

ACTIONAL CORPORATION
LICENSE AND SERVICES AGREEMENT

This License, and Services Agreement (“Agreement”) is made as of _____, 2005, (“Effective Date”), by and between Actional Corporation, a Delaware corporation with offices at 800 West El Camino Real, Suite 120, Mountain View, California 94040 (Phone: 1 650 210 0700; Fax: 1 650 210 8855) (“Actional”) and the “Licensee” listed below.

Licensee:	Contact:
Address:	Phone:
	Fax:
	Contact E-Mail:

This Agreement includes the attached general terms and conditions and all Exhibits, and contains, among other things, warranty disclaimers, liability limitations and use limitations, attached hereto and made a part hereof. To order Products and Services, as defined herein, the parties shall mutually execute Order Schedules and Statements of Work as applicable, in Actional’s standard form.

LICENSEE:

By (signature): _____

Name: _____

Title: _____

ACTIONAL CORPORATION:

By (signature): _____

Name: _____

Title: _____

GENERAL TERMS AND CONDITIONS

1. **Definitions.** For purposes of this Agreement, the following terms shall have the meaning set forth below:
 - 1.1. *Products* shall mean Software, Hardware, and/or Third Party Products.
 - 1.2. *Software* shall mean the object code version of the software product and the enabled modules designated on the applicable Order Schedule, plus updates, bug fixes and software patches Actional provides as part of its Software Support Services, and any user documentation provided therein, and excluding Third Party Products.
 - 1.3. *Hardware.* Hardware shall mean the tangible hardware products set forth on an Order Schedule.
 - 1.4. *Third Party Products.* Third Party Products shall mean the third party software delivered with or embedded in the Software as specified in one or more Order Schedules or the Documentation.
 - 1.5. *Services* shall mean Professional Services and Support Services.
 - 1.6. *Professional Services* shall mean consulting and other such services performed at Licensee's request pursuant to Statements of Work or Order Schedules mutually executed pursuant to this Agreement.
 - 1.7. *Support Services* shall mean Third Party Products Support Services and Software Support Services.
 - 1.8. *Software Support Services* shall have the meaning specified in Section 5.1.
 - 1.9. *Third Party Products Support Services* shall have the meaning specified in Section 5.2.
 - 1.10. *Order Schedule* shall mean the document by which Licensee orders Products and/or Support Services. The document may be an Actional order form and/or another written document issued by Licensee that references this Agreement and that is acceptable to Actional. Any terms and conditions of any Order Schedule or any other document provided by Licensee, including but not limited to purchase orders, which are inconsistent with or in addition to the terms and conditions of this Agreement will be deemed stricken from such Order Schedule or other document, even if Actional accepts any such Order Schedule and provides the Products and/or Services, unless expressly agreed to in writing by Actional.
 - 1.11. *Statement of Work.* A mutually executed document substantially in the form of Exhibit C-1, referencing this Agreement and describing the Professional Services to be performed by Actional and all relevant details, including but not limited to fees, payment schedule, and performance schedule.
2. **Scope of Agreement.** This Agreement sets forth the terms and conditions under which Licensee may order Products and Services by way of Order Schedules and Statements of Work solely for Licensee's internal use. It is understood that resale of the Products or Support Services to third parties, including resellers, is not permitted. Notwithstanding anything to the contrary in this Agreement, with respect to Software, all references in this Agreement to the "sale" or "purchase" of Software or the transfer of title or ownership of Software shall mean the granting of the license set forth in this Agreement. Except as otherwise agreed in writing, an Order Schedule shall prevail for the relevant subject matter over inconsistent terms herein.
3. **Software.**
 - 3.1. *Grant of License.* Subject to all the terms of this Agreement and timely payment of all fees, Actional grants Licensee a nonpublicable, nonexclusive, nontransferable (except as provided in this Agreement), perpetual (except as may be specified in an Order Schedule) right to use the Software on servers operated by Licensee personnel or authorized contractors. Licensee may permit third party service providers to use a Product as an agent Licensee, within the license grant herein, provided such third party agrees, directly or indirectly, to be bound by this Agreement. Without limiting such third party's liability, Licensee shall be jointly and severally liable to Actional for such third party's material breach of this Agreement. Licensee may possess only the number of copies of any Software set forth on the applicable Order Schedule, may use each such copy only with the number of single CPUs set forth on the applicable Order Schedule (defined by the host ID declared to Actional) and only in accordance with Actional's applicable user documentation, and may use only the enabled modules designated on the applicable Order Schedule and only in accordance with the applicable license key provided by Actional to Licensee. Actional retains all right, title and ownership of all Software, Software enhancements and derivatives, and copies thereof. If the license for the Software is designated as "Beta" on the applicable Order Schedule, the additional terms and conditions set forth in Exhibit B shall also apply.
 - 3.2. *Restrictions.* Licensee will maintain the copyright notice and any other notices that appear on the Products on any copies and any media. Licensee will not (and will not allow any third party to) (i) reverse engineer or attempt to discover any source code or underlying ideas or algorithms of any Product (except to the extent that applicable law

prohibits reverse engineering restrictions), (ii) provide, lease, lend, license, sublicense, sell, use for timesharing or service bureau purposes or otherwise use or allow others to use a Product for the benefit of any third party, (iii) use any Product, or allow the transfer, transmission, export, or re-export of any Product or portion thereof in violation of any export control laws or regulations administered by the U.S. Commerce Department, OFAC, or any other government agency, or (iv) modify or create derivative works of any Product. All the limitations and restrictions on Products in this Agreement also apply to documentation. Any rights not expressly granted herein are reserved and retained by Actional. Licensee's rights in and to the Products will be limited to those expressly granted in this Agreement. Actional reserves all title, rights and licenses in and to the Products not expressly granted to Licensee under this Agreement.

4. **Delivery of Products.** Actional will ship the Products to the address for Licensee listed on the cover page to this Agreement. Unless Licensee and Actional agree otherwise, shipment of Software, including Third Party Software, shall be by making it available to Licensee for download from Actional. Shipping terms for the Products are FOB Actional's facility. Title and risk of loss shall pass from Actional to Licensee upon delivery to the common carrier (except in the case of Software, in which case title shall remain with Actional). Licensee shall be responsible for all freight, handling, insurance charges and all applicable taxes, fees and duties. In no event shall Actional have any liability in connection with shipment, nor shall the carrier be deemed to be an agent of Actional.

5. **Support Services**

5.1. *Software Support Services.* Provided that Licensee has purchased Support Services for Software on the applicable Order Schedule, while the license for the Software remains effective and the applicable Annual Support Fee has been paid, Actional will provide the support and maintenance services for that Software in accordance with Actional's maintenance and support policy in effect on the date Licensee orders such services ("Support Services"). A copy of Actional's maintenance and support policy current as of the Effective Date of this Agreement is attached hereto as Schedule A. Actional reserves the right to amend the applicable Annual Support Fees and policy from time to time upon prior written notice to Licensee.

5.2. *Third Party Products Support Services.* All Third Party Products provided to Licensee pursuant to this Agreement shall solely be subject to the OEM support services. Provided that Licensee has purchased Support Services for Software on the applicable Order Schedule, upon the occurrence of an Error in Third Party Products, Licensee shall contact Actional, who shall act as the agent for Licensee to contact the OEM and obtain the necessary service from the OEM.

6. **Professional Services.** Provided the parties have mutually executed a Statement of Work, and subject to all the terms of this Agreement and the terms set forth in Exhibit C, Actional agrees to use reasonable commercial efforts to provide the services as described in the attached Exhibit C ("Professional Services").

7. **Fees and Payment.** Licensee shall pay Actional the License Fee, Product Fee, Annual Support Fees, Training Fees, Professional Services Fees, and any other agreed upon fees in accordance with the applicable Order Schedule and/or Statement of Work. Any additional fees due hereunder shall be due upon invoice by Actional. All payments shall be made inside the U.S., in U.S. currency. Any payments more than thirty (30) days overdue will incur interest at a rate of 2.0% per month or the maximum rate permitted by law, whichever is greater. All fees payable under this Agreement are net amounts and are payable in full, without any deductions for taxes of any kind. Licensee will be responsible for, and will promptly pay, all tax and duties of any kind (including but not limited to sales, use and withholding taxes) associated with this Agreement or Licensee's receipt or use of the Products and support and maintenance, except for taxes based on Actional's net income. In the event that Actional is required to collect any tax for which Licensee is responsible, Licensee shall pay such tax directly to Actional. If Licensee pays any withholding taxes that are required to be paid under applicable law, Licensee will furnish Actional with written documentation of all such payments, including receipts.

8. **Acceptance.** Except as may be otherwise specified on the applicable Order Schedule or Statement of Work, all Products and Services shall be accepted upon delivery or performance.

9. **Audit Right.** Licensee will keep and maintain complete and accurate records to enable verification of the fees payable to Actional and compliance with all terms of this Agreement. Such records will be retained for a period of eighteen (18) months after the date to which such records pertain. Actional will have the right to inspect such records on fifteen (15) days' prior written notice to Licensee. Such inspections will be conducted solely for the purpose of verifying Licensee's compliance with the provisions of this Agreement. If any such audit reveals that Licensee has materially failed to comply with the terms of this Agreement, including payment of all fees owed, Licensee shall reimburse Actional for the reasonable costs of the audit, in addition to all fees owed.

10. **Term and Termination.**

- 10.1. *Term.* This Agreement will begin on the Effective Date and will remain in effect thereafter until terminated earlier in accordance with the terms of this Agreement. The term of each Software and Third Party Product license granted by Actional hereunder will begin upon the date of delivery by Actional of the Software specified in an accepted Order Schedule and will remain in effect indefinitely thereafter or for the term specified in the applicable Order Schedule until Licensee discontinues use of such Software or until terminated earlier by either party in accordance with the terms of this Agreement.
- 10.2. *Termination.* This Agreement and all Software licenses will terminate thirty days (ten in the case of non-payment by Licensee and immediately in the case of a breach of the grant of license by Licensee) after notice of any breach by Licensee remaining uncured at the end of such notice period. Licensee shall also remain liable for any damages, costs and expenses incurred by the company on account of the default including all court costs and reasonable attorney fees.
- 10.3. *Effect of Termination.* Upon termination, or if a Software license ceases to be effective, Licensee shall immediately cease all use of all affected Software and return or destroy all copies of all affected Software and all portions thereof and so certify to Actional, and pay all amounts due hereunder.
- 10.4. *Termination of Support Services.* Licensee may terminate Support Services at any time upon thirty (30) days prior written notice. Prepaid Support Services fees are non-refundable. To reinstate Support Services (if allowed by Actional), Licensee must first pay Actional (i) the then current applicable Annual Support Fees, and (ii) a reinstatement charge equal to the then current Annual Support Fees pro-rated for the period of time during which Support Services lapsed due to nonpayment of the Annual Support Fees.
- 10.5. *Survival.* Except as otherwise expressly provided herein, the terms of the Agreement shall survive termination. Termination is not an exclusive remedy and all other remedies will be available whether or not termination occurs.

11. Confidentiality.

- 11.1. *Definition.* "Confidential Information" means: (a) the Products and other product-related information that Actional desires to protect against unauthorized use or disclosure; (b) any business or technical information of Actional or Licensee, including but not limited to any information relating to Actional's or Licensee's product plans, designs, costs, product prices and names, finances, marketing plans, business opportunities, personnel, research, development or know-how that is designated by the disclosing party as "confidential" or "proprietary" and, if orally disclosed, reduced to writing by the disclosing party within thirty (30) days of such disclosure; and (c) the specific terms and pricing set forth in this Agreement.
- 11.2. *Exclusions.* Confidential Information does not include information that: (a) is or becomes generally known to the public through no fault or breach of this Agreement by the receiving party; (b) is rightfully known by the receiving party at the time of disclosure without an obligation of confidentiality; (c) is independently developed by the receiving party without use of the disclosing party's Confidential Information; (d) the receiving party rightfully obtains from a third party without restriction on use or disclosure or (e) is disclosed with the prior written approval of the disclosing party.
- 11.3. *Use and Disclosure Restrictions.* Each party will not use the other party's Confidential Information except as permitted herein, and will not disclose such Confidential Information to any third party except to employees and consultants as is reasonably required in connection with the exercise of its rights and obligations under this Agreement (and only subject to binding use and disclosure restrictions at least as protective as those set forth herein executed in writing by such employees and consultants). However, each party may disclose Confidential Information of the other party: (a) pursuant to the order or requirement of a court, administrative agency, or other governmental body, provided that the disclosing party gives reasonable notice to the other party to contest such order or requirement; and (b) on a confidential basis to its legal or financial advisors.

12. Limited Warranties.

- 12.1. *Hardware.* Actional warrants to Licensee that for a period of ninety (90) days from the date of the initial shipment of the Hardware to Licensee that such Hardware will be free from material defects in material and workmanship under normal use. This limited warranty extends only to Licensee as original purchaser. Licensee's sole and exclusive remedy and the entire liability of Company and its suppliers under this limited warranty will be, at Company's option, repair or replacement of the Hardware, or if neither of the foregoing is reasonable, immediately terminate Company's obligations (and Licensee's rights) under this Agreement with regard to such Hardware, and if Licensee returns such Hardware to Company refund to Licensee the price originally paid by Licensee to Company for such Hardware. Company may also ship an advance replacement of the Hardware at Company's expense, if the affected Hardware is returned to Company freight and insurance prepaid. Replacement parts used in Hardware repair may be new or equivalent to new. All articles must be returned to Company in accordance with

Company's then-current Return Material Authorization (RMA) procedure.

- 12.2. *Software.* For a period of thirty (30) days from Licensee's initial acquisition of Software, Actional warrants that such Software will materially conform to Actional's then current user documentation for such Software. This limited warranty extends only to Licensee as the original licensee. Licensee's sole and exclusive remedy and the entire liability of Actional and its suppliers under this limited warranty will be, at Actional option, (i) promptly correct any Products that fail to meet this limited warranty; (ii) provide Licensee with a reasonable procedure to circumvent the nonconformity; or (iii) refund the license fees paid by Licensee for the non-conforming Product upon Licensee's return of such Product to Actional.
- 12.3. *Services.* For a period of thirty (30) days from performance of the Services, Actional warrants to Licensee the Services were performed in a professional and workmanlike manner consistent with generally accepted industry standards. Licensee's sole and exclusive remedy and the entire liability of Actional and its suppliers under this limited warranty will be to re-perform the Services at no additional cost to Licensee.
- 12.4. *Title and Indemnification.* Actional warrants that it has all necessary right, title or license to license the Software to Licensee.
- 12.4.1. Actional shall defend Licensee from and against any and all claims, lawsuits or proceedings brought by third parties against Licensee to the extent such claims, lawsuits or proceedings are based upon any United States patent issued sixty (60) days or more before delivery of such Software or any copyright or misappropriation of any trade secret, and pay any and all amounts awarded against Licensee in favor of such third party attributable to such claim (including but not limited to damages, settlements, attorney's fees and expenses), *provided that* Actional is promptly notified of any and all threats, claims and proceedings related thereto and given reasonable assistance (at Actional's cost) and the opportunity to assume sole control over defense and settlement. Actional shall not be responsible for any settlement it does not approve in writing.
- 12.4.2. *Limitations:* The foregoing obligations do not apply to Hardware, nor with respect to any claim to the extent it arises from Software or portions or components thereof (i) not supplied by Actional, (ii) made in whole or in part in accordance to Licensee specifications, (iii) that are modified after delivery by Actional, (iv) combined with other products, processes or materials where the alleged infringement relates to such combination, (v) where Licensee continues allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement, or (vi) where Licensee's use of such Software is not strictly in accordance with this Agreement.
- 12.4.3. Licensee shall defend Actional from and against any and all claims, lawsuits or proceedings brought by third parties against Actional to the extent such claims are based upon (i) any claim of infringement or misappropriation excluded from Actional's indemnity obligation by the preceding sentence, or (ii) any other claim in connection with the Product, and pay any and all amounts awarded against Actional in favor of such third party attributable to such claim (including but not limited to damages, settlements, attorney's fees and expenses) *provided that* Licensee is promptly notified of any and all threats, claims and proceedings related thereto and given reasonable assistance (at Licensee's cost) and the opportunity to assume sole control over defense and settlement.
- 12.4.4. *Injunctions.* If Licensee's use of any of the Products hereunder is, or in Actional's opinion is likely to be, enjoined due to the type of claim specified above, Actional may, at its sole option and expense: (a) procure for Licensee the right to continue using such Products under the terms of this Agreement; (b) replace or modify such Products so that they are non-infringing and substantially equivalent in function to the enjoined Products; or (c) if options (a) and (b) above cannot be accomplished despite Actional's reasonable efforts, then Actional may terminate Licensee's rights and Actional's obligations hereunder with respect to such Products and refund to Licensee the unamortized portion of the license fees paid hereunder, based upon a straight-line five (5) year depreciation commencing as of the date of receipt by Licensee of such Products.
- 12.4.5. THE PROVISIONS OF THIS SECTION SET FORTH ACTIONAL'S SOLE AND EXCLUSIVE OBLIGATIONS, AND LICENSEE'S SOLE AND EXCLUSIVE REMEDIES, WITH RESPECT TO INFRINGEMENT OR MISAPPROPRIATION OF INTELLECTUAL PROPERTY RIGHTS OF ANY KIND.
- 12.5. *Third Party Product Warranties.* Licensee shall have the benefit of any third party warranties, service agreements and infringement indemnities available to end users of the Third Party Products; provided, however, that Licensee's sole remedy for breach of any such warranty, indemnification, service agreement, or other rights shall be against the third party offering such rights and not against Actional. In the event that a Third Party Product causes the Products to fail to perform in all material respects the functions described in the Documentation when operated on a

Supported Platform, Actional will use commercially reasonable efforts to provide Licensee with a workaround or fix pursuant to Exhibit A where such workaround or fix may include, at Actional's option, replacing the Third Party Product with a replacement Third Party Product having substantially equivalent functionality at no additional charge.

12.6. *Restrictions.* The limited warranties set forth in this Section 12 covers only problems reported to Actional during the warranty period and does not apply if the affected Product (a) has been altered, except by Actional, (b) has not been installed, operated, repaired, or maintained in accordance with instructions supplied by Actional, (c) has been subjected to abnormal physical or electrical stress, misuse, negligence, or accident, (d) is marked as "sample", or (e) is used in ultrahazardous activities.

12.7. EXCEPT FOR EXPRESS WARRANTIES IN THIS SECTION 12, ALL PRODUCTS, SERVICES AND DELIVERABLES ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, NONINFRINGEMENT, OR QUALITY OF SERVICE. FURTHER, ACTIONAL DOES NOT WARRANT RESULTS OF USE OR THAT THE PRODUCTS, SERVICES OR DELIVERABLES ARE BUG FREE OR THAT THEIR USE WILL BE UNINTERRUPTED.

13. **Limitation of Liability.**

13.1. *TOTAL LIABILITY.* NOTWITHSTANDING ANYTHING ELSE IN THIS AGREEMENT OR OTHERWISE, AND EXCEPT FOR BODILY INJURY, BREACHES OF THE GRANT OF LICENSE OR CONFIDENTIALITY, NEITHER PARTY SHALL BE LIABLE OR OBLIGATED WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT OR UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL OR EQUITABLE THEORY FOR ANY AMOUNTS IN EXCESS OF THE AGGREGATE OF THE LICENSE FEES PAID TO ACTIONAL (IN THE CASE OF ACTIONAL'S LIABILITY) OR PAID OR OWED BY LICENSEE (IN THE CASE OF LICENSEE) HEREUNDER DURING THE TWELVE (12) MONTH PERIOD PRIOR TO THE CAUSE OF ACTION.

13.2. *EXCLUSION OF DAMAGES.* NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS) ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE USE OR PERFORMANCE OF THE PRODUCTS OR SERVICES, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, AND WHETHER OR NOT SAID PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

13.3. *SURVIVAL.* THE PARTIES HAVE AGREED THAT THESE LIMITATIONS WILL SURVIVE AND APPLY EVEN IF ANY LIMITED REMEDY SPECIFIED IN THIS AGREEMENT IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

14. **Miscellaneous.**

14.1. *Assignment.* Neither the Agreement nor the licenses granted hereunder are assignable or transferable by Licensee, including by way of merger (regardless of whether Licensee is the surviving entity) or acquisition, without the prior written consent of Actional; any attempt to do so shall be void.

14.2. *Marketing.* Licensee agrees that Actional may name Licensee in a published list of Actional's customers.

14.3. *Notices.* Any notice, report, approval or consent required or permitted hereunder shall be in writing and delivered by any reasonable means evidencing receipt and sent separately to the attention of Chief Financial Officer and General Counsel at the address for Licensee and Actional indicated in this Agreement. Either party may change its address for notices under this Agreement by giving written notice to the other party by the means specified in this Section.

14.4. *Waiver.* No failure or delay in exercising any right hereunder will operate as a waiver thereof, nor will any partial exercise of any right or power hereunder preclude further exercise.

14.5. *Severability.* If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable.

14.6. *Governing Law and Jurisdiction.* This Agreement shall be construed pursuant to the laws of the State of California and the United States without regard to conflicts of laws provisions thereof, and without regard to the United Nations Convention on the International Sale of Goods. Any waivers or amendments shall be effective only if made

in writing. Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts of San Mateo County, California and the parties hereby consent to the personal jurisdiction and venue therein.

- 14.7. *Entire Agreement.* This Agreement, including its schedules, constitutes the complete understanding and agreement between the parties regarding its subject matter and supersedes all prior or contemporaneous agreements or understandings, written or oral, relating to the subject matter herein. Any waiver, modifications or amendment of any provisions of this Agreement will be effective only if in writing and signed by duly authorized representatives of both parties.
- 14.8. *Attorney's Fees.* The prevailing party in any action to enforce this Agreement will be entitled to recover its reasonable attorney's fees and costs in connection with such action.
- 14.9. *Force Majeure.* Neither party will be responsible for any failure or delay in its performance under this Agreement due to causes beyond its reasonable control, including but not limited to, labor disputes, strikes, lockouts, shortages of or inability to obtain labor, energy, raw materials or supplies, war, terrorism, riot, act of God or governmental action.
- 14.10. *Government Rights.* If Licensee is an agency, department, or other entity of the United States Government ("Government"), the use, duplication, reproduction, release, modification, disclosure or transfer of Software, or any related documentation of any kind, including technical data or related manuals, is restricted in accordance with Federal Acquisition Regulation 12.212 for civilian agencies and Defense Federal Acquisition Regulation Supplement 227.7202 for military agencies. The Licensed Program(s) and Documentation are "commercial item(s)," as that term is defined at 48 C.F.R. 2.101 (Oct. 1995), consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212 (Sept. 1995). Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (June 1995) (or an equivalent provision, e.g., in supplements of various U.S. government agencies, as applicable), all U.S. Government users acquire the Licensed Program(s) and Documentation with only those rights set forth herein. The use of Software and related documentation is further restricted in accordance with the terms of this Agreement, or any modification hereto.
- 14.11. The Software incorporates software drivers and/or libraries supplied by Sun Microsystems and Oracle, and in accordance with Actional's agreements with such third parties, they are third party beneficiaries to this Agreement.
- 14.12. *Counterparts.* This Agreement may be executed simultaneously in two (2) or more counterparts, each of which will be considered an original, but all of which together will constitute one and the same instrument. The exchange of a fully executed Agreement (in counterparts or otherwise) by fax shall be sufficient to bind the parties to the terms and conditions of this Agreement.
- 14.13. *Interpretation.* The parties acknowledge that each has participated in the drafting and negotiating of this Agreement. For purposes of interpreting this Agreement, each provision will be deemed to have been jointly drafted by the parties. The parties intend for this Agreement to be construed and interpreted neutrally, in accordance with the plain meaning of its language, and not presumptively construed against any actual or purported drafter of specific language contained in it.
- 14.14. *Language.* Customer confirms its request that this Agreement and all documents related directly or indirectly thereto be drafted in the English language. Vous reconnaissez avoir requis que la présente convention ainsi que tous les documents qui s'y rattachent directement ou indirectement soient rédigés en langue anglaise.

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EXHIBIT A

SUPPORT SERVICES TERMS AND CONDITIONS

Capitalized terms not defined below have the same meaning as in the Agreement. Actional is obligated under this Exhibit only with respect to Product for which it is obligated under Section 5 of the main body of the Agreement.

1. Definitions.

- 1.1. "Previous Sequential Release" means the release of a Product which has been replaced by a subsequent release of the same Product. Notwithstanding anything else, a Previous Sequential Release will be supported by Actional only for a period of eighteen (18) months after release of the subsequent release.
- 1.2. "Support Services" means Actional support services as described in Section 2.
- 1.3. "Telephone and Email Support" means technical support telephone and email assistance provided by Actional to the Technical Support Contacts 8 A.M. to 6 P.M. PST.
- 1.4. "Error" means an error in a Product that significantly degrades such Product as compared to Actional's published performance specifications.

2. **Support Services.** Support Services consist of (a) Telephone and Email Support provided to two Technical Support Contacts concerning the installation and use of the then current release of Product and the Previous Sequential Release, and (b) Software updates, bug fixes and software patches that Actional in its discretion makes generally available without additional charge.

3. **Exclusions.** Actional shall have no obligation to support: (i) altered or damaged Product or any portion of a Product incorporated with or into other software; (ii) Product that is not the then current release or immediately Previous Sequential Release; (iii) Product problems caused by Licensee's negligence, abuse or misapplication, use of Product other than as specified in Actional's user manual or other causes beyond the control of Actional; or (iv) Software installed on any hardware that is not supported by Actional. Actional shall have no liability for any changes in Licensee's hardware that may be necessary to use Product due to a workaround or maintenance release.

4. THESE TERMS AND CONDITIONS CONSTITUTE A SERVICE CONTRACT AND NOT A PRODUCT WARRANTY. ALL PRODUCTS AND MATERIALS RELATED THERETO ARE SUBJECT EXCLUSIVELY TO THE WARRANTIES SET FORTH IN THE AGREEMENT. THIS ATTACHMENT IS AN ADDITIONAL PART OF THE AGREEMENT AND DOES NOT CHANGE OR SUPERSEDE ANY TERM OF THE AGREEMENT EXCEPT TO THE EXTENT UNAMBIGUOUSLY CONTRARY THERETO.

5. **Annual Support Fees and payment terms:** 18 % of then current list price for Products (due on Effective Date , and each year thereafter on the anniversary of such date) provided that Actional may elect on sixty (60) days notice effective on any Annual Support Fee payment date with respect to a particular Product, to (a) change the Annual Support Fee and support services terms for that Product to its then standard fees and terms (provided that Actional shall not raise the Annual Support Fee by more than 5% for the second year of support service with respect to a particular Product) or (b) not provide Support Services to Licensee for that Product, in which cases Licensee may elect to forego further Support Services and Annual Support Fees for such Product. In the event Licensee fails to pay Actional the applicable Annual Support Fees on its due date in accordance with the foregoing, then to reinstate or renew Support Services (if allowed by Actional), Licensee must first pay Actional (i) the then current applicable Annual Support Fees, and (ii) a reinstatement charge equal to the then current Annual Support Fees pro-rated for the period of time during which Support Services lapsed due to nonpayment of the Annual Support Fees.

EXHIBIT B
BETA LICENSE TERMS AND CONDITIONS
(Where Applicable for Future Rollouts)

1. **Product Use.** “Product” shall be the pre-release beta version of the Product specified in the applicable Order Schedule and may be used only for non-productive internal evaluation use solely during the Beta License Term. The “Beta License Term” shall mean thirty (30) days from the Effective Date of the Agreement.
2. **Third Party Access.** No third-party shall be permitted access to the code for the Beta Software.
3. **Fees.** No fees or minimums will apply to such evaluation use, except for any specified Beta Fee, which shall be payable by Licensee upon execution of this Agreement,
4. **Warranty, Indemnification and Support.** The Product is provided “AS IS” and no warranty, indemnification or support obligations of Actional will apply.
5. **Termination.** Licensee may terminate this Agreement and all licenses by refusing to pay the License Fees and ceasing all use of the Product prior to the end of the Beta License Term. If at the end of the Beta License Term Licensee has not converted the license into a full production license by paying the applicable fees, Licensee shall immediately cease all use of the Product and shall immediately return the Product to Actional.
6. **Maintenance.** Licensee shall bear all risk of loss on the Product after delivery of the Software and Hardware by Actional. Licensee shall maintain the Product in an undamaged condition and in a setting and in a configuration appropriate, in the opinion of Actional, for the use and proper functioning of the Product. Licensee shall not remove from the Product any legend attached to it, stating it to be the property of Actional or any other third party. Notwithstanding anything else herein, Actional shall be entitled to enter upon the Licensee’s property at any time and take possession of the Product if it believes the Product is being misused or used in breach of this Agreement or is possessed by others or is in danger of being seized by others
7. **Fee Creditable.** The Beta Fee paid for a Product will be creditable towards the License Fees for upgrades to the full production version of the Product.
8. **Reports.** Licensee shall designate a Beta Test Coordinator, who shall act as the primary contact with Actional will provide regular reports to Actional that disclose: (1) the Product used, (2) the nature of that use, (3) the extent or amount of use, (4) the errors or difficulties discovered, and (5) the characteristic conditions and symptoms of those errors and difficulties so that Actional may recreate the errors and difficulties itself. In addition, Licensee will notify Actional by telephone promptly of the discovery of any material error or bug.
9. **Equitable Relief.** Licensee acknowledges and agrees that due to the unique nature of Actional’s Proprietary Information, there can be no adequate remedy at law for any breach of its obligations hereunder, that any such breach may allow Licensee or third parties to unfairly compete with Actional resulting in irreparable harm to Actional, and therefore, that upon any such breach or threat thereof, Actional shall be entitled to injunctions and other appropriate equitable relief in addition to whatever remedies it may have at law.

EXHIBIT C

PROFESSIONAL SERVICES TERMS AND CONDITIONS

- Scope of Work.** Actional will use reasonable commercial efforts to perform the services (“Professional Services”) described in the document attached as Exhibit C-1 hereto, including any subsequent statement of work attached as Exhibit C-2, C-3, etc., which is signed by both parties and references the Agreement (“Statement of Work”). Each subsequent Statement of Work executed by both parties that references the Agreement shall be governed by the Agreement and this Exhibit C, unless otherwise agreed to by the parties in writing. The Professional Services or other Deliverables (as defined below) provided under each Statement of Work shall be deemed accepted on delivery, unless otherwise specified in the Statement of Work. In the event of a conflict between the terms of any Statement of Work and this Exhibit C or the Agreement, the terms of this Exhibit C and the Agreement shall govern with respect to the Services specified in that Statement of Work, unless and solely to the extent that the parties expressly state in the Statement of Work that they intend to override this Exhibit C and the Agreement.
- Compensation.** Subject to the terms of this Agreement, Licensee will pay Actional for the Services in accordance with the relevant Statement of Work (“Professional Services Fees”); provided that if no payment arrangement is so specified, Actional shall submit monthly invoices to Actional. Licensee shall pay Actional the fees incurred upon invoice by Actional. All payments shall be made inside the U.S., in U.S. dollars. Any payments more than thirty (30) days overdue will bear a late payment fee of 2.0% per month, or, if lower, the maximum rate allowed by law.
- Limitation of Charges.** No liability shall be incurred by Licensee in excess of the amount, if any, set forth in the Statement of Work (the “Maximum Amount”) unless and until such Statement of Work is amended in writing by both parties. Actional is not required to continue performance beyond the Maximum Amount unless and until Licensee shall have notified Actional in writing that the Maximum Amount has been increased and shall have specified in such notice a revised Maximum Amount. When and to the extent that the Maximum Amount has been increased, any charges incurred by Actional in excess of the Maximum Amount prior to the increase shall be allowable, due and payable to the same extent as if such charges were incurred after such increase.
- Limitation of Liability.** Notwithstanding anything to the contrary in the Agreement, ACTIONAL’S LIABILITY TO LICENSEE RELATING TO THE PROFESSIONAL SERVICES SHALL BE LIMITED TO THE AMOUNTS PAID BY CUSTOMER FOR THE PROFESSIONAL SERVICES PROVIDED HEREUNDER.
- Intellectual Property.** As between the parties, Actional retains and will own all right, title and interest in and to any and all software, systems design, documentation and other work product or deliverables relating to the Services (“Deliverables”), and Licensee hereby makes and agrees to make all assignments necessary to effectuate the foregoing and agrees to further assist Actional, at Actional’s expense, to further evidence, record and perfect such assignments, and to perfect, obtain, maintain, enforce, and defend any rights assigned. Subject to the terms and conditions of the Agreement, Actional hereby grants to Licensee a non-exclusive, non-transferable, royalty-free, worldwide license to use the Deliverables for its internal business purposes in connection with the applicable Products.

EXHIBIT C-1

STATEMENT OF WORK

(STANDARD TEMPLATE)

This Statement of Work is made as of _____, 2004 (“**Schedule Effective Date**”) by and between Actional Technologies Inc. (“**Actional**”) and _____ (“**Client**”). This Schedule is part of Actional Technologies _____ Agreement by and between the parties dated _____ (“**Agreement**”). Unless otherwise indicated herein, capitalized terms used herein shall have the same meaning ascribed to them in the Agreement. Handwritten or typewritten text (other than information which is specifically called for in the spaces provided) which purports to modify or supplement the printed text of this Schedule shall have no effect and shall not add to or vary the terms of the Agreement. All such additions (whether submitted by Client or Actional) are objectionable and deemed material.

Description of Services.

None.

Services Fees.

N/A

Maximum Amount.

N/A

Licensee:

By (signature): _____

Name: _____

Title: _____

Actional:

By (signature): _____

Name: _____

Title: _____

Template

Not for Signature