



## MARKETWARE, INC.

### MASTER SOFTWARE LICENSE AND SERVICES AGREEMENT

This Master Software License and Services Agreement ("**Agreement**") is between the customer signing below ("**Customer**") and Marketware, Inc., ("**Marketware**"). The Marketware proprietary software, training manuals and all updates provided to Customer ("**Software**") are licensed and not physically sold.

- 1) **SCOPE.** The Software licenses will be hosted by Marketware with licensed access and use provided to Customer via the Internet.
  - a) Customer's employees, affiliate companies, partners may use and access the Software, with Customer being responsible for their compliance with the terms of this agreement.
  - b) This agreement is a master agreement, and contemplates multiple orders, which orders are governed by this agreement.
  
- 2) **LICENSE.** Subject to the other terms of this agreement, Marketware grants Customer, under an order, a non-exclusive, non-transferable, term license(s) up to the license capacity purchased to use and access the Software hosted by Marketware through the Internet.
  
- 3) **RESTRICTIONS.** Customer may not:
  - a) Assign, sublicense, rent or lease the Software, except as permitted under Section 1(a) above, or use it in any type of environment not directly related to Customer's business processes;
  - b) Cause or permit reverse engineering (except to the extent expressly permitted by applicable law despite this limitation), decompile, disassemble, modify, translate, make any attempt to discover the source code of the Software or create derivative works from the Software; or
  - c) Evaluate or use, or facilitate the evaluation or use, of the Software for the purpose of competing with Marketware.
  
- 4) **TAXES AND FEES.** Customer will pay the appropriate governmental agency (or reimburse Marketware) any taxes or fees imposed in connection with the charges under this agreement, including, but not limited to, sales, use, VAT, excise, customs duties and other similar taxes (other than taxes based on Marketware's net income or property) to the extent that Customer is not exempt from such taxes or fees. Marketware will collect all such taxes and fees unless Customer provides Marketware with proof of exemption.

- 5) **PROPRIETARY RIGHTS.** Marketware or its licensors retain all right, title and interest to the Software and all related intellectual property and proprietary rights. The Software is protected by applicable copyright, trade secret, industrial and other intellectual property laws. Customer may not remove any product identification, copyright, trademark or other notice from the Software. Marketware reserves any rights not expressly granted to Customer. CUSTOMER ACKNOWLEDGES THAT ANY MISUSE OF THE SOFTWARE MAY CAUSE IRREPARABLE HARM TO MARKETWARE. AS A RESULT, CUSTOMER UNDERSTANDS THAT MARKETWARE IS ENTITLED TO SEEK INJUNCTIVE RELIEF.
- 6) **MUTUAL CONFIDENTIALITY AND DATA SECURITY.** Marketware (Recipient) will not disclose Confidential Information of Customer (Discloser) to any third party or use the Confidential Information other than for purposes of performing under this agreement.
- a) **Definition.** ‘Confidential Information’ means all proprietary or confidential information that is disclosed to the recipient (“**Recipient**”) by the discloser (“**Discloser**”), and includes, among other things (i) any and all information relating to products or services provided by a Discloser, its financial information, software, processes, techniques, specifications, development and marketing plans, strategies, and forecasts; (ii) as to Marketware, and its licensors, the Software; (iii) as to Customer, all Customer data uploaded to or generated in the Software; and (iv) the terms of this agreement, including without limitation, Software pricing information.
- b) **Exclusions.** Confidential Information *excludes* information that: (a) was rightfully in Recipient's possession without any obligation of confidentiality; (b) is or becomes a matter of public knowledge through no fault of Recipient; (c) is rightfully received by Recipient from a third party without violation of a duty of confidentiality; (d) is independently developed by or for Recipient without use of the Confidential Information; or (e) is required to be disclosed by applicable law or court order.
- c) **Data Security.** Marketware asserts no ownership rights over the Customer data stored in the Software or on Marketware’s database servers, and Customer has the right to remove the data from the Software/Servers at any time or request its deletion from the Software/Servers. All Customer data hosted by Marketware, as part of the Software will be considered Customer’s Confidential Information, except as set forth in subsection (b) above and will also be protected pursuant to the Marketware Data Security & Privacy Policy.
- 7) **WARRANTY.**
- a) **Software Warranty.** Marketware warrants that, during the term of the Agreement, the Software will perform in substantial accordance with its user guide. This warranty will not apply to any problems caused by malfunctioning non-Marketware software, the Customer’s hardware, or misuse of the Software.
- I. **EXCLUSIVE REMEDY.** MARKETWARE’S SOLE LIABILITY AND CUSTOMER’S EXCLUSIVE REMEDY FOR A BREACH OF THIS SECTION 7(B) WILL BE FOR MARKETWARE TO PROVIDE A CREDIT (OR, IN THE CASE OF A NON-RENEWAL, A REFUND) EQUAL TO THE TOTAL LICENSE FEES PAID BY CUSTOMER FOR THE MONTH IN QUESTION, BUT CUSTOMER MUST NOTIFY MARKETWARE IN WRITING OF SUCH BREACH WITHIN 7 DAYS OF THE END OF THE MONTH IN QUESTION.
- II. **Services Warranty.** Customer may purchase offered professional services (“**Services**”) from Marketware in association with the Software hereunder. Marketware represents and warrants that it

shall perform such Services in accordance with professional standards in a good, workmanlike and timely manner using qualified personnel and in conformity to the applicable order. Customer shall have a license to use items delivered pursuant to the Services as part of the License granted subject to the terms and conditions of this Agreement.

- b) Software Availability Warranty.** Marketware warrants that commercially reasonable efforts will be made to maintain the online availability of the Software for a minimum of 99% availability in any given month (excluding advertised scheduled maintenance outages).
  - I. EXCLUSIVE REMEDY.** MARKETWARE'S SOLE LIABILITY AND CUSTOMER'S EXCLUSIVE REMEDY FOR A BREACH OF THIS SECTION 7(B) WILL BE FOR MARKETWARE TO PROVIDE A CREDIT (OR, IN THE CASE OF A NON-RENEWAL, A REFUND) EQUAL TO THE TOTAL LICENSE FEES PAID BY CUSTOMER FOR THE MONTH IN QUESTION, BUT CUSTOMER MUST NOTIFY MARKETWARE IN WRITING OF SUCH BREACH WITHIN 7 DAYS OF THE END OF THE MONTH IN QUESTION.
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- c) Completion of Services.** The successful completion of the Services depends on the commitment and participation of Customer's management and personnel. The responsibilities listed in this section are to be provided at no charge to Marketware; Marketware's performance is predicated upon these responsibilities being fulfilled by Customer as scheduled in the kick off call. Delays in performance of these responsibilities may result in additional cost and/or delay of the completion of the Services.
- d) Implementation Lead.** Prior to the commencement of the Services and Implementation of the Software, Customer will designate an individual as Implementation Lead who will be the point of contact for Marketware communications relative to the Services and will have the authority to act on behalf of the Customer in all matters regarding the Services. The responsibilities of Customer's Implementation Lead include the following: (a) managing Customer personnel and responsibilities for the Services; (b) serving as the interface between Marketware and all participating Customer departments; (c) participating in regular status meetings; (d) expeditiously obtaining and providing any necessary information, data, and decisions pursuant to Marketware's reasonable requests; (d) resolving deviations from the estimated schedule caused by Customer; (e) helping to resolve project issues and escalate issues within Customer's organization as necessary; (f) reviewing or escalating any special invoice or billing requirements associated with the Services and approving any related effect on the price of Services.
- e) Accuracy of Data.** Notwithstanding any configuration-related Services provided by Marketware, Customer is responsible for the accuracy of the actual content of any data file that the Customer provides Marketware with to upload in the Software, as well as the selection and implementation of Customer's controls on end-user access and Customer's use of Customer data residing in the Software.

- f) **Claims Data.** CLIENT REPRESENTS AND WARRANTS THAT THEY HAVE A CLEAR UNDERSTANDING OF WHAT CONSTITUTES CLAIMS DATA, AND HOW IT IS DERIVED AND THE POSSIBLE CAPTURE RATES; INCLUDING THE CLAIMS DATA FIELDS, CALCULATIONS AND DELIVERABLES. ANY CLAIMS DATA PROVIDED THROUGH MARKETWARE IN CONNECTION WITH THIS AGREEMENT IS PROVIDED "AS-IS" UPON DELIVERY OF DATA. CLAIMS DATA IS TYPICALLY A SUBSCRIPTION OF ONE YEAR'S DURATION, AS A RESULT, IF CLIENT CHOSE NOT TO RENEW THEIR SUBSCRIPTION, MARKETWARE IS REQUIRED TO REMOVE THE CLAIMS DATA FROM THE DATABASE.
- g) **Disabling Code.** Marketware warrants that (i) it has used commercially reasonable efforts consistent with industry standards to scan for and remove any software viruses, and (ii) it has not inserted any Disabling Code. "**Disabling Code**" means computer code inserted by Marketware that is not addressed in the documentation and that is designed to delete, interfere with, or disable the normal operation of the Software. This Disabling Code does not apply to Marketware license keys necessary for the operation of the Software, or for any use by Customer outside the scope of the license.
- h) **Indemnification.** Marketware will defend or, upon Customer's written consent, settle any action against Customer based upon a claim that Customer's use of the Software infringes any patent, copyright or other intellectual property right of a third party and will indemnify Customer against any amounts awarded against Customer as a result of the claim, provided Marketware is promptly notified of the assertion of the claim and has control of its defense or settlement. This section contains Customer's exclusive remedies and Marketware's sole liability for infringement claims.
- I. MARKETWARE DISCLAIMS ALL OTHER EXPRESS AND IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE SOFTWARE MAY NOT BE ERROR FREE, AND USE MAY BE INTERRUPTED.
- 8) **SUPPORT.** Included with the license fee, Marketware will provide standard maintenance and technical support ("**Support**") for the Software following the guidelines stated in Marketware's standard [Service Level Agreement](#) (SLA). If a Customer purchases an upgraded level of support, Marketware will provide the Customer with an SLA addendum stating specifically what services are included and will be provided to Customer as part of that upgraded level of support purchased. Marketware may change its Support terms upon written notice to Customer, but Support will not materially degrade.
- 9) **TERM AND TERMINATION.** Each license order will automatically renew on an annual basis, or other date(s) as provided in the Sales Contract, unless either party provides at least ninety (90) days advance notice of non-renewal. Either party may terminate this agreement or an order, upon a material breach by the other party, which is not cured after ninety (90) days written notice of the breach. **Upon termination by Marketware, Customer must end their usage of the Software. Upon termination by Customer for an uncured material breach, Marketware will refund any pre-paid and unused fees and Customer may no longer use the Software.**
- 10) **MUTUAL DISCLAIMER OF DAMAGES.** NEITHER PARTY IS LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES RELATING TO OR ARISING OUT OF THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOSS OF USAGE, AND DAMAGE TO, OR LOSS OF USE OF DATA), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGE, AND WHETHER SUCH DAMAGE RESULTS FROM A CLAIM ARISING UNDER CONTRACT OR TORT LAW.

11) **LIMIT OF LIABILITY.** MARKETWARE'S TOTAL LIABILITY FOR ALL DAMAGES IS LIMITED TO THE AMOUNT PAID FOR THE LICENSE TO THE APPLICABLE SOFTWARE GIVING RISE TO SUCH DAMAGES.

12) **MISCELLANEOUS TERMS.**

- i) **Survival and Waivers.** All terms that would naturally survive termination or expiration survive. A waiver by a party of any breach of this agreement will not be construed as a waiver of any continuing or succeeding breach.
- j) **Assignment.** Customer may not assign or transfer this agreement, or an order, to a third party, except this agreement and all orders may be assigned as part of a sale of all, or substantially all, the assets or business of Customer.
- k) **Notices.** Any notices under this Agreement must be in writing and must be delivered by registered mail (or by courier with tracking number) to the attention of the receiving party's legal department.
- l) **Enforceability.** If any term of this agreement is invalid or unenforceable, the remaining terms remain in effect.
- m) **Purchase Order Terms.** The parties agree that all additional or conflicting terms of Customer's form purchasing document will not apply to this Agreement and the business transactions conducted hereunder.
- n) **Entire Agreement and Changes.** This agreement, and the orders, are the complete and exclusive agreement and supersede any prior or contemporaneous negotiations or agreements, between the parties relating to this subject matter. This agreement may not be modified except in writing executed by both parties.
- o) **Default.** Late payment of invoices due under this license shall be assessed a 1.5% per month late fee (\$25 minimum). Access to a Customer's data and the software may be terminated if License fees are not paid under the terms of the invoice. After 15 days of non-payment the database may be taken offline, and a 5% reinstatement fee will be charged for those Customers desiring to resume access to the software and data. If any payment obligation under this Agreement is not paid when due, the Customer agrees to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.
- p) **U.S. Government Restricted Rights.** The Marketware software is provided with RESTRICTED RIGHTS and any of its supporting documentation is provided with LIMITED RIGHTS. Use, duplication, or disclosure by the U.S. government or any agency thereof is subject to restrictions as set forth in subparagraph "C" of the Commercial Computer Software - Restricted Rights clause at FAR 52.227-19 (or its successor provision) or the Technical Data Commercial Items clause at DFARS 252.227-7015 and DFARS 227.7202 (or its successor provision), as applicable. Contractor/manufacturer is Marketware, Inc., 6975 Union Park Center, Suite 500, Cottonwood Heights, UT 84047.
- q) **Force Majeure.** Neither party is liable for any delays, access limitations etc. caused by force majeure.
- r) **Acceptable Use.** Customer agrees to abide by the [Acceptable Use Policy](#).