



Mykonos Software License Terms

1. Definitions

In addition to terms defined elsewhere in this Agreement, this Agreement uses the following defined terms.

- 1.1 “**Approved Hardware**” means any physical device, system, sub-system, or component thereof that is certified by Mykonos for the purposes of operating Licensed Software and/or Mykonos Technology
- 1.2 “**Bug Fix**” means any modification or addition to any Licensed Software by Mykonos, which is intended to correct Errors or other unwanted or unintended conditions that cause the Licensed Software to fail, malfunction, or operate in a manner other than as anticipated or desired.
- 1.3 “**Documentation**” means the technical manuals, user guides, and other information, if any, which are made available by Mykonos to Licensee with respect to the Mykonos Technology or other Licensed Software, together with modifications and updates thereto, whether in printed or machine-readable form.
- 1.4 “**Enhancement**” means any technology that enhances, improves, or otherwise modifies any Licensed Software.
- 1.5 “**Error**” means an error in any Licensed Software which significantly degrades the Licensed Software as compared to Mykonos’s published performance specifications and/or Documentation.
- 1.6 “**EULA**” means a binding license agreement entered into between Licensee and an End User for any Licensed Software.
- 1.7 “**Executable Code**” means the fully compiled binary version of a software program that can be executed by a computer without further compilation.
- 1.8 “**Fees**” means the License Fees, Support Fees, and Training Fees identified on Licensee’s Order Form(s).
- 1.9 “**Including**”, “**include**”, and their variants means including without limitation unless the context clearly provides otherwise.
- 1.10 “**Intellectual Property Rights**” or “**IPRs**” means any and all rights in patents, copyrights, trademarks, service marks, trade secrets and know-how, and applications, registrations, and derivative works of any of the foregoing.
- 1.11 “**Licensed Software**” means all software Mykonos provides to Licensee in connection with this Agreement, including Licensed Software and Mykonos Technology.
- 1.12 “**Login Credentials**” means the unique set of credentials provided by Mykonos to Licensee which identifies Licensee and enables Licensee to access to a downloadable version of the applicable Licensed Software.

- 1.13 **“Mykonos Technology”** means Mykonos’s tools and technology known as Mykonos Web Security that comprise its deception-based security software, virtual machine, and cloud-based versions including any Executable Code, software packages, images, ISO’s, virtual images, related data files, Source Code, Enhancements, Bug Fixes, and any Updates / Upgrades.
- 1.14 **“Source Code”** means the human-readable version of a software program that can be compiled into Executable Code.
- 1.15 **“Update / Upgrade”** means the most recent version of the Licensed Software developed by Mykonos after the Effective Date delivered to Licensee. Any such Update / Upgrade shall be deemed to be part of the Licensed Software, and all rights and obligations of the parties pertaining to the Licensed Software shall apply to such Update / Upgrade.

2. **License Grants; Ownership**

- 2.1 **License.** Subject to the terms and conditions of this Agreement and Licensee’s obligation to pay Fees, Mykonos grants Licensee a non-exclusive, limited, non-transferable, non-assignable, and non-sublicenseable license to (a) run the Licensed Software only in the Territory defined on the Order Form, and (b) to install and execute the Licensed Software (in Executable Code form) for the purpose of protecting Websites and Web applications with the Licensed Software.
- 2.2 **License Restrictions.** Licensee will: (a) not use, copy, or distribute Licensed Software except as expressly allowed under this Agreement, and Licensee will not use or distribute the Licensed Software in a manner that exceeds or violates any right, restriction, or other limitation set forth in this Agreement; (b) not reverse engineer, decompile, disassemble, or otherwise attempt to derive the Source Code for any Licensed Software that is not provided by Mykonos to Licensee in Source Code form; (c) not use or allow the use of the Licensed Software, unless explicitly authorized by Mykonos in writing: (i) for rental or in the operation of a service bureau or time-sharing arrangement, hosting, or ASP model, or (ii) by any persons other than End Users; (d) reproduce and include all copyright, trademark, and other proprietary rights notices on any copy of Licensed Software in whole or in part; (e) not remove, modify, obliterate, or obscure any IPR or other confidential or proprietary rights notice on any copy of, or which is displayed by, any Licensed Software, the output generated by any Licensed Software; or any other material made available by Mykonos; and (f) cause to be displayed on the media of each tangible or digital copy of any of the foregoing made by Licensee, IPR and other proprietary notices approved by Mykonos.
- 2.3 **No Sublicense.** Nothing in this Agreement shall be construed to grant Licensee the right to sell, disclose, distribute, or sublicense the Licensed Software apart.
- 2.4 **Certain Prohibitions.** Licensee shall not: (a) remove any patent, copyright, or other proprietary notice; (b) conduct a search and replace for any or all names in any Licensed Software, or any part thereof, with Licensee’s or another’s name and claim ownership thereof, (c) run any Licensed Software through an obfuscator program of any sort other than Mykonos’s own obfuscator; or (d) license, sublicense, assign, transfer, distribute, make available, or disclose any Licensed Software or Documentation to any third party except as authorized in this Agreement.
- 2.5 **Non-exclusivity.** Licensee’s license rights are nonexclusive. Accordingly, nothing in this Agreement shall be construed as limiting in any manner: Mykonos’s right to license any Licensed Software, Mykonos’s marketing or distribution activities, and Mykonos’s right to appoint other dealers, distributors, licensees, or agents.

- 2.6 **Ownership.** Notwithstanding anything else in the Agreement, Mykonos expressly reserves and retains: (a) all right and title to, and, except as expressly and unambiguously licensed herein, all interests in, the Licensed Software, all copies and derivative works thereof, and all related Documentation and other materials, (b) all of its service marks, trademarks, trade names and any other commercial symbols, and (c) all IPRs and other proprietary rights in the Licensed Software, including Enhancements, Bug Fixes, and any Updates / Upgrades. Licensee shall have no rights of any nature to the Licensed Software or other information or materials received from Mykonos except those license rights expressly granted under this Agreement. Except for such rights, Licensee irrevocably waive and release any right or claim (including trade secret and copyright ownership) in and to any Licensed Software, including any Enhancement, Bug Fix, Update / Upgrade, and any Documentation and other materials Mykonos provides Licensee.
- 2.7 **Product Registration.** By accepting this Agreement, Licensee agrees to register Licensee's use of Licensed Software as a condition of Licensee's use of Licensed Software, and Licensee's right to access Updates/Upgrades as may be provided by Mykonos. Furthermore, Licensee acknowledges that an internet connection between Licensed Software and Mykonos is required to facilitate and successfully complete such registration, and that regular communication between Licensed Software and Mykonos is necessary in order for Licensee to receive Updates / Upgrades that Licensee may be entitled to. As such, Licensee agrees to facilitate and make available the necessary internet connection as described and adhere to the registration process as may be defined by Mykonos.
- 2.8 **Maintenance and Support.** For the term of this Agreement and as long as Licensee is current in the payment of all Fees and running on a supported version of the software as defined in Exhibit A, Licensee will be entitled to Maintenance and Support as defined in Exhibit A.
- 2.9 **Training.** At Licensee's expense as defined in Order Form, Mykonos shall train Licensee at Licensee's site and/or at Mykonos's facilities. Coursework materials are included in the Training Fees. If Licensee chooses to receive training at Licensee's site, Licensee will also pay all Mykonos's actual and reasonable travel and per diem expenses.
- 2.10 **Update / Upgrade.** While the License is in effect, Licensee shall have the right to applicable Updates / Upgrades as provided in Mykonos's sole discretion from time to time. Nothing in this Agreement will prevent Mykonos from offering any modified version of Licensed Software as a new product for additional consideration.

3. **Certain Licensee Representations and Obligations**

- 3.1 Licensee represents, warrants, and covenants that: (a) its ability to perform hereunder is not limited or restricted by any other agreement or understanding, and will: (i) not infringe upon or misappropriate any Intellectual Property Right or any publicity, privacy, or other right of any third party; and (ii) will not compete in whole or in part with any Licensed Software.
- 3.2 Licensee represents, warrants, and covenants not to: (a) rent, lease or otherwise provide temporary access to any Licensed Software except as expressly permitted in this Agreement; (b) copy, alter or modify any Licensed Software except as authorized in Section 2; and (c) allow any third party to engage in any of the foregoing except as permitted under this Agreement.
- 3.3 Licensee represents, warrants, and covenants to: (a) keep Mykonos reasonably informed as to any Errors or other material problems encountered with any Licensed Software and any Bug Fixes

arrived at for any Error; (b) notify Mykonos as soon as possible if Licensee suspects or becomes aware of any unauthorized use of any part of the Mykonos Technology or Documentation; and (c) ascertain and comply with all applicable local, state, federal, and international laws and regulations under which it is governed and standards of industry or professional conduct, including those applicable to product claims, labeling, approvals, registrations, data privacy, and notices.

- 3.4 Licensee represents, warrants and covenants to comply with the U.S. Foreign Corrupt Practices Act and all export laws, restrictions, national security controls, and regulations of the United States or other applicable foreign agency or authority, and not to (or allow the) export or re-export of any product or information in violation of any such law, restriction, control, or regulation, or to any Group D:1 or E:2 country (or any national of such country) specified in the then current Supplement No. 1 to Part 740, or, in violation of the embargo provisions in Part 746, of the U.S. Export Administration Regulations (or any successor regulations or supplement), except in compliance with and with all required licenses and approvals, including those of the U.S. Department of Commerce and the Department of Defense Trade Controls.
- 3.5 Licensee agrees that Mykonos may collect anonymous data from the Mykonos software deployed by Licensee for the purposes of aggregating data for the Mykonos Global Hacker Database, and for complete data for purposes of customer support.
- 3.6 Licensee represents, warrants and covenants that it shall disclose and otherwise obtain any and all authorizations from its End Users that the Licensee gathers information on the systems of its End Users for enhancing website security, for. Licensee acknowledges that such information gathering may encompass personal data of End Users. Accordingly, Licensee shall comply with all applicable privacy and data protection laws and regulations worldwide.

4. Delivery of Mykonos Technology

- 4.1 In accordance with payment of the License Fees as defined in the Order Form, Mykonos shall provide Licensee with the products ordered on Order Form.
- 4.2 Licensee represents, warrants, and covenants that any Login Credentials shall be deemed part of the Confidential Information (defined below) and will not be distributed in human readable format or other manner which would make the Login Credentials identifiable and useable by any other person or entity.
- 4.3 Use of the Login Credentials of any third party by Licensee, other than to gain access to or use of the applicable Licensed Software, is expressly and strictly prohibited.

5. Fees and Statements

- 5.1 **License Fees.** All invoices issued by Mykonos are due and payable in U.S. Dollars for the amounts and products specified in the Order Form. Except for an overpayment, all payments are nonrefundable, and Licensee will not set-off any amounts that may be due to Licensee against any payments due to Mykonos. Licensee will pay the Fees to Mykonos as specified on Order Form and all sales, use, withholding, and other taxes imposed on it by applicable taxing authorities, as well as all applicable export and import fees, duties, and other governmental charges arising from the exercise of its rights hereunder. Upon request of the applicable taxing authority or Mykonos, Licensee shall provide sufficient evidence to establish that such taxes have been paid. Any

amount not paid when due will be subject to a late charge at the rate of one and one-half percent (1.5%) per month or the maximum rate permitted by applicable law, whichever is less, from the due date until the date paid.

- 5.2 **Audit Rights.** At all times during, and for at least eighteen (18) months after the expiration or termination of, this Agreement, Licensee will maintain at its principal place of business complete and accurate records with respect to Licensee's activities pursuant to this Agreement, including a complete list of all copies of Licensed Software made or distributed by Licensee and all other data and information reasonably needed to verify Licensee's compliance with this Agreement and amounts to be paid to Mykonos ("**Purpose**"). Mykonos will have the right (on its own or using an independent accounting firm) to audit Licensee (including its records related to this Agreement) for the Purpose, at times mutually agreed upon with Licensee at least five (5) business days' in advance. The audit will be conducted during normal business hours and at Mykonos's expense, unless the audit reveals that Licensee has underpaid amounts owed by at least five percent (5%) or \$5,000, whichever is less, in which case Licensee will reimburse Mykonos for all actual and reasonable costs and expenses incurred by Mykonos in connection with the audit. Mykonos will provide Licensee with a report of the results of the audit within fifteen (15) days of completion of the audit. Within ten (10) days after the report of the results of any audit is delivered to Licensee, Licensee will pay to Mykonos any amounts due Mykonos as shown by any such audit.

6. **Intellectual Property Rights; Confidentiality**

- 6.1 The Licensed Software is proprietary to Mykonos and is protected by copyright, trade secret, trademark, patent, and other U.S. and foreign intellectual property laws, treaties, and other applicable laws. All Source Code provided or made available to Licensee is confidential and proprietary to Mykonos. Accordingly, Licensee shall not (nor allow a third party to) copy any Licensed Software or to decompile, disassemble, or reverse engineer it.
- 6.2 In the course of performance of this Agreement, Licensee and Mykonos will obtain information relating to the technology or business of the other party that is of a confidential and proprietary nature ("**Confidential Information**"), which shall either be marked as confidential or will be of such a nature that a reasonable person should assume it's confidential. Without limiting the foregoing, Confidential Information includes Licensed Software, IPRs, computer codes, Documentation, the terms and conditions of this Agreement, inventions, techniques, processes, programs, algorithms, schematics, data, and financial information. The party receiving Confidential Information ("Receiving Party") from the other party ("Disclosing Party") shall keep all Confidential Information in trust and confidence, use it solely in exercising the Receiving Party's rights hereunder, and Receiving Party shall disclose it to Receiving Party's employees and agents only on a need-to-know basis, provided that such employees and agents have been informed of Receiving Party's obligations under this Agreement. Except as permitted by the foregoing, no Confidential Information shall be disclosed to any person or entity without Disclosing Party's prior written consent. However, this Section 6 shall not apply with respect to information that Receiving Party can document to Mykonos's reasonable satisfaction: (a) is in the public domain as a result of no act or omission of Receiving Party or any of Receiving Party's employees or agents; (b) is lawfully received by Receiving Party from a third party without restriction and without breach of any duty of nondisclosure by any such third party; or (c) is required to be disclosed by operation of law or by court order (provided that prior to such disclosure, Receiving Party shall promptly notify Disclosing Party and cooperate with Disclosing Party to contest or limit such order or requirement to the extent possible).

6.3 Due to the unique nature of the Confidential Information, there may be no adequate remedy at law for its unauthorized disclosure or use, which may result in irreparable harm to Disclosing Party. Therefore, upon any such breach or any threat thereof, Disclosing Party shall be entitled to appropriate equitable relief in addition to whatever remedies Disclosing Party might have at law. Receiving Party will notify Disclosing Party in writing immediately upon the occurrence of any such unauthorized release or other breach. Any breach of this Section 6 will constitute a material breach of this Agreement.

7. **Limited Warranty and Disclaimer**

7.1 **Limited Warranty.** For a period of sixty (60) days from the first delivery of any Licensed Software (“**Warranty Period**”), and provided Licensee informs Mykonos of the problem during the Warranty Period, Mykonos warrants that the Licensed Software, when used as permitted under this Agreement and in accordance with the instructions in the Documentation (including use on a computer hardware and operating system platform supported by Mykonos, as stated in the then latest system requirements available at www.MykonosSoftware.com), will perform substantially in accordance with the specifications in the Documentation. Mykonos does not warrant that use of the Licensed Software will be error-free or uninterrupted.

7.2 **Sole Remedy.** Subject to Section 9 in the case of infringement, Mykonos will, at Mykonos's own expense and as Mykonos's sole obligation and Licensee's exclusive remedy for any breach of warranty, use commercially reasonable efforts to correct any reproducible error in the Licensed Software reported to Mykonos by Licensee during the Warranty Period. Notwithstanding the foregoing, during the Warranty Period, Licensee may terminate this Agreement, without liability or fault being attributable to Licensee or Mykonos, if a Severity Level 1 Error (as defined in Exhibit A) occurs during the Warranty Period and Mykonos cannot remedy the Error within thirty (30) days after Mykonos's receipt of notice. Any error correction provided to Licensee will not extend the original Warranty Period. Mykonos will have no warranty obligation to the extent any defect or nonconformity results from: (i) negligence, accident, misuse, abuse, modification, alteration or repair to or of the Licensed Software by anyone other than Mykonos or its authorized agents or subcontractors; or (ii) use of the Licensed Software other than in accordance with the Documentation and this Agreement.

7.3 **Exclusions.** Any warranty hereunder shall not extend, and shall be null and void, if any Licensed Software: (a) is modified, altered or enhanced other than by Mykonos, (b) is not used or maintained pursuant to Mykonos's instructions, (c) is combined with any other software, or if the malfunction results from: (i) the failure of any hardware or any other equipment to function in accordance with applicable specifications, (ii) a force majeure event, or (ii) the use of any release of the Licensed Software other than the most current release. This Section 7 states Licensee's sole and exclusive remedy and Mykonos's sole and exclusive obligation and liability for breach of warranty. Licensee is fully responsible for satisfaction of Licensee's End Users and is responsible for all claims, damages, settlements expenses, and attorneys' fees incurred by Mykonos with respect to End Users and their claims beyond Mykonos's warranty obligations to Licensee.

7.4 **Disclaimer.** EXCEPT FOR THOSE EXPRESS WARRANTIES PROVIDED IN SECTION 7.1, AND SUBJECT TO THE EXCEPTION IN SECTION 8.3, THE LICENSED SOFTWARE AND ANY SERVICES PROVIDED BY MYKONOS HEREUNDER (“**SERVICES**”) ARE PROVIDED “AS IS” AND “WHERE IS” AND ARE ACCEPTED AS SUCH BY LICENSEE. MYKONOS DISCLAIMS ALL OTHER WARRANTIES, EXPRESS AND IMPLIED, RELATING TO THIS AGREEMENT (INCLUDING THE LICENSED SOFTWARE, SERVICES, AND DOCUMENTATION), INCLUDING

WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, AND FITNESS FOR ANY PARTICULAR PURPOSE. MYKONOS DOES NOT WARRANT: (I) THAT THE LICENSED SOFTWARE, DOCUMENTATION, OR SERVICES WILL MEET LICENSEE'S REQUIREMENTS; (II) THAT THE OPERATION OF THE LICENSED SOFTWARE AND (INCLUDING WHERE IN EXECUTABLE CODE FORM) THE DOCUMENTATION WILL BE UNINTERRUPTED OR ERROR-FREE; OR (III) THE ACCURACY, COMPLETENESS, OR USEFULNESS OF ANY DATA CONTAINED IN THE LICENSED SOFTWARE, ANY OUTPUT THEREFROM, OR THE DOCUMENTATION. MYKONOS SHALL NOT BE LIABLE FOR CLAIMS AGAINST LICENSEE FOR BREACH OR ALLEGED BREACH OF PRIVACY OR DATA PROTECTION LAWS IN CONNECTION WITH LICENSEE'S HANDLING OF PERSONAL DATA.

8. Limitation of Liability; WARNING

- 8.1 **No Consequential Damages.** IN NO EVENT SHALL MYKONOS (OR ANY OFFICER, EMPLOYEE, DIRECTOR, SUBSIDIARY, REPRESENTATIVE, AFFILIATE, OR AGENT OF MYKONOS) BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE, RELIANCE, CONSEQUENTIAL DAMAGES, OR OTHER LOSS, WHETHER FORESEEABLE OR NOT, INCLUDING DAMAGE OR LOSS OF PROPERTY, EQUIPMENT, INFORMATION OR DATA, LOSS OF PROFITS, REVENUE OR GOODWILL, COST OF CAPITAL OR REPLACEMENT SERVICES, OR CLAIMS FOR SERVICE INTERRUPTIONS OR TRANSMISSION PROBLEMS, OCCASIONED BY ANY DEFECT IN ANY LICENSED SOFTWARE OR THE SERVICES, INABILITY TO USE THE SERVICES, OR ANY OTHER CAUSE WHATSOEVER WITH RESPECT TO THIS AGREEMENT, REGARDLESS OF THEORY OF LIABILITY (E.G., CONTRACT, TORT (INCLUDING NEGLIGENCE), WARRANTY, OR STRICT LIABILITY). THIS LIMITATION WILL APPLY EVEN IF LICENSEE HAS BEEN ADVISED OR ARE AWARE OF THE POSSIBILITY OF SUCH DAMAGES.
- 8.2 **Limited Damages.** IN NO EVENT SHALL MYKONOS'S LIABILITY FOR ALL LOSSES EXCEED THE FEES PAID BY LICENSEE TO MYKONOS FOR THE MOST RECENT SIX (6) MONTHS BEFORE LICENSEE'S FIRST CLAIM HEREUNDER.
- 8.3 **WARNING:** THE LICENSED SOFTWARE IS NOT FAULT-TOLERANT AND IS NOT DESIGNED, INTENDED, PRODUCED, OR AUTHORIZED FOR USE IN ANY MEDICAL, LIFE SAVING, LIFE SUSTAINING, OR HAZARDOUS SYSTEMS (E.G., MEDICAL DEVICES, NUCLEAR EQUIPMENT, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, MASS TRANSIT, LIFE SUPPORT MACHINES OR OTHER ON-LINE CONTROL EQUIPMENT, ETC.), OR FOR ANY OTHER APPLICATION IN WHICH THE FAILURE OF ANY LICENSED SOFTWARE COULD CREATE A SITUATION WHERE PERSONAL INJURY, DEATH, OR SEVERE PHYSICAL OR ENVIRONMENTAL DAMAGE (“**HIGH-RISK ACTIVITIES**”) MAY OCCUR. ACCORDINGLY, MYKONOS DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, FOR ANY HIGH-RISK ACTIVITIES, AND MYKONOS SHALL NOT BE LIABLE FOR ANY LOSS ARISING FROM OR RELATED TO THE USE OF ANY LICENSED SOFTWARE IN ANY HIGH-RISK ACTIVITY. If Licensee, Licensee's Developer, or any End User uses any Licensed Software for any High-Risk Activity, Licensee shall indemnify and hold Mykonos and its officers, employees, directors, subsidiaries, representatives, affiliates and agents harmless against all losses arising out of, directly or indirectly, any claim of product liability, property damages, personal injury, or death associated with such High-Risk Activity, even if a claim alleges that Mykonos was negligent to any degree, e.g., in the design or manufacture of any Licensed Software.

8.4 **Security, Self-Defense and Privacy.** Licensee acknowledges that: (a) the Licensed Software, including the Mykonos Technology, is only one part of a security system that any prudent operator or host of a web site should adopt; (b) no security system, including the Licensed Software, is perfect; (c) the Licensed Software is capable of providing multiple “anti-hacking” features; (d) some hackers view security systems as challenges; (e) laws exist governing the use of products capable of injuring or otherwise causing damage to other persons or property; (f) the decision to deploy any particular hacker counter-measures is solely in Licensee’s control; (g) the determination of whether an excessive response or use of force has occurred is very dependent on facts and circumstances existing at the time of such response; and (h) the Licensed Software enables Licensee to process certain personal data of End Users, and the Licensee is obligated to handle such personal data in accordance with privacy, data protection and other applicable laws worldwide. Because of the foregoing, Licensee accepts responsibility for all uses of the Licensed Software and acknowledges that Mykonos does not, and cannot, guarantee or warrant that: (x) the Licensed Software will completely protect Licensee; or (y) all of the features and capabilities of the Licensed Software may be used in any particular instance or in any particular jurisdiction; or (z) Licensee will not be subject to legal claims or investigations in relation to breaches or alleged breaches of privacy and/or data protection laws.

9. **Indemnification**

- 9.1 Licensee shall indemnify, defend and hold Mykonos and its employees, agents, representatives, directors, officers, partners, shareholders, attorneys, predecessors, successors, and assigns harmless from any losses arising out of: (a) any breach by Licensee or anyone under Licensee's direction or control of any of Licensee's representations, warranties or obligations under this Agreement; or (b) any unauthorized alteration, modification, adjustment or enhancement made by Licensee or anyone under Licensee's direction or control to any Licensed Software, Documentation, or any other material supplied by Mykonos.
- 9.2 Subject to the limitations of Section 8.1, Mykonos shall indemnify, defend and hold Licensee and its employees, agents, and representatives harmless from liability resulting from any third party allegation that the Licensed Software infringes any U.S. patent issued as of the Effective Date or that Mykonos has infringed or misappropriated the copyright, trademark, trade secret, publicity, or privacy right of any third party. In the event of any such claim of infringement or misappropriation, Mykonos will, at its sole option, obtain the license rights or otherwise modify the Licensed Software or other material to make it non-infringing. If Mykonos is unable to do either of the foregoing, Mykonos may terminate this Agreement and refund, pro rata, any prepayments made hereunder by Licensee representing the most recent calendar year’s contract value.
- 9.3 Mykonos's foregoing obligation does not apply to an infringement claim:(a) where the Licensed Software: (i) has been modified by Licensee without the written consent of Mykonos, if the alleged infringement relates to such modification; (ii) has been combined with other processes or materials not supplied by Mykonos and without the written consent of Mykonos; (iii) has not been used in accordance with this Agreement, to extent the claim of infringement arises from such misuse; or (b) where Licensee continues the allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement.

10. **Term and Termination**

- 10.1 **Term.** The term of this Agreement will start on the Effective Date and will continue until termination or expiration of the last Order Form, unless this Agreement is terminated earlier as provided herein.

- 10.2 **Termination.** In addition to any other rights or remedies to which Mykonos may be entitled, Mykonos may terminate this Agreement if Licensee materially breaches this Agreement and such breach is not cured to Mykonos's reasonable satisfaction within ten (10) days after receipt of written notice.
- 10.3 **Effect of Termination.** Except as expressly set forth in this Agreement, upon the expiration or termination of this Agreement: (a) all of Licensee's rights and Mykonos's obligations hereunder shall terminate; (b) Licensee shall cease any distribution and use of Licensed Software, (c) all unpaid amounts (including late fees) shall immediately become due and payable; (d) within fifteen (15) days thereafter Licensee shall return or destroy all copies of the Licensed Software, Documentation, and all other material provided by Mykonos in Licensee's possession or under Licensee's control, and shall provide Mykonos with an affidavit from an officer of Licensee to that effect.
- 10.4 **Survival.** Section 1 (Definitions), Section 2, Section 5.2 (Audit Rights), Section 6 (Intellectual Property Rights; Confidentiality), Section 8 (Limitation of Liability; WARNING), Section 9 (Indemnification), Section 10.3 (Effect of Termination), Section 10.4 (Survival), and Section 11 (Miscellaneous) shall survive the termination or expiration of this Agreement.
11. **Miscellaneous**
- 11.1 **Waiver.** A waiver by a party of any term or condition of this Agreement or any breach thereof in any instance shall not be deemed to be a waiver of the term or condition or any subsequent or continuing breach thereof.
- 11.2 **Notices.** All notices and other communications hereunder shall be in writing and delivered personally by hand or by United States Postal Service, certified, return receipt requested, Federal Express or other internationally recognized receipted overnight or courier service, postage prepaid, , to Mykonos at the address in the preamble to this Agreement and to Licensee at the address provided to obtain the Login Credentials, unless notice of a change of address has otherwise been provided in writing. Notice shall be deemed delivered upon the date of delivery as indicated by the applicable courier or the United States Postal Service.
- 11.3 **Severability.** If any part of this Agreement is held to be invalid or unenforceable, the parties shall use their best efforts to replace the invalid or unenforceable part by a provision that, to the extent permitted by applicable law, achieves the purposes intended under the original provision and to allow the parties to have the intended benefit of their bargain. If it cannot be so reformed it shall be omitted. The balance of this Agreement shall remain valid and unchanged and in full force and effect.
- 11.4 **Entire Agreement.** This Agreement, including its attached Exhibit, completely and exclusively states the agreement of the parties. It supersedes all prior or contemporaneous proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement shall not be modified except by a subsequently dated written amendment signed on behalf of Mykonos and Licensee by their duly authorized representatives. The Terms apply to all orders and supersede any different, additional or inconsistent terms on Licensee's purchase orders or other documentation.
- 11.5 **Assignment.** Licensee may not assign or transfer, by operation of law or otherwise, any of Licensee's rights or obligations under this Agreement (including Licensee's license with respect to

the Licensed Software) to any third party without Mykonos's prior written consent. Notwithstanding anything to the contrary in this section, a party may assign this Agreement to a successor in a merger, change of control, or sale of all or substantially all of the assets of the assigning party, provided that the non-assigning party may immediately terminate this Agreement, without fault or penalty, upon written notice to the other party if the assigning party assigns this Agreement to a competitor of the non-assigning party, as determined by the non-assigning party in its sole discretion. Any attempted assignment or transfer in violation of the foregoing will be a material breach of this Agreement and will be void.

- 11.6 **Headings.** The headings of Sections of this Agreement are for convenience and are not to be used in interpreting this Agreement.
- 11.7 **Equitable Relief.** Notwithstanding anything herein, any actual or threatened breach of this Agreement adversely affecting Mykonos's proprietary rights would cause irreparable injury for which monetary damages would not be an adequate remedy, and Mykonos shall be entitled to seek equitable relief in addition to any remedies it may have at law.
- 11.8 **Governing Law/Dispute Resolution.** This Agreement, including its Exhibit, shall be construed in accordance with the laws of the United States and the State of California, without regard to conflict of laws provisions. The United Nations Convention for the International Sale of Goods will not apply to this Agreement. Any dispute between the parties which cannot be amicably settled ("Dispute") shall be resolved by binding arbitration within ten miles of Burlingame, California. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures before one neutral arbitrator who shall be experienced in software licensing and related services. If Mykonos and Licensee do not agree on an arbitrator within sixty (60) days of the institution of the arbitration, the arbitrator shall be chosen by JAMS. Evidence and argument may be presented in person or by telephone, fax, postal and electronic mail, and other methods of communication approved by the arbitrator. The prevailing party shall be entitled to recover its actually incurred costs, including reasonable attorney's fees and arbitration and court costs. All hearings shall be held and a written arbitration award issued within one-hundred eighty (180) days of the date on which the arbitrator is appointed. Judgment on the award shall be final and binding and may be entered in any court of competent jurisdiction, and each party hereby irrevocably submits to the exclusive personal jurisdiction of the state and federal courts located in or nearest to San Mateo County, California, in connection with any Dispute. Notwithstanding the foregoing, a party may proceed directly to a court of competent jurisdiction to protect or enforce its Intellectual Property Rights or other equitable relief.
- 11.9 **Force Majeure.** No party shall be liable to the other for acts beyond the first party's reasonable control, including acts of God or public enemy, act or failure to act of any civil or military authority, labor dispute, fire, war, embargo, epidemic, flood, unusually severe weather, or shortage or absence of any utility (including primary power and failure of backup systems).
- 11.10 **No Third-Party Beneficiaries.** Except as otherwise expressly provided herein: (a) no third party shall have or acquire any rights by reason of this Agreement, and (b) no party shall have any obligation or liability whatsoever to any third party by reason of this Agreement.
- 11.11 **Counterparts.** This Agreement may be executed in counterparts, each of which will be considered an original, but all of which together will constitute the same instrument.

Terms Subject to Change. These terms may change from time to time, and Licensee agrees to be bound by the changes once they occur. If these changes have a demonstrable material and adverse effect on the Licensee, then the Licensee has the right to terminate this Agreement.

**EXHIBIT A
MAINTENANCE AND SUPPORT**

DEFINITIONS

- 1.1 "SEVERITY 1 (S1)" means a reported problem in the software which causes the production system to be down causing severe Licensee problems that prevent Licensee from performing critical business functions.
- 1.2 "SEVERITY 2 (S2)" means a reported problem in the software not considered as Severity 1 (S1) as defined in 1.1 above where Licensee is able to perform job functions, but the performance of the job function is degraded or severely limited.
- 1.3 "SEVERITY 3 (S3)" means a reported problem in the software which is not affecting the software's ability to perform substantially in accordance with the user documentation. Questions on product use would be an example of Severity 3 (S3)
- 1.4 "SEVERITY 4 (S4)" means Mykonos Support has been contacted by Licensee to request a new feature for the software or to ask general questions.
- 1.5 "RESPONSE TIME" means the elapsed time between the receipt of a support call and the time when Mykonos begins the Maintenance and Support including a verbal or written confirmation to Licensee thereof.
- 1.6 "SUPPORT CONTACT PROCEDURE" shall mean:

Hours of Operation
Monday – Friday (excluding public holidays) 9am – 5pm EST

Contact Information
Tel: 1-877-889-4647 or 1-650-329-9000
E-mail: support@mykonossoftware.com
2. Support Term and Termination. Mykonos Software's provision of Maintenance and Support to Licensee will commence on the Effective Date of this Agreement and will continue for the term of this Agreement. Maintenance and Support will automatically renew with the renewal of this Agreement.
- 3 MAINTENANCE AND SUPPORT SERVICES. Maintenance and Support will be provided only with respect to versions of the Licensed Software that are being supported by Mykonos, according to the following schedule:
 - (a) a Major Release will be supported for up to (18) months after the next Major Release provided always that the Licensee makes use of the all minor releases patches and updates as deemed necessary by Mykonos.
- 3.1 LEVELS OF MAINTENANCE AND SUPPORT. Maintenance and Support is available at the following response times: (i) Severity 1 (S1): Response Time (2) hours, Mykonos Work Effort Continuous during Mykonos Hours of Operation as stated in 1.6 above. Communication frequency with Licensee once per day. (ii) Severity 2 (S2): Response Time (4) hours, Mykonos Work Effort daily during Mykonos Hours of Operation as stated in 1.6 above. Communication frequency with Licensee once every 2-3 days. (iii) Severity 3 (S3): Response Time (8) hours, Mykonos Work Effort weekly during Mykonos Hours of Operation as stated in 1.6 above. Communication frequency with Licensee once a week. (iv) Severity 4 (S4): Response Time (12) hours, Mykonos Work Effort daily during Mykonos Hours of Operation as stated in 1.6 above. Communication frequency with Licensee once every other week.
- 3.2 BASIC MAINTENANCE. Basic Maintenance means that Mykonos will provide during Mykonos' standard hours of business: (i) telephone and e-mail assistance with respect to the software, including (a) clarifications of functions and features of the software; (b) clarification of the Documentation; (c) guidance in the operation of the software; and (d) error verification, analysis and correction to the extent possible by telephone and e-mail. Mykonos' standard hours of business are Monday through Friday, 9:00 am to 5:00 pm, EST except for the holidays observed by Mykonos.
- 3.3 ON-SITE ASSISTANCE. At Mykonos's sole discretion, Mykonos can decide to provide Maintenance and Support at the Licensee's site. In such event Licensee will reimburse Mykonos for actual and reasonable travelling expenses and costs for board and lodging.

- 3.4 **INSTALLATION.** Upon Licensee's request, Mykonos can perform the installation of the software. Unless otherwise agreed, the costs hereof shall be invoiced to the Licensee on the basis of Mykonos' then-current professional services rates.
- 3.5 **CAUSES WHICH ARE NOT ATTRIBUTABLE TO MYKONOS.** Maintenance and Support will not include services requested as a result of, or with respect to causes which are not attributable to Mykonos. Causes which are not attributable to Mykonos include but are not limited to:
 - 3.5.1 **Accident.** Unusual physical electrical or electromagnetic stress; misuse; failure or fluctuations of electric power, air conditioning or humidity control; excessive heating; fire and smoke damage; software or telecommunication interfaces not meeting or not maintained in accordance with the manufacturer's specification; or causes other than ordinary use;
 - 3.5.2 **Improper installation by Licensee or use of the software that deviates from any operating procedures established by Mykonos in the applicable documentation.**
 - 3.5.3 **Modification.** Alteration or addition or attempted modification, alteration or addition of the software undertaken by persons other than Mykonos or Mykonos' authorized representatives;
 - 3.5.4 **Software programs made by Licensee**
- 4 **RESPONSIBILITIES OF CUSTOMER.** Mykonos' provisions of the Maintenance and Support Licensee is subject to the following:
 - 4.1 Licensee shall provide Mykonos with access to Licensee's personnel and equipment when necessary in order for Mykonos to support the software
 - 4.2 Licensee shall provide supervision, control and management of the Use of the Software.
 - 4.3 Licensee shall document and promptly report all errors or malfunctions of the software to Mykonos. Licensee shall take all steps necessary to carry out procedures for the rectification of errors or malfunctions within a reasonable time frame after such procedures have been received from Mykonos.
 - 4.4 Licensee shall maintain a current backup copy of all data
- 5 **ASSIGNMENT OF DUTIES.** Mykonos may assign its duties of Maintenance and Support to third parties provided that Mykonos will remain responsible for the actions of such third party.