



Actiance Sales and License Agreement

CONFIDENTIAL

This Sales and License Agreement (this "Agreement") is made as of _____, 2012 ("Effective Date") between Actiance, Inc., a Delaware corporation with its principal place of business at 1301 Shoreway Road, Belmont, California 94002 ("Actiance") and _____, Inc., a _____ with its principal place of business at _____ ("Licensee").

1. The License

1.1 License Grant. Subject to compliance with the terms and conditions of this Agreement and payment of applicable fees, Actiance grants to Licensee a non-exclusive, non-transferable, non-sublicensable license to use the object code form of the Actiance software acquired together with its documentation (the "Software"), internally by the number of Licensed Users indicated on Licensee's purchase documentation. In the case of a subscription or term license, the Software is licensed for the period designated. In the case of a perpetual license, the Software is licensed for an indefinite period. A "Licensed User" means: a person, a directory user, or a user name or identity that is not mapped to the user directory, any of which make use of, or are subject to, the operation of the Software. Actiance grants to Licensee a license only for use of the Actiance Software. The Software may be delivered with and/or link to programs that are copyrighted and made available under one or more open source or public licenses that permit copying, modification and redistribution of its source code ("Public Software"). All such Public Software is separate and distinct from the Software and made available pursuant to the terms of its applicable license. Actiance reserves all rights not expressly granted to Licensee in this Agreement.

1.2 Restrictions. Licensee shall not reverse engineer, decompile, disassemble or otherwise attempt to discover the source code or underlying ideas or algorithms of the Software (except to the extent that applicable law prohibits reverse engineering restrictions); modify, translate, or create derivative works based on the Software, including Software preinstalled on any hardware sold hereunder ("Hardware"); or copy (except for archival or back-up purposes), sublicense, resell, rent, lease, distribute, assign, or otherwise transfer rights to the Software or Hardware (together, the "Products") or use the Products for timesharing or service bureau purposes. Licensee shall not remove, deface or obscure any copyright, trademark or other proprietary notice contained on or in the Products. Licensee shall not transfer, transmit, export, or re-export the Products or portion thereof in violation of any export control laws or regulations administered by the U.S. Commerce Department or any other government agency. Licensee shall not take any action prohibited herein through an agent nor enable a third party to take any such action.

2. Proprietary Rights.

2.1 The Software provided to Licensee is protected by U.S. and international copyright laws, and Actiance and its licensors retain ownership of all right, title, and interest in and to the Software, including all aspects, portions, copies or modifications thereof. No rights or licenses are granted except those expressly and unambiguously set forth in Section 1.1 above.

3. Maintenance, Services, Subscriptions and Records.

3.1 Product Fees. Licensee agrees to pay Actiance or Actiance's authorized reseller the applicable fees in consideration for the license granted in Section 1.1 above. For Products shipped by Actiance to Licensee, delivery of the Products ("Delivery") shall mean the physical shipment of Hardware and electronic shipment of access to Software, and all Products are shipped free on board (F.O.B.) from Actiance's shipment facility.

3.2 Maintenance and Support, Renewals. Actiance provides maintenance and support ("Maintenance and Support") services in accordance with Maintenance and Support services begin upon Delivery and expire on the anniversary thereof after the number of years of service purchased. If Licensee allows the Maintenance and Support services to lapse, Licensee may reinstate the Maintenance and Support services by paying any fees that would otherwise have been due for the lapsed period, in addition to any fees due and payable for the subsequent period.

3.3 Professional Services. Licensee may request installation, configuration and/or customizations for the Products that will be detailed in a separate Statement of Work ("SOW") to this Agreement. The fees for Professional Services shall be set forth in and are due and payable in accordance with the applicable Order based on the SOW.

3.4 Subscriptions and Renewals. Licensee may purchase one or more annual subscriptions (“Subscriptions”) provided by Actiance to enhance the operation of the Software. The first year of Licensee’s Subscriptions shall begin on Delivery and shall expire on the first anniversary thereof.

3.5 Records Retention. Licensee agrees to maintain accurate records necessary to verify the number of users of the Software and compliance with the terms of this license. Upon the reasonable written request of Actiance, and no more than once per year, Licensee shall provide Actiance with information necessary to verify such compliance. If Licensee discovers that it is exceeding the number of Licensed Users that it has paid for, Licensee shall immediately notify Actiance or Actiance’s authorized reseller, and Actiance shall invoice Licensee for the fees. Actiance may cause an audit to be made of Licensee’s applicable records and facilities in order to verify statements issued by Licensee, if deemed necessary in compliance with security clearance. Such audits shall be at the Actiance’s expense.

4. Confidentiality.

4.1 Definitions. Each party may disclose certain Confidential Information (a “Disclosing Party”) to the other (a “Receiving Party”). “Confidential Information” shall mean all information provided by the Disclosing Party to the Receiving Party which is marked as confidential or which is provided under circumstances where the Receiving Party should reasonably understand the confidential nature of the information. Confidential Information shall include without limitation the Products, trade secrets, proprietary information, ideas, works of authorship, know-how, processes and any other information or data related to the future, and proposed products and services of the Disclosing Party, employee and customer information, business and contractual relationships business forecasts, sales and merchandising, and marketing plans. Confidential Information shall not, however, include any information that the Receiving Party can establish through its written records or credible evidence (i) was in the public domain prior to the time of disclosure; (ii) becomes publicly known and made generally available after disclosure through no action or inaction of the Receiving Party; (iii) is in the possession of the Receiving Party, without confidentiality restrictions, at the time of disclosure as shown by the Receiving Party’s files and records immediately prior to disclosure, or (iv) is independently developed by the Receiving Party without the use of any Confidential Information.

4.2 Non-use and Nondisclosure. The Receiving Party agrees not to use any Confidential Information for any purpose except as necessary to fulfill its obligations and exercise its rights under this Agreement. The Receiving Party agrees not to disclose any Confidential Information to third parties or to employees or contractors of the Receiving Party, other than those of its employees or contractors who are required to have access to such information in order to fulfill the Receiving Party’s obligations under this Agreement. Notwithstanding the foregoing, either party may disclose the general terms and conditions of this Agreement to potential acquirers or investors and their respective agents upon prior written permission of the other party. The Receiving Party may disclose Confidential Information without any liability hereunder pursuant to any applicable law, regulation, court order or document discovery request, provided that prior written notice of such disclosure is furnished to the Disclosing Party as soon as reasonably practicable in order to afford the Disclosing Party an opportunity to seek a protective order against such disclosure.

5. Indemnification.

5.1 Actiance Indemnification. Actiance shall indemnify and hold Licensee harmless from any action brought against Licensee for costs, expenses(including reasonable attorneys’ fees and expenses), losses, damages, or liabilities to the extent it is based on a claim that the Products directly infringe any valid United States patent, copyright, or trade secret right of a third party. The foregoing indemnification obligations shall not apply to any claim or action to the extent such claim or action is based on: (i) use of a version of the Products that was not an unaltered current version during the period to which the claim or action pertains; (ii) modifications to the Products, or portions thereof, not authorized by Actiance and made after Delivery to Licensee; (iii) the combination or use of the Products, or portions thereof, with other programs, data, equipment or documentation not authorized by Actiance; (iv) the continued allegedly infringing activities of Licensee after actions taken by Actiance in accordance with Section 5.2, or (v) the use of the Products not in accordance with the terms and conditions of this Agreement.

5.2 Remedy. Should the Products become, or be likely to become in Actiance’s opinion, the subject of an infringement action, Actiance may, at its sole option, (i) procure for Licensee the right to continue using the Products, (ii) replace or modify the Products to make them non-infringing or (iii) refund the remaining value of the Products (based on a three-year, straight line amortization of the license fees paid). In the event of a refund, Licensee will cease all further use of the Products. The foregoing remedies and the indemnity set forth above shall be Licensee’s remedies in the event of a claim of infringement involving the Products.

5.3 Notification. Actiance's indemnification obligations herein are dependent on the conditions that the Licensee shall promptly notify Actiance of such claim or demand, and shall reasonably cooperate with Actiance, at Actiance's expense, in defending or settling such claim.

6. **Limitation of Liability.**

6.1

Neither Actiance nor Licensee shall be liable for any indirect, incidental, special, or consequential damages, or any loss of profits, revenue, data, or data use. Further, neither Actiance nor Licensee shall be liable for punitive damages except to the extent this limitation is prohibited by applicable law. This clause shall not impair the U.S. Government's right to recover for fraud or crimes arising out of or related to this Contract under any federal fraud statute, including the False Claims Act, 31 U.S.C. §§ 3729-3733. Furthermore, this clause shall not impair nor prejudice the U.S. Government's right to EXPRESS remedies provided in the Contract (i.e. clause 552.238-72 – Price Reductions, clause 52.212-4(h) – Patent Indemnification, Liability for Injury or Damage (Section 3 of the Price List), and GSAR 552.215-72 – Price Adjustment – Failure to Provide Accurate Information), but in no other event will Actiance be liable for direct damages in excess of the fees paid for the Actiance products licensed under the terms of this Agreement in the twelve (12) months prior to the occurrence upon which the claim is based.

7. **Warranty, Disclaimer.**

7.1

Warranty for Software. Software licensed hereunder shall be free from significant programming errors and defects in workmanship and materials and shall operate and conform to the performance capabilities, specifications, functions and other descriptions as set forth in any then-current documentation for a period of thirty (30) days following Delivery of the Software (the "Software Warranty Period"). The Software shall be delivered free from viruses, backdoor traps, "Trojan Horses," "time bombs", "spyware" or other feature or function designed to interfere with, monitor, terminate, or modify the availability or use of the Software. Services provided hereunder shall be performed in a good and workmanlike manner. If at any time during the Software Warranty Period, Licensee discovers one or more material defects or errors in the Software or services, Actiance shall, as Licensee's sole and exclusive remedy, use reasonable efforts to correct such defect, error or non-conformity provided that Licensee provides adequate notice and description of the defect or error to Actiance prior to the expiration of the warranty period. Actiance shall have a reasonable time period to correct such defect or error.

7.2

Limited Warranty for Hardware. Hardware purchased hereunder shall be free from defects in materials and workmanship and perform in accordance with the applicable specifications under normal use and operation for a period of twelve (12) months from Delivery of the Hardware (the "Hardware Warranty Period"). Actiance will provide support, repair and/or replacement service for the Hardware, either directly or through a third party, usually the business day following receipt of notice of a warranty issue from Licensee. If defective Hardware is to be replaced, Licensee shall return the defective Hardware: 1) to the service technician upon in-person delivery of the replacement Hardware, or 2) by return shipment within ten (10) days of receipt of replacement Hardware shipped to Licensee. Licensee's exclusive remedy and Actiance's sole liability is that Actiance will remedy, repair or replace any Hardware that fails during the Hardware Warranty Period. In the case of Hardware (or component thereof) that is replaced under warranty or is purchased by Customer following installation for evaluation, such Hardware (or component) may not be new and may have been previously installed.

7.3

Disclaimer. Except as stated in this section 7, ALL INFORMATION, TECHNOLOGY AND SERVICES PROVIDED BY ACTIANCE OR ITS LICENSORS HEREUNDER ARE PROVIDED "AS IS" WITHOUT ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, ACTIANCE AND ITS LICENSORS EXPRESSLY DISCLAIM ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT WITH RESPECT TO SUCH INFORMATION TECHNOLOGY AND SERVICES. ACTIANCE AND ITS LICENSORS MAKE NO WARRANTY REGARDING FREEDOM FROM BUGS OR UNINTERRUPTED USE.

8. **Term and Termination.**

8.1

Term. This Agreement shall commence on the earlier of the day Licensee accepts the license terms or the day Licensee first uses the Products, and shall remain in effect unless terminated in accordance with 52.212-4 Contract Terms and Conditions – Commercial Items (June 2010) (Deviation Feb 2007)

8.2 Survival Clause. Sections 1.2, 2, 3.1 (for any payments owed as of the termination date), 3.5 (for a period of three years), 4, 5, 6, 7.3, 8, and 9 shall survive any termination or expiration of this Agreement.

9. General.

9.1 Relationship. For all purposes of this Agreement each party shall be and act as an independent contractor and not as partner, joint venturer, or agent of the other and shall not bind nor attempt to bind the other to any contract.

9.2 Force Majeure. Except as otherwise expressly provided in this Agreement, neither party shall be liable for any breach of this Agreement for any delay or failure of performance resulting from any cause beyond such party's reasonable control, such as: weather, strikes or labor disputes, war, terrorist acts, riots or civil disturbances, governmental regulations, acts of civil or military authorities, or acts of God, provided that the party affected takes all reasonably necessary steps to resume full performance.

9.3 Assignment. Licensee may not assign or otherwise transfer by operation of law or otherwise this Agreement or any rights or obligations herein without the prior express written consent of Actiance, which consent will not be unreasonably withheld. This Agreement shall be binding upon and shall inure to the benefit of the parties, their successors and permitted assigns. Any assignment or transfer in violation of this section is void.

9.4 Modifications. No changes, modifications, or waivers are to be made to this Agreement unless evidenced in writing and signed for and on behalf of both parties.

9.5 Severability. In the event that any provision of this Agreement shall be determined to be illegal or unenforceable, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable.

9.6 Government Use. The Software and associated service provided under this Agreement are "commercial items," "commercial computer software" and/or "commercial computer software documentation" as defined in FAR section 2.101, or DFAR sections 252.227-7014(a)(1)&(5). Any Actiance technical data not covered by the above shall be deemed "technical data-commercial items" pursuant to DFAR section 227.7015(a). Modification, reproduction, release, performance, display, disclosure or distribution of the Software by or for the U.S. Government shall be prohibited except to the extent expressly permitted by this Agreement.

9.7 Notice. Any notices which are required to be given hereunder shall be in English, in writing and deemed sufficiently given (i) on the date sent by confirmed facsimile; (ii) on the date delivered personally to the party to whom the same is directed; (iii) one business day after deposit with a commercial overnight carrier, with written verification of receipt; or (iv) five business days after the mailing date, whether or not actually received, if sent by U.S. mail, return receipt requested, postage and charges prepaid, or any other means of rapid mail delivery for which a receipt is available.

9.8 Choice of Law. Federal law governs all matters arising out of or relating to this Agreement, including, without limitation, its validity, interpretation, construction, performance, and enforcement.

9.9 Arbitration. To the extent permitted by applicable administrative rulemaking on the use of binding arbitration under 5 USC § 575, any dispute or claim arising out of, in relation to, or in connection with this Agreement, or the interpretation, making, performance, breach or termination of this Agreement, will be finally settled by binding arbitration.

9.10 Foreign Use of Products. If Licensee is located outside the United States., then: (i) Licensee agrees to withhold and remit any amounts due to the appropriate taxing authorities under applicable law and to promptly furnish Actiance with tax receipts evidencing the payments of such amounts, (ii) any sum payable by Licensee upon which the deduction or withholding is based shall be increased to the extent necessary to ensure that, after such deduction or withholding, Actiance receives and retains, free from liability for such deduction or withholding, a net amount equal to the amount Actiance would have received and retained absent such required deduction or withholding; and (iii) Licensee is responsible for complying with any local laws in its jurisdiction which might impact Licensee's right to import, export or use the Software, and Licensee represents that it has complied with any regulations or registration procedures required by applicable law to make this license enforceable.

9.11 Complete Understanding. This Agreement (together with the exhibits, and other appendices attached hereto or specifically incorporated herein by reference) constitutes the complete understanding of the parties, and supersedes all prior or contemporaneous agreements, discussions, negotiations, promises, proposals, representations, and understandings (whether written or oral) between the parties, with regard to the licensing of Actiance products. To the extent allowable by Federal law, the licensing terms and conditions of

this Agreement may not be superseded by, and shall prevail exclusively over, any written instrument submitted by Licensee, including a purchase order, and Licensee hereby disclaims any terms therein, except for terms therein relating to product description, quantity, pricing and shipment. This Agreement may be executed in counterparts or by facsimile, each of which shall be deemed an original, and all of which together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the Effective Date and do each hereby warrant and represent that their respective signatory whose signature appears below has been and is on the date of this Agreement duly authorized by all necessary and appropriate corporate action to execute this Agreement.

ACTIANCE, INC.

AGENCY

Signature: _____

Signature: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____