

## PRE-RELEASE SOFTWARE LICENSE AGREEMENT

THIS PRE-RELEASE SOFTWARE LICENSE AGREEMENT (the "Agreement"), effective as of \_\_\_\_\_ ("Effective Date"), is hereby made by and between \_\_\_\_\_, a \_\_\_\_\_ (State) corporation, having principal offices at \_\_\_\_\_ and its affiliates ("Company") and \_\_\_\_\_, a \_\_\_\_\_ corporation, having principal offices at \_\_\_\_\_ ("Licensee").

This Agreement has the following attachments, which are incorporated in this Agreement by this reference:

1. Pre-Release Software License Terms and Conditions
2. EXHIBIT A: Software

### RECITALS

- A. Company is the owner of the software described in Exhibit A (the "Software").
- B. Licensee desires to receive a copy of the Software prior to the completion of testing by Company and the general commercial release of the Software by Company; and Company desires to deliver such copy in accordance with the terms of this Agreement.

### AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

#### 1.0 LICENSE GRANT.

1.1 Grant of License to the Software. Subject to the terms and conditions of this Agreement, Company hereby grants to Licensee a royalty-free, personal, nonexclusive, nontransferable and revocable license to download and use the Software solely for [internal purposes and not for any commercial purpose] or [evaluation purposes only]. No license is granted for any other purpose and there are no implied licenses in this Agreement.

1.2 Limitations. Licensee agrees not to modify, disassemble, decompile or reverse engineer the Software and will not rent or transfer the Software to any third party. Licensee agrees not to use the Software in a "live" situation or for production or other high risk purposes. Licensee will not make any copy of the Software except as necessary to use the Software in accordance with the terms of this Agreement. Licensee agrees to reproduce, in any such copy, all copyright notices and any other proprietary rights notices included in the Software. Licensee may use the Software only on Licensee's premises except as otherwise authorized by the prior written consent of Company.

1.3 Support. Company is under no obligation to provide any technical support for the Software or provide any updates, bug fixes or error corrections. If Company provides any such

items, they will be considered to be part of the Software and subject to the terms of this Agreement.

## 2.0 OWNERSHIP.

Licensee acknowledges and agrees that Company and/or its suppliers own all right, title and interest in and the Software, including without limitation any and all copyrights, patents, trade secrets, trademarks and other intellectual property rights therein. Licensee agrees not to use Company's trademarks or other business names for any purpose or to take any actions which are harmful to or inconsistent with Company's rights in its trademarks, service marks and trade names. Licensee will not earn or acquire any rights or licenses under any copyrights, patents, trade secrets, trademarks or other intellectual property rights on account of this Agreement.

## 3.0 NONDISCLOSURE.

3.1 Confidential Obligations. Licensee agrees to hold the Software and related written information marked "Confidential" or oral information identified as "Confidential" and summarized in writing within thirty (30) days following disclosure, including information that is proprietary to a third party ("collectively referred to as the "Confidential Information") in strict confidence and not to use or disclose the Confidential Information, in whole or in part, except as expressly permitted in this Agreement. Licensee may disclose the Confidential Information to employees of Licensee, but only to the extent they have a need to know to test the Software and Licensee has advised them that such information is Confidential. Licensee agrees to instruct any such employees in advance who will have access to the Software that they must comply with the restrictions set forth in this Agreement with respect to the Software.

3.2 Exceptions. Licensee shall have no obligation to maintain the confidentiality of any information which: (a) is or becomes publicly available without breach of this Agreement; (b) is rightfully received by Licensee from a third party without an obligation of confidentiality and without breach of this Agreement; (c) is developed independently by Licensee without access to or use of the Confidential Information; or (d) has been approved for release by written authorization of Company.

## 4.0 DISCLAIMER OF WARRANTIES.

Licensee acknowledges and agrees that: (a) the Software has not been commercially released for sale by Company; (b) the Software may not be in final form or fully functional and it is expected that it may contain errors, design flaws or other problems which cannot or will not be corrected by Company; (c) the Software and its use may result in unexpected results, loss of data, project delays or other unpredictable damage or loss to Licensee; (d) Company is under no obligation to release a commercial version of the Software and any commercial product released may not be backward compatible and or the programming interfaces may change; and (e) Company has the right to unilaterally abandon development of the Software at any time and without any obligation or liability to Licensee or any third Party. Licensee further agrees that THE SOFTWARE IS BEING SUPPLIED TO LICENSEE ON AND "AS IS" BASIS. ALL EXPRESS OR IMPLIED CONDITIONS, REPRESENTATIONS, AND WARRANTIES INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT OR ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE, ARE HEREBY EXCLUDED TO THE EXTENT

ALLOWED BY APPLICABLE LAW. Licensee shall make no claim against Company for lost data, re-run time, inaccurate output, work delays or lost profits resulting from the use or operation of the Software.

5.0 LIMITATION OF LIABILITY.

IN NO EVENT WILL COMPANY OR ITS SUPPLIERS BE LIABLE FOR ANY LOST REVENUE, PROFIT, OR DATA, OR FOR SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL, OR PUNITIVE DAMAGES HOWEVER CAUSED AND REGARDLESS OF THE THEORY OF LIABILITY ARISING OUT OF THE USE OF OR INABILITY TO USE THE SOFTWARE EVEN IF COMPANY OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

6.0 INDEMNIFICATION

Licensee shall indemnify, defend and hold Company harmless from any claim, liability, damage, expense, or demand arising out of or in connection with Licensee's breach of this Agreement or unauthorized use of the Software.

7.0 TERMINATION.

7.1 Termination. This Agreement will automatically expire upon Licensee's license of a released copy of the Software or for any reason or no reason upon ten (10) days written notice from the other party. Notwithstanding the above, this Agreement shall expire [ninety (90) days] [one hundred eighty (180) days] after delivery of the Software. This Agreement may be immediately terminated upon Licensee's breach of this Agreement or if in Company's sole opinion, the Software is likely to become the subject of a claim of infringement of any intellectual property right.

7.2 Return of Software. Within ten (10) days after the expiration or termination of this Agreement, Licensee will, at its expense, ship to Company or destroy (including purging from any system or storage media) all copies of the Software and any other Confidential Information. If requested by Company, an officer of Licensee shall certify in writing to Company that all copies of the Software and Confidential Information have been returned to Company or destroyed.

7.3 Survival. The rights and obligations of the parties under Sections 2, 3, 4, 5, 6, 7.2, 8 and 9 will survive the expiration or termination of this Agreement.

8.0 LICENSEE EVALUATION.

Upon Company's request, Licensee shall provide Company with its comments, evaluation and other feedback in written or oral form regarding the operation of the Software, including any defects or improvements that could be made.

9.0 GENERAL.

9.1 Compliance with Laws. Licensee agrees to comply with all applicable laws in connection with licensee's use of the software, including but not limited to laws concerning export controls and infringement. Licensee agrees to indemnify Company against liability to third parties (including governmental authorities) resulting from licensee's failure to comply with

such laws.

9.2 Injunctive Relief. Licensee acknowledges that any breach of its obligations under this Agreement with respect to the proprietary rights or Confidential Information of Company will cause Company irreparable injury for which there are inadequate remedies at law, and, therefore, Company will be entitled to equitable relief in addition to all other remedies provided by this Agreement or available at law or in equity.

9.3 Attorneys' Fees. In addition to any other relief awarded, the prevailing party in any action arising out of this Agreement shall be entitled to its attorneys' fees and costs.

9.4 Notices. Any notice required or permitted to be given by either party under this Agreement shall be in writing and shall be personally delivered or sent by a reputable overnight mail service (e.g., Federal Express), or by first class mail (certified or registered), or by facsimile confirmed by first class mail (registered or certified). Notices will be deemed effective (i) three (3) working days after deposit, postage prepaid, if mailed, (ii) the next day if sent by overnight mail, or (iii) the same day if sent by facsimile and confirmed as set forth above.

with a copy to:

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

Fax: \_\_\_\_\_

with a copy to:

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

Fax: \_\_\_\_\_

9.5 Assignment. Licensee may not assign its rights or delegate its obligations hereunder, either in whole or in part, whether by operation of law or otherwise, without the prior written consent of Company. Any attempted assignment or delegation without Company's written consent will be void. The rights and liabilities of the parties under this Agreement will bind and inure to the benefit of the parties' respective successors and permitted assigns. For purposes of this section, a twenty percent (20%) change in control shall constitute an assignment.

9.6 Waiver and Modification. Failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision. Any waiver, amendment or other modification of any provision of this Agreement will be effective only if in writing and signed by the parties.

9.7 Severability. If for any reason a court of competent jurisdiction finds any provision of this Agreement to be unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.

9.8 Controlling Law and Jurisdiction. This Agreement and any action related thereto shall be governed, controlled, interpreted and defined by and under the laws of the State of

California and the United States, without regard to the conflicts of laws provisions thereof. Unless waived by Company, the exclusive jurisdiction and venue of any action with respect to the subject matter of this Agreement shall be the state courts of the State of California for the County of Santa Clara or the United States District Court for the Northern District of California and each of the parties hereto submits itself to the exclusive jurisdiction and venue of such courts for the purpose of any such action. Service of process in any such action may be effected in the manner provided in Section 9.4 for delivery of notices.

9.9 Headings. Headings used in this Agreement are for ease of reference only and shall not be used to interpret any aspect of this Agreement.

9.10 Entire Agreement. This Agreement, including all exhibits which are incorporated herein by reference, constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes and replaces all prior and contemporaneous understandings or agreements, written or oral, regarding such subject matter.

9.11 Counterparts. This Agreement may be executed in two counterparts, each of which shall be an original and together which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by persons duly authorized as of the date and year first above written.

COMPANY SYSTEMS, INC.

\_\_\_\_\_  
“Licensee”

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

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

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

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

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

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

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

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

**EXHIBIT A**

1. Software. [Define software]