**Source Code Escrow Agreement**

**THIS AGREEMENT** entered this \_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, 20\_\_, by and among \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_Corporation ('Licensor'), \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_ Corporation ('Licensee') and (Insert chosen Bank), a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ corporation, having its principal office at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ('Escrow Agent').

**WHEREAS,** Licensor has developed certain proprietary software at the request of Licensee, and;

**WHEREAS,** Licensee wishes to license the software for its use, and;

**WHEREAS,** the Parties acknowledge that the source code for said software is a valuable, confidential, and essential factor to the maintenance of said software, and;

**WHEREAS,** the Parties desire that under specific enumerated circumstances and only under those circumstances, that the source code be made available to Licensee, and;

**WHEREAS,** the Escrow Agent has agreed to hold said source code and release it only as provided herein;

**NOW, WHEREFORE,** in consideration of the mutual promises, covenants and conditions contained herein, and for other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Licensor, the Licensee, and the Escrow Agent hereby agree as follows:

A. The Licensor and the Licensee have entered into a certain Hardware Purchase and Software License Agreement ('License Agreement'), pursuant to which the Licensor has licensed to the Licensee certain computer software packages (hereinafter referred to as the 'Product').

B. It is the policy of the Licensor not to disclose the source codes and related documentation (hereinafter collectively referred to as the 'Source Code') for the Product to its customers except pursuant to specific terms and conditions.

C. Licensor and Licensee agree that upon the occurrence of certain events described in Section 3.1 hereof, the Licensee shall be able to obtain the Source Code and all revisions thereof, and accordingly, the Licensor agrees to deliver the Source Code to the Escrow Agent.

1. Deposits. The Escrow Agent, as a safekeeping agent, agrees to accept from the Licensor the source Code, which is described on Schedule A, and revisions thereof as provided in Section 2 hereof. The Escrow Agent shall issue to the Licensor a receipt for the Source Code upon delivery. The Source Code held by the Escrow Agent shall remain the exclusive property of the Licensor, and the Escrow Agent shall not use the source Code or disclose the same to any third party except as specifically provided for herein. The Escrow Agent shall retain the Source Code in safekeeping at its office hereinabove indicated unless and until the Escrow Agent receives notice pursuant to the terms of this Agreement that the Escrow Agent is to deliver the Source Code to Licensee or Licensor, in which case the Escrow Agent shall deliver the Source Code to the party identified therein, subject, however, to the provisions of this Escrow Agreement.

2. Representations of Licensor to Licensee. Licensor represents and warrants to Licensee as follows:

2.1. Format. The material described in Schedule A hereto constitutes the Source Code (including Documentation) for the Product licensed to the Licensee pursuant to the License Agreement, and the material delivered to the Escrow Agent is in a form suitable for reproduction by computer and/or photocopy equipment, and consists of a source language statement of the program or programs comprising the Product and program maintenance documentation.

2.2. Supplement. The Licensor will annually deliver to the Escrow Agent supplements, revisions, corrections, enhancements or other changes to the Source Code, provided Licensee has paid the required maintenance fee. The first escrow and maintenance fee is payable upon execution of this agreement and annually thereafter.

3. Release From Escrow

3.1. Events of Release. Upon the occurrence of any of the following Events of Release, the Licensee shall give notice to the Escrow Agent of such Event:

(i) The Licensor becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition in bankruptcy, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any valid proceeding under any bankruptcy or insolvency law, or has wound up or liquidated its business voluntarily or otherwise and Licensee has compelling reasons to believe that such event will cause Licensor to fail to meet its warranty and maintenance obligations in the foreseeable future. Licensee shall give written notice of such Event to the Escrow Agent.

3.2. Release Notice. The Release Notice shall, at a minimum: (i) be labeled 'Release Notice'; (ii) identify the License Agreement and this Escrow Agreement; (iii) specify the Event of Release, (iv) identify the Source Code with specificity; and (v) demand the delivery of the Source Code to the Licensee.

3.3. Requirements Upon Receipt of Release Notice. Upon receipt of the Release Notice, the Escrow Agent shall send a copy thereof to the Licensor by certified mail, postage prepaid, return receipt requested. If the Licensor desires to dispute the Release Notice, the Licensor shall, within ten days after receipt of the copy of the Release Notice from Escrow Agent, deliver to the Escrow Agent a sworn statement ('Affidavit') stating that such Event of Release has not occurred or that such Event has been cured, whereupon the provisions of Section 5 hereof will become applicable. If the Escrow Agent receives the Affidavit within ten days, the Escrow Agent shall send a copy thereof to Licensee by certified or registered mail, return receipt requested, and the Escrow Agent shall continue to hold the Source Code in accordance with the terms of this Escrow Agreement. If the Escrow Agent does not receive the Affidavit within such ten-day period, the Escrow Agent is authorized and directed to deliver the Source Code to the Licensee. Licensee agrees the Source Code may only be used to support existing installations and upon receipt assumes all liability therefor.

4. Notice of Termination. Upon the termination of the License Agreement, the Licensor shall obtain the return of the Source Code.

5. Disputes

5.1. Release Restricted. In the event that Licensor files the Affidavit with the Escrow Agent in the manner and within the time period set forth in Section 3.3 hereof, the Escrow Agent shall not release the Source Code to either party except in accordance with: (i) a final decision of the arbitration panel as hereinafter provided; or (ii) receipt of an agreement with authorized and notarized signatures of both Licensor and Licensee, authorizing the release of the Source Code to one of the parties hereto.

5.2. Arbitration. Disputes arising under this Agreement shall be referred immediately to, and settled by, binding arbitration. The arbitration panel shall consist of three persons. The Licensor and the Licensee shall each appoint one arbitrator and the two arbitrators thereby appointed shall select a third arbitrator. The arbitration shall be conducted in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ , \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ in accordance with the rules of the American Arbitration Association. In addition to any award the prevailing party shall be entitled to all costs of the arbitration proceeding including attorneys fees.

6. Payment to Escrow Agent. As payment for its services hereunder, the Escrow Agent shall receive its reasonable and customary fee, to be paid by the Licensee.

7. Termination. This Escrow Agreement shall terminate on the delivery of the Source Code to either party in accordance with the terms of this Agreement.

8. Waiver, Amendment or Modification; Severability. This Escrow Agreement shall not be waived, amended or modified except by the written agreement of all the parties hereto. Any invalidity, in whole or in part, or any provision of this Escrow Agreement shall not affect the validity of any other of its provisions.

9. Notices. All notices required to be given hereunder shall be in writing and shall be given by certified or registered mail, return receipt requested, to the parties at their respective address below, or at such other address as shall be specified in writing to all other parties.

**If to Escrow Agent:**

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**If to Licensee:**

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**If to Licensor:**

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10. Governing Law. This Agreement shall be enforced in accordance with the law of the State of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, without giving effect to its conflicts of law provisions.

11. Successors and Assigns. This Agreement shall be binding upon the parties, their heirs, successors, and assigns.

12. Limitation on Escrow Agent's Responsibility and Liability

12.1. Degree of Care. The Escrow Agent shall not be obligated or required to examine or inspect the Source Code. The Escrow Agent's obligation for safekeeping shall be limited to providing the same degree of care for the Source Code as it maintains for its valuable documents and those for its customers lodged in the same location with appropriate atmospheric or other safeguards. However, the parties agree and acknowledge that the Escrow Agent shall not be responsible for any loss or damage to the Source Code due to changes in such atmospheric conditions (including, but not limited to, failure of the air conditioning system), unless such changes are proximately caused by the negligence or malfeasance of the Escrow Agent.

12.2. Reliance on Notices. Escrow Agent shall be protected in acting upon any written notice, request, waiver, consent, receipt or other paper or document furnished to it, not only in assuming it due execution and the validity and effectiveness of its provisions but also as to the truth and acceptability of any information therein contained, which is in good faith believed to be genuine and what it purports to be.

12.3. Limitation on Liability. In no event shall the Escrow Agent be liable for any act or failure to act under the provisions of this Escrow Agreement except where it acts are the result of its negligence or malfeasance. The Escrow Agent shall have no duties except those which are expressly set forth herein, and it shall not be bound by any notice of a claim, or demand with respect thereto, or any waiver, modification, amendment, termination or rescission of this Escrow Agreement, unless in writing received by it, and if its duties herein are affected, unless it shall have given its prior written consent thereto.

12.4. Indemnification. The Licensor and the Licensee hereby jointly and severally indemnify the Escrow Agent against any loss, liability, or damage (other than any caused by the negligence or malfeasance of the Escrow Agent), including reasonable costs of litigation and attorney's fees, arising from and in connection with the performance of its duties under this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Agreement to be duly executed as of the year and date above written.

**LICENSOR**

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

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

**LICENSEE**

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

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

**ESCROW AGENT**

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

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

**SCHEDULE A**

Description of Materials Constituting the Source Code and Related Documentation