall be considered Licensee Data), will be the sole property of Ephesoft.

### **3. Subscription Services.**

(a) **Hosted Environment.** Ephesoft or its authorized partners will provide the application hosting environment, including the hardware, equipment, and systems software configuration on which Ephesoft or its authorized partners supports use of the Subscription Software and Subscription Services, on servers located at a facility selected by Ephesoft.

(b) **Support.** Ephesoft or its authorized partners shall (a) provide Licensee with access (via the internet, telephone or other means established by Ephesoft) to Ephesoft or its authorized partner’s support helpline, (b) install, for a fee, when and if generally available, Updates; and (c) use reasonable efforts to correct or circumvent any material deviation between the then-current, general release version of the Subscription Software and its Documentation (the foregoing referred to collectively as “Support”). Support is included in the Subscription Fee.

(c) **User Accounts.** Licensee is responsible for maintaining its own Authorized User, UserIDs and passwords which can be managed through the Subscription Software interface. Licensee is responsible for maintaining the confidentiality of Licensee’s UserIDs and passwords and shall cause its Authorized Users to maintain the confidentiality of their UserIDs and Passwords. Licensee is responsible for all uses of and activities undertaken with UserIDs registered on Licensee’s account. Licensee agrees to immediately notify Ephesoft of any unauthorized use of Licensee’s UserIDs of which Licensee becomes aware.

(d) **Connectivity.** Ephesoft or its authorized partners will be responsible for maintaining connectivity from its cloud network to the Internet which is capable of servicing the relevant Internet traffic to and from the hosted environment. Licensee is responsible for

providing connectivity to the Internet for itself and its Authorized Users. Licensee shall also be responsible for ensuring that latency and available bandwidth from the user's desktop to Ephesoft's hosted cloud is adequate to meet Licensee's desired level of performance. If Licensee requires a VPN or private network connection to the Subscription Services, Licensee is responsible for all costs associated with any specialized network connectivity required by Licensee.

(e) Restrictions. Ephesoft or its authorized partners shall have no obligation to correct a problem caused by Licensee's negligence, Licensee's equipment malfunction or other causes beyond the control of Ephesoft or its authorized partners.

(f) Customizations. Customizations are not permitted absent Ephesoft's prior written consent. If permitted, Customizations may only be created by Ephesoft (or an Ephesoft certified alliance partner) and deployed by Ephesoft, and shall be documented in a separate agreement between Ephesoft and Licensee. Support or other services for Customizations are not available under this Agreement or included as part of the Subscription Fees and may only be purchased pursuant to a separate agreement between Ephesoft and Licensee.

**4. Payment and Taxes.**

(a) Payment. Licensee shall pay Ephesoft the Subscription Fees set forth on the Order Form. Subscription Fees are payable in advance and Ephesoft will invoice Licensee for Subscription Fees prior to the commencement of the portion of the Subscription Term to which such fees apply. After the Initial Subscription Term, the Subscription Fees shall be subject to annual adjustment. Except as otherwise set forth in this Agreement, Subscription Fees are non-refundable. Licensee will pay each Ephesoft invoice in accordance with the payment terms set forth on the Order Form. Late payments are subject to a late charge equal to the lesser of: (i) one and one-half percent (1½%) per month; and (ii) the highest rate permitted by applicable law. Notwithstanding anything to the contrary in this Agreement, Ephesoft reserves the right to suspend access to the Subscription Services in the event of any past due Subscription Fees.

(b) Taxes. Licensee is responsible for paying all taxes relating to this Agreement and the use of the Subscription Software and Subscription Services (except for taxes based on Ephesoft's net income or capital stock). Applicable tax amounts (if any) are not included in the Subscription Fees set forth on any Order Form. Ephesoft will invoice Licensee for applicable tax amounts and such invoices are payable in accordance with Section 4(a) and the Order Form.

**5. Limited Warranties, Disclaimer of Warranties, and Remedies.**

(a) Right to Grant License. Ephesoft warrants that that it owns all right, title and interest in and to the Subscription Software or has obtained rights in such Subscription Software sufficient to grant the licenses granted to Licensee under this Agreement. Licensee's exclusive remedy, and Ephesoft's exclusive obligation, for a breach of this warranty is set forth in Section 7 (Indemnity).

(b) Limited Subscription Software Warranty by Ephesoft and Remedy For Breach. Ephesoft warrants that the Subscription Software licensed to Licensee will operate without a Documented Defect for a period of ninety (90) days from the applicable Subscription Service Ready Date or Order Form Date defined in the applicable Order Form and as applicable to such Order Form. Ephesoft's sole obligation with respect to a breach of the foregoing warranty shall be to repair or replace the Subscription Software giving rise to the breach of warranty. If Ephesoft is unable to repair or replace such Subscription Software within a reasonable period of

time, then, subject to the limitations set forth in Section 14 of this Agreement, Licensee may pursue its remedies at law to recover direct damages resulting from the breach of this warranty. The remedies in this Section 5(b) are exclusive and in lieu of all other remedies, and represent Ephesoft's sole obligations, for a breach of the foregoing warranty. Licensee must provide notice to Ephesoft of any warranty claim within the warranty period. For clarity, Licensee's entitlement to Support (as defined in Section 3(b) in connection with any Documented Defect shall continue throughout the Subscription Term.

(c) Malicious Code. Ephesoft represents that it has used commercially reasonable best efforts utilizing generally accepted industry tools and practices to provide Subscription Software that does not contain any "time bombs," "worms," "viruses," "Trojan horses," "protect codes," "data destruct keys," or other programming devices that are intended to access, modify, delete, damage, deactivate or disable the Subscription Services ("Malicious Code"). As Licensee's sole remedy for breach of this representation, Ephesoft shall take action immediately to investigate, identify and remove such Malicious Code from the Subscription Software.

(d) Limited Services Warranty and Remedy For Breach. Ephesoft warrants to Licensee that, Ephesoft will render the Subscription Services with commercially reasonable care and skill. Ephesoft further warrants that the hosted environment will be available at all times throughout the Subscription Term, subject to the exceptions and allowances described in the Availability section of the applicable Service Level Description. The level of unavailability shall not exceed one and one half of one percent (1.5%) per month, excluding Scheduled Maintenance as described in the applicable Service Level Description (the "Down Time Warranty"). In the event of a breach of the foregoing warranty Ephesoft shall apply service level credits based on the actual availability measure for the applicable period as follows:

<u>Availability</u>	<u>Service Level Credit</u>
98.500% or greater	No Service Level Credit
96.000% - 98.499%	5% of the monthly prorated subscription fee
93.000% - 95.999%	15% of the monthly prorated subscription fee
90.000% - 92.999%	25% of the monthly prorated subscription fee
Below 90.000%	35% of the monthly prorated subscription fee

Licensee may terminate the Subscription Services or relevant Order Form in accordance with Section 8(b) of this Agreement and receive a refund for any pre-paid and unused Subscription Fees as its exclusive remedy if:

(a) Availability is less than 90.000% in three (3) consecutive calendar months;

(b) Availability is less than 90.000% during four (4) months (need not be consecutive) out of a rolling twelve (12) month period.

Service level credits for Subscription Fees paid on an annual basis shall be based on a monthly equivalent fee. For example, a 5% service level credit on an annual subscription fee shall be 5% of 1/12 of the annual fee. Service level credits shall be applied to Licensee's

next invoice or, if Licensee has paid the final invoice under this Agreement, service level credits shall be paid to Licensee within thirty (30) calendar days following the determination that the credit is due. The remedies contained in this Section 5 (d) are exclusive and are in lieu of all other remedies for breach of the Down Time Warranty.

(e) Disclaimer of Warranties. The limited warranties in this Section 5 are made to Licensee exclusively and are in lieu of all other warranties. **EPHESOFT MAKES NO OTHER WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, WITH REGARD TO THE SUBSCRIPTION SOFTWARE AND SUBSCRIPTION SERVICES PROVIDED UNDER THIS AGREEMENT AND/OR ANY ORDER FORM, IN WHOLE OR IN PART. EPHESOFT EXPLICITLY DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE. EPHESOFT EXPRESSLY DOES NOT WARRANT THAT THE SUBSCRIPTION SOFTWARE OR SUBSCRIPTION SERVICES, IN WHOLE OR IN PART, WILL BE ERROR FREE, OPERATE WITHOUT INTERRUPTION OR MEET LICENSEE'S REQUIREMENTS.**

(f) Abrogation of Limited Warranty. Ephesoft will have no obligation under this Section 5 to the extent that any alleged breach of warranty is caused by any modification of the Subscription Software not performed by or on behalf of Ephesoft. To the extent that an alleged breach of warranty concerns a Third-Party Product that is subject to a more limited warranty under a Third Party Agreement than specified in Section 5 above, Ephesoft's obligations hereunder will be further limited accordingly.

(g) **FAILURE OF ESSENTIAL PURPOSE. THE PARTIES HAVE AGREED THAT THE LIMITATIONS SPECIFIED IN SECTIONS 5 AND 14 WILL SURVIVE AND APPLY EVEN IF ANY REMEDY SPECIFIED IN THIS AGREEMENT IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE, AND REGARDLESS OF WHETHER LICENSEE HAS ACCEPTED ANY SUBSCRIPTION SOFTWARE OR SUBSCRIPTION SERVICE UNDER THIS AGREEMENT.**

(h) **HIGH RISK ACTIVITIES. THE SUBSCRIPTION SOFTWARE IS NOT FAULT-TOLERANT AND IS NOT DESIGNED, MANUFACTURED OR INTENDED FOR USE AS ON-LINE CONTROL EQUIPMENT IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE PERFORMANCE, SUCH AS IN THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR AIRCRAFT COMMUNICATION SYSTEMS, MASS TRANSIT, AIR TRAFFIC CONTROL, DIRECT LIFE SUPPORT MACHINES, OR WEAPONS SYSTEMS, IN WHICH THE FAILURE OF THE SUBSCRIPTION SOFTWARE COULD LEAD DIRECTLY TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR ENVIRONMENTAL DAMAGE ("HIGH RISK ACTIVITIES"). ACCORDINGLY, EPHESOFT DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY OF FITNESS FOR HIGH RISK ACTIVITIES. LICENSEE AGREES THAT EPHESOFT SHALL NOT BE LIABLE FOR ANY CLAIMS OR DAMAGES ARISING FROM OR RELATED TO THE USE OF THE SUBSCRIPTION SOFTWARE IN SUCH APPLICATIONS.**

## **6. Confidential Information.**

(a) Confidentiality. The Confidential Information disclosed under this Agreement may be used, disclosed or reproduced only to the extent necessary to further and fulfill the purposes of this Agreement.

Except as otherwise permitted under this Agreement, the Recipient will not knowingly disclose to any third party, or make any use of the Discloser's Confidential Information. The Recipient will use at least the same standard of care to maintain the confidentiality of the Discloser's Confidential Information that it uses to maintain the confidentiality of its own Confidential Information, but in no event less than reasonable care. The non-disclosure and non-use obligations of this Agreement will remain in full force with respect to each item of Confidential Information for a period of ten (10) years after Recipient's receipt of that item; provided, however, that Licensee's obligations to maintain the Subscription Software and Documentation as confidential will survive in perpetuity. Each of Licensee and Ephesoft shall be responsible for the breach of the confidentiality terms contained in this Section 6 by any of its directors, officers, employees, Authorized Users, agents, accountants and advisors. Notwithstanding the foregoing, this Section is not intended to prevent (a) a Recipient from using Residual Knowledge, subject to any Intellectual Property Rights of the Discloser, or (b) Ephesoft from using aggregated data regarding the use of the Subscription Services to provide reports or analytics to Licensee or to improve the performance of Ephesoft's products, provided such data does not contain any Personal Information regarding Licensee, its employees, customers or Authorized Users. If the Recipient should receive any legal request or process in any form seeking disclosure of Discloser's Confidential Information, or if the Recipient should be advised by counsel of any obligation to disclose such Confidential Information, the Recipient shall (if allowed by law) provide the Discloser with prompt notice of such request or advice so that the Discloser may seek a protective order or pursue other appropriate assurance of the confidential treatment of the Confidential Information. Regardless of whether or not a protective order or other assurance is obtained, the Recipient shall furnish only that portion of the Discloser's Confidential Information which is legally required to be furnished and to use reasonable efforts to assure that the information is maintained in confidence by the party to whom it is furnished.

(b) Security Policies and Safeguards. Ephesoft shall establish and maintain administrative, technical, and physical safeguards designed to protect against the destruction, loss, unauthorized access or alteration of Licensee Data and Personal Information in the possession or under the control of Ephesoft or to which Ephesoft has access, which are: (i) no less rigorous than those maintained by Ephesoft for its own information of a similar nature; (ii) no less rigorous than generally accepted industry standards; and (iii) required by applicable laws. The security procedures and safeguards implemented and maintained by Ephesoft pursuant to this Section 6(b) shall include, without limitation:

- (i) User identification and access controls designed to limit access to Licensee's Data to authorized users;
- (ii) the use of appropriate procedures and technical controls regulating data entering Ephesoft's network from any external source;
- (iii) the use of encryption techniques when Licensee's Data is transmitted or transferred into or out of the hosted environment;
- (iv) physical security measures, including without limitation securing Licensee's Data within a secure facility where only authorized personnel and agents will have physical access to Licensee Data;
- (v) operational measures, including without limitation IT Service Management (ITSM) processes designed to ensure the correct and secure operations of information processing activities;

(v) periodic employee training regarding the security programs referenced in this Section; and

(vi) periodic testing of the systems and procedures outlined in this Section.

(c) **Review of Controls.** Once in each 12-month period during the Subscription Term, Ephesoft shall, at its cost and expense, conduct a review of the design and operating effectiveness of Ephesoft's defined control objectives and control activities in connection with the Subscription Services.

(d) **Security Incident Response.** In the event that Ephesoft becomes aware that the security of any Licensee Data or Personal Information has been compromised, or that such Licensee Data or Personal Information has been or is reasonably expected to be subject to a use or disclosure not authorized by this Agreement (an "Information Security Incident"), Ephesoft shall: (i) promptly (and in any event within 24 hours of becoming aware of such Information Security Incident), notify Licensee, in writing, of the occurrence of such Information Security Incident; (ii) investigate such Information Security Incident and conduct a reasonable analysis of the cause(s) of such Information Security Incident; (iii) provide periodic updates of any ongoing investigation to Licensee; (iv) develop and implement an appropriate plan to remediate the cause of such Information Security Incident to the extent such cause is within Ephesoft's control; and (v) cooperate with Licensee's reasonable investigation or Licensee's efforts to comply with any notification or other regulatory requirements applicable to such Information Security Incident.

## 7.

(a) **Indemnity by Ephesoft.** Ephesoft will defend, indemnify and hold Licensee harmless from and against any loss, cost and expense to the extent arising from a third-party claim against Licensee that the Subscription Software infringes any Intellectual Property Rights of others. Ephesoft's obligations under this indemnification are expressly conditioned on the following: (i) Licensee must promptly notify Ephesoft of any such claim; (ii) Licensee must, in writing, grant Ephesoft sole control of the defense of any such claim and of all negotiations for its settlement or compromise so long as such settlement or compromise does not result in payment of money by Licensee or an admission of guilt by Licensee (if Licensee chooses to represent its own interests in any such action, Licensee may do so at its own expense, but such representation must not prejudice Ephesoft's right to control the defense of the claim and negotiate its settlement or compromise); (iii) Licensee must reasonably cooperate with Ephesoft to facilitate the settlement or defense of the claim. Ephesoft will not have any liability hereunder to the extent the claim arises from (a) any modification of the Subscription Software by, on behalf of, or at the request of Licensee; or (b) the use or combination of the Subscription Software with any computer, computer platform, operating system and/or data base management system other than provided by Ephesoft. If any Subscription Software is, or in Ephesoft's opinion is likely to become, the subject of an Intellectual Property Rights infringement claim, then Ephesoft, at its sole option and expense, will either: (A) obtain for Licensee the right to continue using the Subscription Software under the terms of this Agreement; (B) replace the Subscription Software with products that are substantially equivalent in function, or modify the Subscription Software so that it becomes non-infringing and substantially equivalent in function; or (C) refund to Licensee the un-used portion of the Subscription Services fee, if any, paid to Ephesoft for the Subscription Software giving rise to the infringement claim, and discontinue Licensee's use of such Subscription Software. **THE FOREGOING SETS FORTH EPHESOFT'S EXCLUSIVE OBLIGATION AND LIABILITY WITH RESPECT TO**

## INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS.

(b) **Indemnitee by Licensee.** Licensee will defend Ephesoft against any claim, demand, suit or proceeding made or brought against Ephesoft by a third party alleging that any of Licensee's data infringes or misappropriates such third party's intellectual property rights, or arising from Licensee's use of the services or content in violation of the Agreement, the documentation, order form or applicable law (each a "Claim Against Ephesoft"), and Licensee will indemnify Ephesoft from any damages, attorney fees and costs finally awarded against Ephesoft as a result of, or for any amounts paid by Ephesoft under a settlement approved by Licensee in writing of, a Claim Against Ephesoft, provided Ephesoft (a) promptly gives Licensee written notice of the Claim Against Ephesoft, (b) gives Licensee sole control of the defense and settlement of the Claim Against Ephesoft (except that Licensee may not settle any Claim Against Ephesoft unless it unconditionally releases Ephesoft of all liability), and (c) gives Licensee all reasonable assistance, at Licensee's expense.

## 8. **Term and Termination.**

(a) **Term.** With respect to the Subscription Software, the Initial Subscription Term shall be as set forth on the applicable Order Form. After the Initial Subscription Term, the Subscription Term shall automatically renew for successive one-year Renewal Terms, unless Licensee provides written notice of non-renewal to Ephesoft at least ninety (90) days prior to expiration of the Initial Subscription Term or then current Renewal Term. Ephesoft may terminate the Subscription Services (including any applicable Subscription Software) after the Initial Subscription Term on at least twelve (12) months written notice to Licensee. Except as set forth in Section 8(b), the Subscription Term cannot be terminated prior to its expiration date.

(b) **Right of Termination.** If either party breaches any material obligation in this Agreement or an Order Form (including, without limitation, any obligation to pay Subscription Fees), and fails to remedy such breach (if such breach can be remedied) within sixty (60) days of receipt of written notice of such breach, the other party may terminate this Agreement (including all Order Forms hereunder). Notwithstanding the foregoing, to the extent such material breach cannot be remedied through efforts of the breaching party, the other party has the right to terminate this Agreement (including all Order Forms hereunder) on less than thirty days' written notice.

(c) **Effect of Termination.** Upon termination of this Agreement by either party, Licensee's license to access and use the Subscription Software and Subscription Services shall immediately terminate as of the effective date of such termination. Termination of this Agreement will not release either party from making payments which may be owing to the other party under the terms of this Agreement through the effective date of such termination. Termination of this Agreement will be without prejudice to the terminating party's other rights and remedies pursuant to this Agreement, unless otherwise expressly stated herein.

(d) **Return of Licensee Data.** Upon termination or expiration of this Agreement, Ephesoft shall use its best efforts to promptly make all available Licensee Data available to Licensee via a billable services engagement.

(e) **Survival of Obligations.** All obligations relating to non-use and non-disclosure of Confidential Information, limitation of

liability, and such other terms which by their nature survive termination, will survive termination or expiration of this Agreement.

9. **Notices.** All notices and other communications required or permitted under this Agreement must be in writing and will be deemed given when: delivered personally; sent by registered or certified mail, return receipt requested; transmitted by facsimile confirmed by first class mail; or sent by overnight courier. Notices must be sent to a party at its address shown on the signature page of this Agreement, or to such other place as the party may subsequently designate for its receipt of notices in accordance with this Section. Licensee must promptly send copies of any notice of material breach and/or termination of the Agreement to David J. Barker, Esq., Barker Law Offices, 650 North Rangeline Road, Carmel, Indiana 46032; Direct Dial (317) 506-4394; Fax (317) 575-6260; david@barkerlaw-in.com, or to such other place as Ephesoft may subsequently designate for its receipt of notices.

10. **Force Majeure.** Except with respect to the payment of fees hereunder, neither party will be liable to the other for any failure or delay in performance under this Agreement due to circumstances beyond its reasonable control, including, without limitation, Acts of God, war, terrorist acts, accident, labor disruption, acts, omissions and defaults of third parties and official, governmental and judicial action not the fault of the party failing or delaying in performance, or the threat of any of the foregoing.

11. **Assignment.** Licensee may not assign or transfer any of its rights or obligations under this Agreement without the prior written consent of Ephesoft, whether by operation of law or otherwise, including in connection with a change in control, merger, acquisition, consolidation, asset sale or other reorganization, and any attempt at such assignment or transfer will be void, and such consent may be withheld at the sole discretion of Ephesoft.

12. **No Waiver.** A party's failure to enforce its rights with respect to any single or continuing breach of this Agreement will not act as a waiver of the right of that party to later enforce any such rights or to enforce any other or any subsequent breach.

13. **Choice of Law; Severability; Venue.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, without application of any conflict of laws provisions thereof, and all claims relating to or arising out of this Agreement, or the breach thereof, whether sounding in contract, tort or otherwise, shall likewise be governed by the laws of the State of California, without application of any conflict of laws provisions thereof. This Agreement is originally written in the English language and the English language version shall control over any translations. If any provision of this Agreement is illegal or unenforceable, it will be deemed stricken from the Agreement and the remaining provisions of the Agreement will remain in full force and effect. The United Nations Convention on the International Sale of Goods (CISG) shall not apply to the interpretation or enforcement of this Agreement. The state and federal courts located in Orange County, California shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to this Agreement. Each party consents to the exclusive jurisdiction of such courts.

14. **LIMITATIONS OF LIABILITY.**

(a) **LIMITED LIABILITY OF EPHESFT. EXCEPT WITH RESPECT TO INTELLECTUAL PROPERTY INDEMNIFICATION OBLIGATIONS UNDER SECTION 7(b), THE TOTAL LIABILITY OF EPHESFT, ITS AFFILIATES AND THIRD PARTY LICENSORS IN CONNECTION WITH OR RELATED TO THE**

**SUBSCRIPTION SOFTWARE, THE SUBSCRIPTION SERVICES, OR ANY OTHER MATTER RELATING TO THIS AGREEMENT (WHATEVER THE BASIS FOR THE CAUSE OF ACTION) WILL NOT EXCEED THE SUBSCRIPTION FEES PAID OR PAYABLE TO EPHESFT HEREUNDER FOR THE TWELVE-MONTH PERIOD IN WHICH SUCH LIABILITY FIRST AROSE.**

(b) **EXCLUSION OF DAMAGES. IN NO EVENT WILL EPHESFT, ITS AFFILIATES OR THIRD PARTY LICENSORS BE LIABLE FOR ANY SPECIAL, PUNITIVE, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES OR DAMAGES FOR LOST PROFITS, WHETHER BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY, OR OTHERWISE, AND REGARDLESS OF WHETHER EPHESFT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR WHETHER ANY REMEDY SET FORTH HEREIN FAILS OF ITS ESSENTIAL PURPOSE.**

15. **Audit Rights.** Ephesoft (including any third-party auditor retained by Ephesoft) may audit the records and systems of Licensee to ensure compliance with the terms of this Agreement and each applicable Order Form. Ephesoft will notify Licensee in writing at least ten (10) business days prior to any such audit. Any such audit will be conducted during regular business hours and will not interfere unreasonably with Licensee's business activities. Ephesoft may audit Licensee no more than once in any twelve (12) month period. If an audit reveals that Licensee is using the Subscription Software or Subscription Services beyond the scope of the license granted herein (for example, in excess of the License Restriction), then, in addition to any other remedies available to Ephesoft, Licensee will promptly pay Ephesoft the underpaid Subscription Fees associated therewith based on Ephesoft's then-current list rates, as well as any applicable late charges.

16. **Compliance with Laws.** Ephesoft and Licensee will comply with all laws, rules and regulations applicable to the use of the Subscription Software and the Subscription Services including, without limitation, by not submitting any Licensee Data that is illegal, defamatory, or that infringes any third party proprietary rights.

17. **Entire Agreement.** This Agreement contains the entire understanding of the parties with respect to its subject matter, and supersedes and extinguishes all prior oral and written communications between the parties about its subject matter. Any purchase order or similar document, which may be issued by Licensee in connection with this Agreement, does not modify, supplement or add terms to this Agreement. No modification of this Agreement will be effective unless it is in writing, is signed by each party, and expressly provides that it amends this Agreement. This Agreement and any signed agreement or instrument entered into in connection herewith or contemplated hereby, and any amendments hereto or thereto, to the extent signed and delivered by means of digital imaging, electronic mail or a facsimile machine, shall be treated in all manner and respects as an original agreement or instrument and shall be considered to have the same binding legal effect as if it were the original signed version thereof delivered in person. This Agreement and all Order Forms may be signed in counterparts.

18. **JURY TRIAL WAIVER.** EPHESFT AND LICENSEE WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING, OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER ON ALL MATTERS ARISING OUT OF THIS AGREEMENT OR THE USE OF THE SUBSCRIPTION

SOFTWARE OR THE SUBSCRIPTION SERVICES. IF EPHESOFT COMMENCES ANY SUMMARY PROCEEDING FOR NONPAYMENT OF THE SUBSCRIPTION SOFTWARE OR THE SUBSCRIPTION SERVICES, LICENSEE WILL NOT INTERPOSE (AND WAIVES THE RIGHT TO INTERPOSE) ANY COUNTERCLAIM IN ANY SUCH PROCEEDING.

19. **Dispute Resolution.** In the event of disagreement with respect to any aspect of this Agreement, the parties agree to discuss in good faith to reach an amicable resolution, and to escalate such resolution process to the appropriate members of their respective management organization who have the power and authority to achieve a successful resolution. Before either party commences an action against the other party, it shall give thirty (30) days written notice to the other party of its intention to file such action, and the senior management of the parties may then choose to meet in good faith to resolve the dispute by an alternative dispute resolution method such as mediation.

20. **Agreement Prevails.** This Agreement, in addition to the terms of the Master Subscription Agreement, and in the event any of the terms of this Agreement conflict with any of the terms of the Master Subscription Agreement, the terms of this Agreement shall prevail.

[Signature Page Follows]

THE PARTIES have executed this Subscription License and Services Agreement through the signatures of their respective authorized representatives as of the Effective Date set forth hereinbelow.

Effective Date: \_\_\_\_\_

**Ephesoft Inc, a Delaware corporation**

\_\_\_\_\_  
Company

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_