

SUBSCRIPTION SERVICES AGREEMENT

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TERMS AND CONDITIONS

1. Grant of License. Subject to the terms and conditions contained in this Agreement, zAgile hereby grants Customer, beginning on the date Customer first downloads the zAgile Software (the “Effective Date”) and during the term specified in Section 13, a non-exclusive, non-transferable, non-assignable, non-sublicensable, worldwide license to use, solely for internal business purposes (including use by external users, namely employees, customers, and partners), the object code of the zAgile Software. The zAgile Software and the Support provided pursuant to Section 4, if any, shall constitute the “Services”). zAgile shall not provide any support or maintenance in respect of any modifications to the zAgile Software. The zAgile Software may not be distributed to any other person or entity except as expressly set forth below in this Section 1. If Customer downloaded or received the zAgile Software for evaluation only, use of the zAgile Software is limited to internal evaluation purposes only, and not for production, for a period of thirty (30) days after download or delivery (unless otherwise agreed in writing by zAgile), unless earlier terminated by zAgile pursuant to Section 13.

The zAgile Software or accompanying documentation may not be distributed, hosted, or sublicensed to any other person or entity.

2. Proprietary Rights. Customer acknowledges that zAgile controls all right, title and interest in and to the zAgile Software and all intellectual property rights relating thereto. The zAgile Software is the valuable intellectual property of zAgile and constitutes confidential and proprietary information of zAgile. zAgile does not grant to Customer any other right or license, either express or implied, in the zAgile Software except as specified in this Agreement, and Customer's use of the zAgile Software shall be subject to the restrictions set forth in this Agreement.

3. Restrictions on Use. Except as expressly permitted in this Agreement, Customer shall not (and shall not allow any third party to) (i) decompile, disassemble, or otherwise reverse engineer the zAgile Software (except to the extent expressly permitted under applicable law); (ii) provide, lease, lend, use for timesharing or otherwise use or allow others to use the zAgile Software to or for the benefit of third parties; (iii) incorporate into or with other hardware or software, or create a derivative work of any part of the zAgile Software; (iv) disseminate performance information or analysis from any source relating to the zAgile Software; (v) remove any product identification, copyright notice or other proprietary legend from the zAgile Software; or (vi) use only the zAgile Software product(s) for which a subscription has been purchased and corresponding license key(s) have been issued.

4. Support. "Support" under this Agreement means those services which Customer has purchased and zAgile has agreed to provide under the terms and conditions set forth during the purchase.

5. Enhancements and Upgrades. During the term of this Agreement, zAgile shall provide to Customer enhancements and upgrades, if any, of the zAgile Software it makes generally available, free of additional charge.

6. Export Control. Customer will comply with all relevant laws and regulations regarding export of zAgile Software. Customer shall indemnify and hold zAgile harmless from any claim arising out of a breach of this Section 6.

7. Payment Terms. Amounts due shall be considered paid when zAgile is in receipt of the amount due or upon confirmation of receipt by a bank designated by zAgile.

8. Warranty and Liability; Indemnification. zAgile expressly warrants that it is the owner or Customer of zAgile Software, including any and all copyrights and trade secrets, and has the right and authority to enter into this Agreement and to license zAgile Software to Customer in accordance with the terms herein as of the Effective Date. For the period beginning on the original date of delivery of the zAgile Software and continuing for thirty (30) days thereafter, zAgile expressly warrants that the zAgile Software will perform substantially in accordance with the written specifications contained in the documentation provided with the zAgile Software.

zAgile shall indemnify and hold harmless Customer and its officers, employees, agents and representatives and defend any action brought against same with respect to any third-party claim, demand or cause of action, including reasonable attorney's fees, to the extent that it is based upon a claim that the zAgile Software infringes or violates any United States patents, copyrights, trade secrets, or other proprietary rights of a third party. Customer may, at its own expense, assist in such defense if it so chooses, provided that zAgile shall

control such defense and all negotiations relating to the settlement of any such claim. Customer shall promptly provide zAgile with written notice of any claim which Customer believes falls within the scope of this Section 8. In the event that the zAgile Software or any portion thereof is held to constitute an infringement and its use is enjoined, zAgile may, at its sole option and expense, (i) modify the infringing zAgile Software so that it is non-infringing, (ii) procure for Customer the right to continue to use the infringing zAgile Software, or (iii) replace said zAgile Software with suitable, non-infringing software. Notwithstanding the foregoing, zAgile will have no obligation for any claims to the extent such claims result from (i) modifications or alterations of the zAgile Software made by or for Customer or any other party that were not provided by zAgile or authorized by zAgile in writing; (ii) use outside the scope of the license granted hereunder, (iii) use of a superseded or previous version of the zAgile Software if infringement would have been avoided by the use of a newer version which zAgile made available to Customer, (iv) use of the zAgile Software in combination with any other software, hardware or products not supplied by zAgile, or (v) third-party open source software. This indemnity obligation is subject to the limitation of liability and the other pertinent terms and conditions of this Agreement.

EXCEPT AS PROVIDED IN THIS SECTION, ALL SOFTWARE LICENSED HEREUNDER IS PROVIDED "AS IS." IN ADDITION, THE FOREGOING WARRANTIES SHALL NOT APPLY IN THE EVENT THAT CUSTOMER BREACHES ANY OF THE RESTRICTIONS ON USE OF THE ZAGILE SOFTWARE.

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IN NO EVENT SHALL ZAGILE BE LIABLE TO CUSTOMER OR ANY THIRD PARTY OR END USER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR CONTINGENT DAMAGES INCLUDING LOSS OF PROFITS, OR ANY AMOUNTS IN EXCESS OF THE FEES ACTUALLY PAID TO ZAGILE BY CUSTOMER (THE FOREGOING BEING COLLECTIVELY CALLED "DAMAGES") INCURRED BY CUSTOMER OR ANY OTHER THIRD PARTY. SUCH NON-LIABILITY FOR DAMAGES SHALL APPLY WHETHER IN AN ACTION BASED ON CONTRACT, TORT OR ANY OTHER SUCH THEORY, EVEN IF ZAGILE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

9. Third-Party Software. Customer agrees to be bound by all of the terms and conditions applicable to end users of any third-party software licenses to products embedded in or distributed with the zAgile Software. The third-party software license terms and conditions are set forth in the "Third-Party Notices" file delivered with certain zAgile Software products. Customer agrees not to use or access any third-party software as a "stand-alone product," or in a manner other than in connection with the zAgile Software. zAgile and its licensors make no warranties, express or implied, with respect to the third-party software, and Customer agrees not to assert any claims against zAgile's third-party licensors relating to this Agreement. Such third-party licensors of zAgile are intended third-party beneficiaries of this Agreement. Source code may not be provided for all third-party software, and Customer agrees not to reverse engineer, decompile, or otherwise derive the source code of any software provided hereunder.

10. No Agency. The Parties are independent contractors. Neither Party is an employee, agent, joint venturer or legal representative of the other Party for any purpose. Neither Party shall have the authority to

enter into any legal or equitable obligation for the other Party. Under no circumstances may either Party hold itself out to have agency authority for the other Party. The Parties agree not to make false or misleading statements, claims or representations about the other Party, its products or the relationship between the Parties.

11. Governing Law. This Agreement is in accordance with, and shall be governed by and construed under, the laws of the State of California and applicable United States statutes. Such governance and construction explicitly excludes the State of California's body of laws governing conflict of laws and the 1980 United Nations Convention on Contracts for the International Sale of Goods. Customer hereby irrevocably consents to jurisdiction of the state or federal courts located in San Francisco County, California. To the extent permitted by law, the provisions of this Agreement shall supersede any provisions of the Uniform Commercial Code as adopted or made applicable to this Agreement in any competent jurisdiction.

12. Term; Termination. This Agreement and the licenses granted hereunder shall remain in effect during the purchased subscription period, unless a different term is ordered and paid for by Customer, and unless earlier terminated as set forth herein. zAgile may terminate this Agreement and the licenses granted hereunder, upon written notice for any material breach of this Agreement that Customer fails to cure within sixty (60) days following written notice specifying such breach. In the event of termination of this Agreement for any cause, all rights granted hereunder automatically revert to the granting Party and all licenses shall cease.

13. Waiver. The Party entitled to the benefit of any provision of this Agreement may waive said provision. Neither Party shall be deemed, by any act or omission, to have waived any of its rights or remedies hereunder unless such waiver is in writing and signed by an authorized officer of such Party. Such a waiver shall be limited specifically to the extent set forth in said writing. Waiver as to one event shall not be construed as waiver of any right or remedy as it relates to any subsequent event.

14. Force Majeure. If by reason of Force Majeure including, without limitation, earthquakes, governmental regulation, fire, flood, labor difficulties, civil disorder and all acts of God, a Party is unable to perform in whole or in part its obligations as set forth in this Agreement, except for payment obligations, such Party shall not be liable to the other for its failure to perform said obligations.

15. Severability. If the application of any provision or provisions of this Agreement to any particular set of facts or circumstances is held to be invalid or unenforceable by a court of competent jurisdiction, the validity of said provision or provisions to any other particular set of facts or circumstances shall not, in any way, be affected. Such provision or provisions shall be reformed without further action by the Parties to the extent necessary to make such provision or provisions enforceable when applied to that set of facts or circumstances.

16. Affirmative Action/Equal Opportunity Employer. zAgile is an Affirmative Action/equal employment opportunity employer who will employ qualified individuals with disabilities and qualified protected veterans.

17. Survival. The following sections shall survive the termination of this Agreement for any cause: 2, 3, 6, 8, 9, and 11.

18. Rules of Construction. As used in this Agreement, all terms used in the singular shall be deemed to include the plural, and vice versa, as the context requires. Descriptive headings are inserted for convenience only and shall not be utilized in interpreting this Agreement.

19. Amendment. This Agreement may not be modified or amended except in a writing signed by a duly authorized representative of each party.

20. Entire Agreement. This Agreement constitutes the exclusive terms and conditions with respect to the subject matter hereof, notwithstanding any different or additional terms that may be contained in the form of purchase order or other document used by Customer to place orders or otherwise effect transactions hereunder. This Agreement represents the final, complete and exclusive statement of the agreement between the parties with respect to subject matter hereof and all prior written agreements and all prior and contemporaneous oral agreements with respect to the subject matter hereof are merged therein.

21. Publicity. During the term of this Agreement, Customer and zAgile may engage in co-marketing and publicity programs, including advertisements in trade and other publications, only upon written approval of both parties. Such approval shall not be unreasonably withheld. Notwithstanding the foregoing, written approval shall not be necessary with respect to zAgile's use of Customer's name and logo as a reference and in marketing materials.