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By using, copying, or distributing all or any portion of the DeskActive Software, Licensee agrees to abide by the following terms and conditions for access to the software.

1 Definitions

1.1 In this Agreement unless the context otherwise requires:

Administrator means any employee or contractor of the Licensee who has been trained by DeskActive to use the administrative functions of the Software.

Agreement means this Agreement consisting of the Terms and Conditions, and any supplementary DeskActive License Agreements signed by Licensor and Licensee.

Business Day means a week day that is not a Federal holiday.

Clause means a clause in these Terms and Conditions.

Commencement Date is either the date of purchase of subscription from the DeskActive Website, the date specified in the DeskActive License Agreement, or the date of contract through a third party.

Confidential Information means all information of a confidential nature including all concepts, know-how, ideas, data, inventions, performance and service level compliance, trade secrets and business or other information claimed as confidential, whether in material or non-material form disclosed by one party (**Disclosing Party**) to the other party (**Recipient**), but does not include information:

- (a) which is or becomes part of the public domain other than as a result of a breach of this Agreement by the Recipient;
- (b) which is or becomes lawfully available to the Recipient from a third party lawfully in possession of it and not under an obligation of confidentiality to the Disclosing Party; or
- (c) which is known by the Recipient before entering into this Agreement (as shown by its written records) other than as a result of disclosure by the Disclosing Party.

Current Release means the version of the Software, which includes all patches, updates and enhancements that have been released to production. The Current Release is specified on the DeskActive Website.

DeskActive **Privacy Policy** is a separate document published by DeskActive and amended and updated from time to time by DeskActive. The DeskActive Privacy Policy is published on the DeskActive Website, and is also available by email request from DeskActive at info@deskactive.com

DeskActive **Website** means <http://www.deskactive.com> and linked pages.

Fees means the various fees either paid by Licensee on a 12 month subscription basis at the DeskActive website or the Fees specified in the DeskActive License Agreement. The License Fees are specified at the time of purchase from the DeskActive Website or as specified in the DeskActive License Agreement.

Help Desk and Help Desk Support and the relevant procedures have the meanings given to those terms herein or as published on the DeskActive Website and updated from time to time by DeskActive.

Intellectual Property Rights means all intellectual property rights throughout the world including copyright, rights in circuit layouts, appearance designs (whether or not registrable), rights in respect of inventions (whether patentable or not), trademarks (whether registrable or not) and confidential information, together with the right to apply for and be granted registration if registration is required or available to perfect those rights.

License means the license of the Software on the Terms and Conditions set out in this Agreement.

Licensee means the purchaser of subscription of the Software from the DeskActive website, the licensee specified in the DeskActive License Agreement, or the licensee through a third party agreement.

License Fee means the Software license fee either paid by Licensee or as agreed in the DeskActive License Agreement signed by Licensee.

Material means any material or medium used for the holding, storage or communication of information, whether paper, magnetic tape, disc, electronic or otherwise.

Personal Information means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Services means the various services provided by DeskActive under this Agreement, or as described in the DeskActive License Agreement.

Software means the software purchased, or to be purchased from the DeskActive website or as described in the DeskActive License Agreement including all patches, updates and enhancements.

Standard Operating Environment (or SOE) means the minimum technical requirements for a User to access the Software, as specified on the DeskActive Website and updated from time to time by DeskActive.

Remote Support means Software Installation Services, User Training Services, Maintenance Services and Help Desk Support Services.

Taxes means any Federal, state, and local taxes including any added value, use, sales, or similar tax and any import duties or other charges imposed by the country of final destination.

Term means the term of this Agreement set out in the DeskActive License Agreement or one year from the date of purchase of subscription from the DeskActive website.

Terms and Conditions means the section of this Agreement headed "Terms and Conditions" consisting of Clauses 1 to 27.

Users means any person or entity authorized by the Licensee to use the Software as contemplated by this Agreement, and where applicable includes Administrators.

2 License Grant and Use

2.1 DeskActive grants to the Licensee, and the Licensee hereby accepts, subject to the Terms and Conditions, a non-exclusive and non-transferable License to use the Software for the Term.

2.2 The Software may only be used:

- (a) for the Licensee's own internal business operations;
- (b) for authorized Administrators and Users of the Software authorized by the Licensee;
- (c) in a proper manner by authorized Administrators who are competent and trained by DeskActive.

2.3 This License does not permit the Licensee to:

- (a) copy the Software or Materials, except as provided in this Agreement;
- (b) sell, market, transfer, lease, license, rent, lend or otherwise dispose of the Software or Materials;
- (c) copy, alter, modify, reproduce, reverse engineer, reverse compile, disassemble, reconfigure, or otherwise attempt to discover the source code of the whole or a part of the Software, or allow any third party to do any of the above to any part of the Software;
- (d) provide training of the Software to any third party, without the prior written consent of DeskActive.

3 Fees and Terms of Payment

The License Fee covers access to the Software by all authorized Administrators and Users as set out in this Agreement and includes Remote Support for corporate Licenses licensed directly from DeskActive. Limited Remote Support is provided for individual Licensees who license the Software directly from DeskActive. **Remote Support is not available** for Licensees who license the Software directly from third parties.

3.1 The License Fee does not include:

- (a) any custom software development requested by the Licensee;
- (b) any functional and technical consultancy; unlimited: Installation, Help Desk Support or Maintenance Services;
- (c) on-site Installation and additional Training Services; or
- (d) connectivity to the internet for Administrators or other authorized Users of the Software.

3.2 Remote Support does not include:

- (a) any functional and technical consultancy, beyond standard Help Desk Support. Any functional and technical consultancy commissioned by the Licensee will be charged at

DeskActive consulting rates to be agreed between the parties;

(b) on-site Installation and additional User Training Services;

or

(c) any custom software development requested by the Licensee.

3.3 The Fee for on-site Installation and additional User Training Services will be charged at DeskActive consulting rates to be agreed between the parties including travel and expenses. This chargeable service is only available for corporate Licenses licensed directly from DeskActive

3.4 DeskActive reserves the right to adjust any of the Fees by providing at least 90 days prior written notice of any change to the Licensee.

3.5 All Fees are exclusive of any taxes, duties and charges, which may be levied now or in the future, in connection with this Agreement ("Taxes"). The Licensee will be responsible for the payment of all Taxes, in addition to the Fees.

3.6 Fees, expenses and applicable Taxes will be detailed in invoices.

4 Monthly Report and Audit

4.1 During normal business hours and at any time during which the Software is being used, DeskActive or its authorized representatives or agents shall have the right upon reasonable advance notice to audit and inspect the Licensee's utilization of the Software, in order to verify compliance with the terms of this Agreement.

4.2 If the number of Users exceeds the number of Licensed Users under this Agreement, DeskActive will invoice additional Users.

5 Software Installation Services

5.1 For corporate Licenses licensed directly from DeskActive Software Installation Services include limited technical assistance required by the Licensee to successfully install DeskActive Software in accordance with DeskActive's most current version of the installation procedures within the Licensee organization. Support will be capped and additional support will be available in accordance with Clause 9.1.

5.2 The Licensee will nominate at least one IT representative within the Licensee organization to manage the rollout of DeskActive Software within the Licensee organization. The Licensee will provide the representative(s) contact details to DeskActive via email within 30 days of

the commencement of this Agreement. All correspondence regarding Software Installation and IT support will occur via the nominated IT representative(s).

5.3 For all other Licensees who license the Software directly from DeskActive Software installation may be performed by the Licensee utilizing the guides provided by DeskActive which are available at www.deskactive.com. Assistance with Software Installation may be provided remotely to the nominated IT representative(s) from the DeskActive support team, within the limits of the caps set out in Clause 9 below.

6 User Training Services

6.1 User Training information is available via the "Help" button or menu item in all DeskActive software. Additional training and material is available at www.deskactive.com Use of such material is free-of-charge for the Licensee.

6.2 For corporate Licenses licensed directly from DeskActive additional User Training Services can be conducted on-site and will be charged at DeskActive consulting rates to be agreed between the parties including travel and expenses, or via video link, at an additional charge as per clause 9.3 below.

7 Maintenance Services

7.1 Maintenance Services will only be provided for the Current Release of the Software and the two releases immediately prior to the Current Release. Failure by the Licensee to upgrade to the Current Release could result in:

- a) DeskActive ceasing to provide Remote Support to the Licensee;
- b) the Software becoming unsupported or inefficient.

7.2 Maintenance Services do not include Materials other than installation/ loading instructions and electronic updates to on-line help manuals.

7.3 New releases and any repairs (patches or workarounds) are issued as part of Maintenance Services, and will be offered from time to time to the Licensee for Software licensed directly from DeskActive for upgrade by the Licensee within their organization.

8 Help Desk Support Services

8.1 For Licenses licensed directly from DeskActive Help Desk Support Services are available for suspected maintenance issues or technical advice required by the Licensee, via email to support@deskactive.com

- 8.2 The Licensee will be advised of any changes to the Help Desk Support, including the procedures for using Help Desk and the service levels to be provided.
- 8.3 Before requesting Help Desk Support the Licensee must:
- (a) rule out User or operational error; and
 - (b) use all reasonable endeavors to minimize the consequences of the defect including work-around.
- 8.4 If the Licensee is unable to repair an error in accordance with Clause 8.3, it should promptly notify the DeskActive Help Desk in accordance with the Help Desk Support procedures.
- 8.5 Where the Licensee identifies an error, it must specifically identify the nature of the perceived error to the Help Desk including describing the conditions under which the error occurs.
- 8.6 DeskActive will use its reasonable efforts to investigate, prioritize and commence working on repair of the error within a time-frame that is reasonable for the reported error, based on the category of the error as described in the most current version of the Help Desk Support procedures.
- 8.7 At DeskActive's request, the Licensee will provide sufficient access, time and the required personnel to duplicate the error, run corrections and test to confirm that the error has been repaired.
- 8.8 If there is no straightforward resolution, DeskActive will arrange a process work-around or temporary fix to restore functionality, pending development of a permanent resolution.
- 8.9 DeskActive reserves the right to utilize outsourced resources if appropriate to provide Help Desk Support Services.
- 9 Phone and Email Support Caps**
- 9.1 Technical support time available to the Licensee, including both Software Installation and Help Desk support, and including inquiries originating from either DeskActive or from the Licensee, is capped at:
- 2 hours, PLUS an additional 2 hours for every 100 members/users licensed with Software directly from DeskActive.. Additional support will be charged at DeskActive's prevailing rates.
- 10 Misreported Errors**
- 10.1 DeskActive is not responsible for errors reported by the Licensee, which:
- (a) after reasonable efforts by DeskActive, cannot be replicated;
 - (b) result from use by the Licensee of the Software on other than the recommended SOE;
 - (c) are caused by the unauthorized modification by the Licensee or a third party of the Software or the SOE;
 - (d) result from interactions with other systems or applications software not certified by DeskActive;
 - (e) result from unauthorized use of the Software, viruses or damage caused by hackers (external or internal to the Licensee's organization); or
 - (f) are caused by something other than the Software itself.
- 10.2 Where any error is reported which falls into any one or more of the categories specified in Clause 10.1, repair support will be treated as technical support subject to the Caps detailed in Clause 9.
- 11 Ongoing Development Services**
- 11.1 DeskActive may change the Software to eliminate errors, to improve or enhance the Software, or for any other reasonable purpose.
- 11.2 Changes will be tested by DeskActive before being incorporated into the Current Release.
- 11.3 The latest version of the Current Release will be made available to the Licensee for Software licensed directly from DeskActive without additional cost during the Term, provided that all Fees have been paid by the Licensee.
- 11.4 This Agreement does not include any undertaking by DeskActive to the Licensee to modify or enhance the Software if requested by the Licensee. However, DeskActive may consider the Licensee's wishes for product enhancements as part of its new release planning or as a separate consulting arrangement. Any Intellectual Property in any modification or enhancement to the Software or any newly created software will be owned by DeskActive. Any new functionality that is developed as the result of the Licensee's request may result in a new release of the Software. If this occurs then all licensees of the Software will subsequently be entitled to use this new functionality as a part of the Current Release.
- 11.5 Any functional or technical consulting services to be provided by DeskActive to the Licensee are to be agreed and documented in a separate agreement.

12 Responsibilities of the Licensee

- 12.1 If the Licensee alters or supplements the Software, DeskActive reserves the right to cease providing the Services to the Licensee.
- 12.2 The Licensee is only entitled to the Services if the Software is being used in the SOE and is running on a valid and properly maintained operating system.
- 12.3 If the Licensee is not using the Software within the defined SOE, DeskActive may be unable to provide the Services effectively or at all.

13 Privacy

- 13.1 DeskActive licenses the Software to the Licensee subject to the DeskActive Privacy Policy. The DeskActive Privacy Policy forms a part of these Terms and Conditions and is incorporated by reference. The DeskActive Privacy Policy is available via email request to info@deskactive.com, or online at www.deskactive.com. DeskActive Software when used in the manner specified in DeskActive's Privacy Policy is in compliance with all applicable laws in the USA: including, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules, the Health Information Technology for Economic and Clinical Health Act (HITECH Act) and any subsequent Federal privacy laws.
- 13.2 The parties acknowledge that the Licensee's use of the Software will involve the collection, handling and storage of Personal Information by the Licensee.
- 13.3 The Licensee agrees that when dealing with Personal Information it will at all times attempt to comply with:
- All applicable laws in the USA: including, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules, the Health Information Technology for Economic and Clinical Health Act (HITECH Act) and any subsequent Federal privacy laws.
- 13.4 The parties acknowledge that to operate the Software:
- (a) the Licensee may disclose, on a confidential basis, Personal Information of its employees, contractors or third parties engaged by it to perform administrative or other services, provided the consent of the individuals whose Personal Information is being disclosed is legally obtained;

- (b) any Personal Information collected and held may be accessed and corrected by the individual to whom the Personal Information pertains;
- (c) measures will be taken by the Licensee to ensure that Personal Information that is entered into the Software or the associated system is stored there securely and only authorized personnel have access to that Personal Information.

13.5 The Licensee acknowledges that it is the responsibility of the Licensee to ensure that it abides by the laws of the jurisdiction in which the Software is to be operated or accessed. It will ensure that the terms and conditions for use of the Software requires Users of the Software to do the same.

13.6 The Licensee agrees that in the terms and conditions for use of the Software it will prohibit Users of the Software from:

- (a) acting on or through the Software so as to circulate any unsolicited publicity or advertising material, or propagate computer worms and viruses;
- (b) using the Software to make unauthorized access to any other computer that can access the Software;
- (c) hacking;
- (d) sending harassing, obscene, indecent, offensive or threatening electronic mail;
- (e) engaging in harassment or stalking by whatever means;
- (f) forgery (or attempted forgery) of electronic mail messages or other content;
- (g) the placement, transmission or storage of any defamatory illegal or offensive material, and
- (h) the undertaking any illegal activities in association with the Software or Materials.

14 Intellectual Property Rights

- 14.1 DeskActive owns or licenses all Intellectual Property Rights in and associated with the Software and Materials (including any modifications to, or customization of, the Software on the terms set out in this Agreement).
- 14.2 The Licensee must not remove, conceal or in any way alter any copyright, trademark or

other proprietary notices on the Software or any associated Materials.

15 Confidentiality

- 15.1 The Licensee acknowledges that aspects of the Software, including its specific design and structure, and the Materials all form a part of DeskActive's Confidential Information.
- 15.2 The Licensee and DeskActive must not directly or indirectly, at any time during the performance of their duties under this Agreement, or following the termination of this Agreement disclose, use, copy or reproduce any Confidential Information of the other party without written consent of that party.
- 15.3 The Licensee and DeskActive must ensure that any person to whom Confidential Information is or may be disclosed is familiar with the provisions of this clause and is bound by obligations of confidentiality equivalent to the Licensee's and DeskActive's obligations under this clause.

16 Warranty

- 16.1 DeskActive warrants during the Term that it has the right to grant the License for the Software.
- 16.2 By using DeskActive's Software and Services, Licensee acknowledges and agrees that DeskActive is not responsible for examining or evaluating the content, accuracy, completeness, timeliness, validity, copyright compliance, legality, decency, quality or any other aspect of third party materials or web sites. DeskActive, its officers, affiliates, advisory board members, licensors and subsidiaries do not warrant or endorse and do not assume and will not have any liability or responsibility to Licensee or any other person for any third-party Services, third party materials or web sites, or for any other materials, products, or services of third parties. Third party materials and links to third party web sites are provided solely as a convenience to Licensee.
- 16.3 **Disclaimer of Warranties.** LICENSEE HEREBY WAIVES, ALL OTHER CONDITIONS, REPRESENTATIONS, AND WARRANTIES, EXPRESS OR IMPLIED BY STATUTE, USAGE, CUSTOM OF THE TRADE OR OTHERWISE, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. LICENSEE EXPRESSLY ACKNOWLEDGES AND AGREES THAT USE OF THE DESKACTIVE SOFTWARE IS AT LICENSEE'S SOLE RISK AND THAT THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY AND EFFORT IS WITH LICENSEE. TO THE MAXIMUM

EXTENT PERMITTED BY APPLICABLE LAW, THE DESKACTIVE SOFTWARE AND ANY DESKACTIVE OR THIRD PARTY SERVICES PERFORMED OR PROVIDED BY THE DESKACTIVE SOFTWARE (COLLECTIVELY "SERVICES") ARE PROVIDED "AS IS" AND "AS AVAILABLE", WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, AND DESKACTIVE ITS AFFILIATES, ADVISORY BOARD MEMBERS, LICENSORS AND SUBSIDIARIES HEREBY DISCLAIM ALL WARRANTIES AND CONDITIONS WITH RESPECT TO THE DESKACTIVE SOFTWARE AND SERVICES, EITHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES AND/OR CONDITIONS OF MERCHANTABILITY, OF SATISFACTORY QUALITY, OF FITNESS FOR A PARTICULAR PURPOSE, OF ACCURACY, OF QUIET ENJOYMENT, AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS. DESKACTIVE DOES NOT WARRANT AGAINST INTERFERENCE WITH YOUR ENJOYMENT OF THE DESKACTIVE SOFTWARE AND SERVICES, THAT THE FUNCTIONS CONTAINED IN, OR SERVICES PERFORMED OR PROVIDED BY, THE DESKACTIVE SOFTWARE WILL MEET LICENSEE'S REQUIREMENTS, THAT THE OPERATION OF THE DESKACTIVE SOFTWARE OR SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE, THAT ANY SERVICE WILL CONTINUE TO BE MADE AVAILABLE, THAT THE DESKACTIVE SOFTWARE OR SERVICES WILL BE COMPATIBLE WITH THIRD PARTY SOFTWARE OR OTHER THIRD PARTY SERVICES, OR THAT DEFECTS IN THE DESKACTIVE SOFTWARE OR SERVICES WILL BE CORRECTED. LICENSEE FURTHER ACKNOWLEDGES THAT THE DESKACTIVE SOFTWARE IS NOT INTENDED OR SUITABLE FOR USE IN SITUATIONS OR ENVIRONMENTS WHERE THE FAILURE OF, OR ERRORS OR INACCURACIES IN THE CONTENT, DATA OR INFORMATION PROVIDED BY, THE DESKACTIVE SOFTWARE COULD LEAD TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR ENVIRONMENTAL DAMAGE, NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY DESKACTIVE OR A DESKACTIVE AUTHORIZED REPRESENTATIVE SHALL CREATE A WARRANTY. SHOULD THE DESKACTIVE SOFTWARE OR SERVICES PROVE DEFECTIVE, LICENSEE ASSUMES THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES OR LIMITATIONS ON APPLICABLE STATUTORY RIGHTS OF A CONSUMER, SO THE ABOVE EXCLUSION AND LIMITATIONS MAY NOT APPLY TO LICENSEE.

16.4 **Limitation of Liability.** TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, IN NO EVENT SHALL DESKACTIVE BE LIABLE FOR PERSONAL INJURY, OR ANY INCIDENTAL, SPECIAL, INDIRECT OR CONSEQUENTIAL OR PUNITIVE DAMAGES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, BUSINESS INTERRUPTION OR ANY OTHER COMMERCIAL DAMAGES OR LOSSES, ARISING OUT OF OR RELATED TO LICENSEE'S USE OR INABILITY TO USE THE DESKACTIVE SOFTWARE, HOWEVER CAUSED, REGARDLESS OF THE THEORY OF LIABILITY (CONTRACT, TORT OR OTHERWISE) AND EVEN IF DESKACTIVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OF LIABILITY FOR PERSONAL INJURY, OR OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THIS LIMITATION MAY NOT APPLY TO LICENSEE. In no event shall DeskActive's total liability to Licensee for all damages (other than as may be required by applicable law in cases involving personal injury) exceed the amount of fifty dollars (\$50.00). The foregoing limitations will apply even if the above stated remedy fails of its essential purpose.

16.5 DeskActive does not warrant that:

- (a) the operation of the Software will be uninterrupted or free from minor defects or errors which do not materially affect performance;
- (b) the provision of Services under this Agreement will render the Software defect free;
- (c) the Software will meet the Licensee's technical requirements, work on all platforms, operating systems and networks and be free from defects, errors or bugs;
- (d) applications contained in the Software are designed to meet all of the Licensee's business requirements, or
- (e) the Materials will be free from minor defects or errors.

17 Indemnity for Infringement of Intellectual Property Rights

17.1 Subject to Clauses 17.2 and 17.3, DeskActive indemnifies the Licensee against any final judgment in proceedings brought against the Licensee by a third party which determine that the Licensee's use of the Software constitutes an infringement of any Intellectual Property Rights of a third party. This indemnity sets out

the limits of DeskActive's liability to the Licensee in relation to any infringement of a third party's Intellectual Property Rights caused by the use of the Software.

17.2 The indemnity in Clause 17.1 does not apply unless the Licensee:

- (a) promptly notifies DeskActive of any infringement or alleged infringement;
- (b) provides DeskActive with the opportunity to take all necessary action to defend or settle any claim;
- (c) provides DeskActive with all reasonable assistance to defend any claim (at DeskActive's cost);
- (d) allows DeskActive to modify, alter or substitute the infringing part of the Software at its own expense to avoid continuing infringement; and
- (e) authorizes DeskActive to procure the necessary licenses to continue to use any such infringing software.

17.3 The indemnity in Clause 17.1 does not apply if any infringement or alleged infringement arises from:

- (a) the Licensee's use of the Software in combination by any means and in any form with other goods not specifically approved by DeskActive where that combined use gives rise to the infringement;
- (b) the Licensee's use of the Software in a manner or for a purpose not reasonably contemplated or authorized by DeskActive;
- (c) modification or alteration of the Software by or at the Licensee's request (with or without DeskActive's specific written approval);
- (d) any transaction entered in to by the Licensee relating to the Software, without DeskActive's prior written consent; or
- (e) the Licensee not using the Current Release of the Software or any subsequent release that does not infringe the third party's Intellectual Property Rights.

18 Implied Terms

18.1 Subject to Clause 18.2, any condition or warranty, which would otherwise be implied in this Agreement is hereby excluded.

18.2 Where legislation implies in this Agreement any condition or warranty, and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such condition or warranty, the condition or warranty shall be deemed to be included in this Agreement. However, the liability of DeskActive for any breach of such condition or warranty shall be limited, at the option of DeskActive (in its absolute discretion), to one or more of the following:

- (a) if the breach relates to goods:
 - (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of such goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (iv) the payment of the cost of having the goods repaired; and
- (b) if the breach relates to services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost of having the services supplied again.

19 Liability of DeskActive

19.1 DeskActive is not and will not be liable to the Licensee in respect of any indirect or consequential loss including loss of profits, loss of data or loss of goodwill incurred in connection with this Agreement, regardless of the form or cause of action, and whether arising in contract, tort (including, without limitation, negligence) or by misrepresentation or warranty, or other statutory, legal or equitable grounds.

19.2 The Licensee further acknowledges that DeskActive cannot in any way supervise, edit or control the content and form of any information or data accessed through the Software, and the Licensee understands and agrees that DeskActive cannot be held responsible in any way for any content or information accessed by Users or anyone else via the Software. The Licensee agrees that DeskActive cannot be held liable to the Licensee or any Users of the Software for any material that Users may find offensive, upsetting, defamatory, personally offensive and in any way unsuitable for people under the age of 18.

19.3 In no event will DeskActive have any liability whether based in contract, tort (including,

without limitation, negligence) or by misrepresentation or warranty, or other statutory, legal or equitable grounds, for any third party claims against the Licensee for losses, damages or expenses.

19.4 In no event will DeskActive be liable for any damages if and to the extent caused by the Licensee's failure to perform its responsibilities under this Agreement, nor shall DeskActive be liable for any damages if and to the extent caused by failure of the Licensee's, or any of its subcontractors, employees or agents, to perform their responsibilities as set out in this Agreement.

19.5 The Licensee warrants that the Licensee has not relied on any representation made by DeskActive, which has not been stated expressly in this Agreement.

19.6 LICENSEE SHALL DEFEND AND INDEMNIFY AGAINST, AND HOLD DESKACTIVE, ITS AFFILIATES, AND THE EMPLOYEES, DIRECTORS, OFFICERS AND AGENTS OF EACH OF THEM, HARMLESS FROM ANY LOSS, DAMAGE, CLAIM, COST, FINES, LIABILITY OR EXPENSE (INCLUDING COURT COSTS AND REASONABLE FEES OF ATTORNEYS AND OTHER PROFESSIONALS) (A "LOSS") INCURRED OR ARISING FROM:

19.6.1 A BREACH OF THIS AGREEMENT BY LICENSEE OR ANY SUBCONTRACTOR OR SUBLICONSEE,

19.6.2 A BREACH OF ANY REPRESENTATION OR WARRANTY OF LICENSEE,

19.6.3 ANY INTELLECTUAL PROPERTY CLAIM, OR

19.6.4 ANY CLAIM BY ANY THIRD PARTY RELATING TO OR ARISING FROM THE USE OF SOFTWARE.

19.6.5 THE PARTIES SHALL COOPERATE AND PROVIDE RELEVANT INFORMATION IN THEIR POSSESSION REASONABLY REQUESTED BY THE OTHER PARTY AND MAKE REASONABLY AVAILABLE PERSONNEL OF THE PARTY FOR DEPOSITIONS, TESTIMONY AND CONSULTATIONS, AND PROVIDE SUCH TECHNICAL ASSISTANCE REASONABLY REQUESTED BY THE PARTY CONTROLLING THE DEFENSE TO THE EXTENT NECESSARY FOR THE CONDUCT OF THE DEFENSE RELATED TO THIRD PARTY CLAIMS FOR WHICH INDEMNIFICATION IS SOUGHT.

19.6.6 SHOULD LICENSEE WRONGFULLY REFUSE TO DEFEND AND INDEMNIFY DESKACTIVE PURSUANT TO THE TERMS OF THIS AGREEMENT, THE NON-BREACHING PARTY SHALL BE ENTITLED TO RECOVER ITS REASONABLE ATTORNEYS' FEES AND ALL

EXPENSES INCURRED IN DEFENDING SUCH CAUSES OF ACTION AND IN SEEKING TO ENFORCE THE INDEMNIFICATION AGREEMENT HEREIN.

20 DeskActiveTermination

20.1 **Immediate Right of Termination.** The occurrence of any of the following acts or events shall constitute a material breach of this Agreement, entitling the non-breaching party to terminate this Agreement:

20.1.1 Licensee fails to make any payment in full to DeskActive when due and does not cure such failure within five (5) days of written notice of the breach.

20.1.2 Either party becomes insolvent, admits in writing its inability to pay its debts as they mature, files a petition in bankruptcy, makes an assignment for the benefit of creditors, or has an involuntary petition under any bankruptcy laws filed against it which is not dismissed within thirty (30) days.

20.1.3 Either party becomes aware of any illegal business practices of the other.

20.2 If terminated, DeskActive may, in addition to terminating the Agreement:

- (a) repossess any copies of the Software and Materials in the possession, custody or control of the Licensee;
- (b) retain any moneys paid by the Licensee;
- (c) charge a reasonable sum for work performed in respect of which work an invoice has not then been rendered;
- (d) shall be entitled to the full remaining balance of all License Fees owed for the remaining Term of this Agreement from Licensee
- (e) be regarded as discharged from any further obligations under this Agreement;
- (f) pursue any additional or alternative remedies provided by law; and
- (g) take any action necessary to prevent the Licensee from continuing to use the Software.

20.3 Either party may at any time and without cause terminate this Agreement on 90 days notice in writing to the other party. All payments due to the end of the term of the Agreement will be immediately payable at the end of the 90 day notice period.

21 Dispute Resolution

21.1 Without limiting the rights of either party under this Agreement, if a dispute arises between the parties in relation to this Agreement (the "Dispute"), the Dispute must be dealt with in accordance with this Clause 21 (the "Dispute Resolution Procedure").

21.2 Any party claiming that such a Dispute exists must give notice in writing to the other party to the Dispute (the "Second Party") of the nature of the Dispute and each party's representatives shall mediate in good faith and use their best efforts to resolve the Dispute.

21.3 Notwithstanding the best efforts of the parties, if the representatives are unable to resolve the Dispute within ten (10) Business Days of receipt by the Second Party of the notice referred to above, the matter will be immediately referred to the Chief Executive Officer of each party or the person responsible for overall management of the party ("CEO") who shall meet in good faith to resolve the Dispute.

21.4 The CEOs are to use their best efforts to resolve the Dispute within ten (10) Business Days (or such other period as the CEOs agree) from the date on which the Dispute was referred to them.

21.5 Neither party will commence legal proceedings in relation to any Dispute until that Dispute has been submitted to this Dispute Resolution Process.

22 Consultants

22.1 DeskActive may, without the Licensee's consent, engage sub-contractors or consultants, whether or not operating under a corporate structure, to assist in the provision of Services under this Agreement.

23 Force Majeure

23.1 DeskActive's failure or delay in the performance of any obligation under this Agreement will not be deemed to be a breach of this Agreement if that failure or delay is due to, or contributed to by, any cause or event beyond the DeskActive's reasonable control or contemplation.

23.2 If a delay or failure by DeskActive to perform its obligations due to the circumstances described in Clause 23.1 exceeds 60 days, DeskActive may immediately terminate the Agreement by written notice to the Licensee. If this Agreement is so terminated DeskActive will refund moneys previously paid by the Licensee pursuant to this Agreement for which the Services have not been provided to DeskActive.

24 Notices

- 24.1 A party must promptly notify the other of any change to its address for delivery of notices.
- 24.2 Any notices required or permitted to be given hereunder shall be given by electronic mail to the address provided by Licensee and shall be deemed delivered upon the date sent.

25 Assignment

- 25.1 The rights of DeskActive under this Agreement belong to DeskActive and the Licensee may not transfer, assign, rent, lease, sell or otherwise dispose of its rights without the prior written consent of DeskActive.
- 25.2 DeskActive may assign its interest in the Agreement at any time. If an assignment takes place then DeskActive will notify the Licensee of this.

26 Continuing Obligations

- 26.1 Termination or expiration of this Agreement for any reason will not extinguish or otherwise affect any rights of a party against the other which:
- (a) accrued prior to the time of the termination or expiration;
 - (b) otherwise relate to any breach or non-observance of obligations under this Agreement which arose prior to the time of the termination or expiration; or
 - (c) by their nature survive termination or expiration.

27 General

- 27.1 All capitalized terms in these Terms and Conditions are defined in the Agreement.
- 27.2 In relation to its subject matter, this Agreement constitutes the entire agreement between the parties and supersedes any previous representations, understandings or agreements.
- 27.3 This Agreement is binding on and will enure for the benefit of each of the parties and their successors and permitted assigns.
- 27.4 This Agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same document.
- 27.5 Unless specifically stated to the contrary in this Agreement, a party's failure to enforce or a delay in enforcing any of its rights under this Agreement does not constitute a waiver of those rights and a party's partial exercise of a

right does not preclude any further exercise of that or any other right.

- 27.6 If any provision of this Agreement is held to be prohibited, invalid or unenforceable in any jurisdiction:
- (a) that provision is ineffective to the extent of the prohibition, invalidity or unenforceability in that jurisdiction;
 - (b) the validity or enforceability of that provision is not affected in any other jurisdiction; and
 - (c) the remaining provisions of this Agreement are not affected.
- 27.7 This Agreement may be amended, supplemented, replaced or novated by DeskActive, unless otherwise expressed in the Terms and Conditions.
- 27.8 **Relationship of Parties.** Licensee and its distributors, retailers, and dealers are and shall always remain independent contractors in performing under this Agreement. Nothing in this Agreement shall create, or be deemed to create, a partnership, or the relationship of principal and agent, a joint venture or any other type of cooperative business venture among the parties. The provisions of this Agreement shall not be construed as authorizing or reserving to DeskActive any right to exercise any control or direction over the operations, activities, officers, employees, or agents of Licensee or its distributors, retailers, or dealers in connection with this Agreement, it being understood that the entire control and direction of such operations, activities, officers, employees, or agents shall remain with Licensee. Neither party to this Agreement shall have any authority to employ any person as an employee or agent for or on behalf of the other party for any purpose, and neither party, nor any person performing any duties or engaging in any work at the request of such party, shall be deemed to be an employee or agent of the other party to this Agreement. In addition, Licensee and its distributors, retailers, and dealers are not and shall not act or purport to act as agents for DeskActive hereunder in any capacity.
- 27.9 This Agreement is made and entered into in the State of Iowa and the substantive laws of said State shall govern its validity and interpretation, the performance of the parties and their respective obligations hereunder. The application of the United Nations Convention on Contracts for the International Sale of Goods is hereby expressly excluded.

27.10 **Forum.** THE PARTIES HEREBY CONSENT TO THE EXCLUSIVE JURISDICTION IN THE IOWA DISTRICT COURT FOR POLK COUNTY OR, IF SUBJECT MATTER JURISDICTION EXISTS, IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION, AND WAIVE ANY OBJECTION TO VENUE BASED ON FORUM NON CONVENIENS OR OTHER BASIS, WITH REGARD TO ANY ACTIONS, CLAIMS, DISPUTES OR PROCEEDINGS RELATING TO THIS AGREEMENT OR ENFORCEMENT OR INTERPRETATION THEREOF. EITHER PARTY MAY MAKE SERVICE ON THE OTHER PARTY BY SENDING OR DELIVERING A COPY OF THE PROCESS TO THE PARTY TO BE SERVED AT THE ADDRESS AND IN THE MANNER PROVIDED FOR THE GIVING OF NOTICES HEREIN.