



Xtremesoft

## **Product License and Services Agreement (Agreement)**

This Product License and Services Agreement (“Agreement”) is between Xtremesoft, Inc. (hereinafter, “Xtremesoft”), having a principal place of business at 800 West Cummings Park, Woburn, MA 01801, USA, and the click-through Licensee (hereinafter “Licensee”). The terms of this Agreement shall apply to each Product license granted and to all services provided by Xtremesoft under this Agreement.

In consideration of the mutual promises and agreements set forth below, the parties agree as follows:

### **1. DEFINITIONS**

- A. “Affiliate” shall mean any person, corporation or other entity, which, directly or indirectly, is owned or controlled by Licensee. For the purposes of this paragraph, “to own” shall mean to own an equity interest (or the equivalent thereof) of fifty percent (50%) or greater.
- B. “Agent” shall mean any third party, other than an Affiliate, providing services to Licensee and under contract with Licensee.
- C. “Confidential Information” shall mean the Xtremesoft Products, Product information, technical and/or business information disclosed in relation to this Agreement, and the terms and pricing under this Agreement. Confidential Information also includes, but is not limited to, the following types of information belonging to each party, provided such information is clearly marked as confidential or proprietary: business methods and marketing plans; research and development; product and services pricing information; customer lists; employee or personnel files; financial information; and any other information that a party makes reasonable efforts to protect from disclosure, and which derives independent economic value from not being generally known. Confidential Information shall not include information that: (i) is or becomes a part of the public domain through no act or omission of the other party; (ii) written records can demonstrate was in the other party’s lawful possession prior to disclosure in connection with this Agreement and had not been obtained by the other party either directly or indirectly from the disclosing party in violation of any duty of confidentiality; (iii) is lawfully disclosed to the other party by a third party without restriction on disclosure; or (iv) is independently developed by the other party, as evidenced by written records.
- D. “Effective Date” shall mean the date on which the click-through license is accepted .
- E. “Product” shall mean a computer software program belonging to Xtremesoft’s AppMetrics® software family, for which Licensee is granted a license pursuant to this Agreement (“Software”); the user guides and manuals associated with the Software (“Documentation”); and any and all Updates to, or patches and fixes for, the Software and Documentation. The term “Product” shall not include any code that has been modified or developed by Licensee.
- F. “Services” shall mean the maintenance and support services provided by Xtremesoft in accordance with the Annual Support Program Addendum attached hereto as Exhibit B and consulting and/or training services provided by Xtremesoft in accordance with the Professional Services Addendum attached hereto as Exhibit C.
- G. “Territory” shall mean all countries of the world, subject, however, to all applicable U.S. export restrictions.
- H. “Update” shall mean any subsequent release of Software and/or Documentation that is made generally available to licensees subscribing to “Services” (as defined on Exhibit B hereto) at no additional charge other than media and handling charges, as determined by Xtremesoft. Updates shall not include any release of future product(s) that Xtremesoft licenses separately.

- I. "Support" means the provision, when Product is purchased and if available, during standard business hours (on the east coast of the USA, typically EST) of assistance by telephone or electronically with respect to the Product, including (i) clarification of functions and features of the Product; (ii) clarification of Product documentation; (iii) guidance in the operation of the Product, including telephone assistance regarding installation of the Product; and (iv) Product error verification, analysis and correction to the extent possible by telephone and email; and (v) access to Xtremesoft's web Site.

## **2. LICENSE**

- A. Xtremesoft grants to Licensee a nonexclusive and nontransferable license to use the Software in object code form only for Licensee's own internal use, and to use the documentation in support of such use of the Software in the Territory, subject to the terms and conditions of this Agreement. Licensee's use of the Software is limited to the number of total CPUs within Licensee's systems as specified in (i) Exhibit A and for which licensee has paid the license fee as set forth in Exhibit A; and (ii) and any subsequent Product Order Form or invoice referencing this Agreement and its Effective Date and for which licensee has paid the license fee as set forth therein.
- B. Xtremesoft grants to Licensee a nonexclusive, nontransferable license to make object code copies of the Software for archival, disaster recovery and routine backup, purposes only, as is reasonably necessary. Licensee may make a reasonable number of copies of the documentation so long as the total number of copies, including any copies provided by Xtremesoft, does not exceed the number of CPUs for which license fees have been paid. All titles and all trademark, copyright and restricted rights notices shall be reproduced in all Product copies. All copies of the Products are subject to the terms of this Agreement.
- C. Xtremesoft shall retain all title, copyright and other proprietary rights in the Product. Licensee shall not acquire any rights in the Products, other than those specified in this Agreement.
- D. Licensee's Affiliates may license Products or purchase Services under this Agreement by issuing a Purchase Order and paying license fees per CPU; provided that such Affiliates must previously agree in writing to be bound by the terms of this Agreement and Licensee shall be fully responsible for any failure of Affiliates to comply with the terms of this Agreement. When an Affiliate has licensed Products or purchased Services as described herein, the Affiliate shall be included in the definition of Licensee.

## **3. UNAUTHORIZED USE**

Licensee shall not, and shall not permit others to: (i) transfer or sublicense the Products; (ii) rent the Products, provide third parties with access to the Products through a service bureau or commercial time-sharing arrangement, or use the Products for outsourcing; (iii) modify the Software or translate or port the Software or Documentation into any other computer or human language without the prior written consent of Xtremesoft; (iv) trace, disassemble, reverse engineer or decompile the Software, source code, structure, algorithms or ideas underlying such Software, or cause or permit reverse engineering, disassembly or decompilation of the Software save to the extent that applicable law limits Xtremesoft' right to restrict such use; (v) avoid, circumvent or disable any security device, procedure, protocol or mechanism that Xtremesoft may include, require or establish with respect to the Product; or (vi) publish or provide the results of any benchmark or comparison tests run on the Software to any third party, without the prior written consent of Xtremesoft.

## **4. USE BY AGENTS**

Licensee may allow its Agents to use the Products for Licensee's internal use, provided Licensee ensures that Agents use the Products in accordance with the terms of this Agreement. Licensee shall be fully responsible for any failure of its Agents to comply with the terms of this Agreement.

## **5. ASSIGNMENT AND TRANSFER**

Licensee may not assign this Agreement or transfer a Product license to any third party without the prior written consent of Xtremesoft, or to any Affiliate without prior written consent of Xtremesoft, which consent shall not be unreasonably withheld.

## 6. AUDIT

Xtremesoft may, at its expense, conduct an audit to verify that Licensee is using the Products pursuant to the provisions of this Agreement. Any such audit shall be conducted during regular business hours and shall not unreasonably interfere with Licensee's business activities. If an audit reveals that Licensee has distributed or allowed use of the Products in excess of the use permitted by this Agreement, Licensee shall pay Xtremesoft for such unauthorized use based on the Xtremesoft price list in effect at the time the audit is completed. If the underpaid fees exceed five percent (5%) of the license fees paid, then Licensee shall pay Xtremesoft's reasonable costs of conducting the audit. Xtremesoft shall conduct audits not more than once per calendar year; provided however that if the underpaid fees exceed five percent (5%) of the license fees paid then Xtremesoft shall be entitled to conduct a second audit within the same year.

## 7. LIMITED WARRANTIES AND DISCLAIMERS

- A. Software Warranty. Xtremesoft warrants, for a period of thirty (30) days from the date the Software is delivered (the "Warranty Period") that the Software, if operated as directed, will perform in substantial conformity with the technical specifications set forth in the Documentation. Notwithstanding the foregoing, Xtremesoft makes no warranty with respect to failures that are caused directly by the underlying hardware, operating system and associated software on which the Product is operated.
- B. Media Warranty. Xtremesoft warrants that the media containing the Software, if provided by Xtremesoft, will be free from defects in material and workmanship under normal use, during the Warranty Period.
- C. Conditions to Limited Warranties. The limited warranties in this Section 7 are conditioned upon Licensee's use of the Software in accordance with the instructions provided in the documentation. The limited warranties set forth in this Section 7 shall not apply to the extent that an error occurs because of : (i) modifications made to the Software by a party other than Xtremesoft; (ii) Licensee's failure to implement enhancements provided without charge to Licensee by Xtremesoft; (iii) Licensee's use of the Software in connection with any computer equipment or devices not meeting the minimum requirements set forth in the Documentation; or (iv) Licensee's violation of the terms of this agreement.
- D. Disclaimers. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, XTREMESOFT AND ITS SUPPLIERS DISCLAIM ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY OR FITNESS FOR A PARTICULAR PURPOSE WITH REGARD TO THE SOFTWARE AND DOCUMENTATION.

Xtremesoft does not warrant that the Software will meet Licensee's requirements or operate with all equipment and software configurations. Furthermore, Licensee acknowledges that due to the complex nature of computer software, it is impossible to ensure that the Software is completely error free, or will operate without interruption that all Software errors will be corrected. To the extent Licensee obtains any pre-production releases of the Software, such Software is distributed "as is" with no warranty of any kind.

- E. Exclusive Remedies. For breach of any of the warranties contained in this Section 7 during the Warranty Period, Licensee's exclusive remedy, and Xtremesoft's entire liability, shall be: (i) for media, to replace defective media returned during the Warranty Period; or (ii) for Software, to either correct errors that cause breach of the warranty or to replace the Software.

## 8. LIMITATION OF LIABILITY

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES, OR DAMAGES FOR LOSS OF PROFITS, REVENUE, DATA OR USE, INCURRED BY EITHER PARTY OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT OR TORT, EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. XTREMESOFT'S LIABILITY FOR DAMAGES HEREUNDER SHALL IN NO EVENT EXCEED THE AMOUNT OF LICENSE FEES PAID BY LICENSEE UNDER THIS AGREEMENT.

## 9. INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIALITY

- A. Licensee acknowledges that the Product, including methods, processes or techniques utilized therein, are proprietary to and valuable trade secrets of Xtremesoft and are protected by United States copyright law and

international treaties. Licensee shall take no actions that infringe Xtremesoft's intellectual property rights. Licensee agrees not to use, copy, modify, transfer, download, merge, make any translation or derivative work or otherwise deal with the Software except as expressly provided in this Agreement. Licensee further agrees not to remove or destroy any copyright or trademark notices, other proprietary markings or confidentiality legends placed upon or contained within the Software.

- B. Xtremesoft shall retain all right, title and interest (including any copyrights, patents, trade secrets or other intellectual property rights) in and to materials developed by Xtremesoft under this Agreement. Licensee shall not sell, transfer, publish, display, disclose or otherwise make such materials available to others. Licensee will take appropriate action by instruction or agreement with its employees or agents to satisfy its obligations hereunder.
- C. During the term of this Agreement, each party may have access to the other party's Confidential Information. The parties agree to hold each other's Confidential Information in confidence during the term of this Agreement and for a period of three (3) years after termination of this Agreement. Each party agrees that, unless required by law, such party shall not make the other party's Confidential Information available in any form to any third party or use the other party's Confidential Information for any purpose other than the implementation of this Agreement. Each party agrees to take all reasonable steps to ensure that Confidential Information is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement, including limiting access to the Confidential Information to those employees and agents who may require such access to complete the transactions contemplated by this Agreement. Furthermore, Licensee agrees not to use any Confidential Information of Xtremesoft to create any computer software program or user documentation that is substantially similar to any Xtremesoft Product.
- D. If the recipient of Confidential Information ("Recipient") is requested or required in any judicial or administrative proceeding or by any regulatory body or court to disclose any Confidential Information, the Recipient will (i) use its best efforts to give the providing party (the "Provider") prompt notice of such request so that it may seek an appropriate protective order or other remedy and (ii) consult with Provider as to the advisability of taking legally available steps to resist or narrow such a request. Recipient will cooperate fully with Provider in obtaining such an order or other remedy. If in the absence of an appropriate protective order or other remedy Recipient is nonetheless legally required to disclose Confidential Information, Recipient may make such disclosure without liability hereunder, provided that Recipient shall use its best efforts to give Provider written notice of the information to be disclosed as far in advance of its disclosure as is practicable and, upon Provider's request and at its expense, shall use its reasonable best efforts to obtain reasonable assurances that confidential treatment will be accorded such information.

## 10. INDEMNITY

- A. Xtremesoft will defend, indemnify and hold Licensee harmless from and against a claim that the Product infringes a third-party copyright, trademark or patent arising under the laws of the United States ("Infringement Claim"), provided that: (i) Licensee promptly notifies Xtremesoft of the Infringement Claim in writing, providing reasonable detail as to the substance of the claim; (ii) Xtremesoft has sole control of the defense and all related settlement negotiations; and (iii) Licensee provides Xtremesoft with the reasonable assistance, information and authority necessary to perform Xtremesoft's obligations under this Section.
- B. Xtremesoft shall have no liability for any Infringement Claim based on: (i) Licensee's use of a superseded or altered release of the Product if the infringement would have been avoided by the use of a current, unaltered release of the Product or (ii) modification of the Product by Licensee or Licensee's combination of the Product with other software, if the infringement was caused by such modification, combination, incorporation or use. For all Infringement Claims to which this section is applicable, Licensee agrees to indemnify Xtremesoft.
- C. In the event the Products are held or believed by Xtremesoft to infringe, Xtremesoft shall have the option, at its expense, to: (i) modify the Products to be non-infringing; (ii) obtain for Licensee a license to continue using the Products; or if these options are unavailable or commercially unreasonable, (iii) terminate the license for the infringing Products and refund the license fees paid for such Products, prorated over a five (5)-year term from the date of the applicable invoice. This Section 10 states Xtremesoft's entire liability and Licensee's exclusive remedy for infringement.
- D. Licensee agrees to indemnify, defend and hold Xtremesoft harmless against any and all claims, of any nature, arising out of Licensee's use, publication or distribution of any data generated through use of the Products alone or in combination with other software, hardware or information of any kind.

## 11. SERVICES

- A. Support Services. Support Services shall be provided according to the terms and conditions of the Annual Support Program Addendum attached to this document as Exhibit B.
- B. Professional Services. Unless the parties to this Agreement enter into a separate Professional Services agreement, Xtremesoft shall provide consulting and training services agreed to by the parties under the terms of this Agreement, including the Professional Services Addendum attached to this document as Exhibit C. All consulting services shall be billed on a time and materials basis. Any consulting services acquired from Xtremesoft shall be bid separately from the Product licenses, and Licensee may acquire either Product licenses or consulting services without acquiring the other.
- C. Non-solicitation of Employees. Each party agrees that it will not, without prior written consent of the other party, solicit any employee of the other party who was directly involved in the provision of Services hereunder, or induce such employee to leave the other party's employment, directly or indirectly, for a period of one (1) year after the most recent time such employee has performed or received Services hereunder. The foregoing restriction shall not apply with respect to advertisements in newspapers, job fairs or unsolicited resumes or applications for employment.

## 12. TERM AND TERMINATION

- A. Term. This Agreement shall remain in effect until terminated in accordance with this Section 12. If not terminated as provided herein, the license granted under this Agreement shall remain in effect perpetually.
- B. Termination by Xtremesoft. Xtremesoft may terminate this Agreement or any license upon written notice if Licensee has materially breached the terms and conditions of this Agreement and has failed to correct the breach within thirty (30) days following written notice informing Licensee of the breach.
- C. Termination by Licensee. Licensee may terminate any license or this Agreement at any time; termination shall not, however, relieve Licensee of the obligations specified in Sections 12.D and 12.E below.
- D. Effect of Termination. Termination of this Agreement or any license shall not prevent either party from pursuing other remedies available to it, including injunctive relief, nor shall such termination relieve Licensee's obligation to pay all fees that have accrued or are otherwise owed by Licensee under this Agreement.
- E. Handling of Products upon Termination. If any license granted under this Agreement is terminated, Licensee shall: (i) cease using the applicable Products; and (ii) certify to Xtremesoft within thirty (30) days after expiration or termination that Licensee has destroyed or has returned to Xtremesoft the Products and all copies thereof and any Confidential Information of Xtremesoft in Licensee's possession or control; provided, however, that in the event that only certain licenses granted under this Agreement expire or are terminated, Licensee may retain any Confidential Information that relates to the licenses Licensee continues to hold. This requirement applies to copies in all forms, partial and complete, in all types of media and computer memory, and whether or not modified or merged into other materials.

## 13. INVOICING AND PAYMENT

- A. All fees must be paid in U.S. Dollars, and shall be calculated based upon Xtremesoft's prices in effect at the time of any quote or order, as applicable. All fees shall be payable thirty (30) days from the date of invoice, and shall be deemed overdue if they remain unpaid thereafter. Any amounts payable by Licensee hereunder which remain unpaid after the due date shall be subject to a late charge equal to one and one-half percent (1.5%) per month or the highest rate allowable by law, whichever is lower, from the due date until such amount is paid. Licensee agrees to pay applicable shipping and handling charges. If Licensee's procedures require it to issue a purchase order, all purchase orders or ordering documents shall be governed by the terms of this Agreement. In no event shall the terms of any purchase order Licensee issues to Xtremesoft be given any force or effect.
- B. The fees listed in this Agreement do not include taxes. If Xtremesoft is required to pay sales, use, value-added or other taxes based on the licenses or services granted in this Agreement or on Licensee's use of Products or

Services, then such taxes shall be billed to and paid by Licensee. This provision shall not apply to taxes based on Xtremesoft's income or property.

#### 14. GENERAL TERMS

- A. Entire Agreement. This Agreement, together with the attached Exhibits, sets forth the entire agreement and understanding between the parties relating to the subject matter herein and merges all prior discussion between them. No modification or amendment to this Agreement shall be effective unless in writing and signed by authorized representatives of both parties. Neither party is bound by any provision of any purchase order, receipt, acceptance, confirmation, correspondence, or otherwise, unless the parties specifically agree to the provision in writing.
- B. Governing Law. This Agreement is made in and shall be governed by and construed in accordance with the laws of the United States and The Commonwealth of Massachusetts, excluding any provision subordinating Massachusetts law to laws of any other state and without regard to the United Nations Convention on the International Sale of Goods.
- B. Jurisdiction. The exclusive jurisdiction and venue for any action with respect to this Agreement shall be the state and U.S. Federal courts of the Commonwealth of Massachusetts, and each of the parties hereto submits itself to this exclusive jurisdiction and venue of such courts for the purpose of such action.
- C. Notice. All notices, including notices of address change, required to be sent under this Agreement shall be in writing and shall be deemed to have been given when mailed by first class mail to the relevant address in the signature blocks of this Agreement or the address stated in any applicable notice of change of address.
- D. Severability. If for any reason a court of competent jurisdiction finds any provision or portion of this Agreement to be unenforceable, that provision will be enforced to the maximum extent permissible so as to affect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.
- E. Waiver. To be enforceable, any waiver of this Agreement or any provision hereof must be in writing and signed by the waiving party. Should either party waive or excuse a breach by the other party, such waiver shall not constitute a consent to, waiver of, or excuse of any different or subsequent breach, whether or not of the same kind as the original breach.
- F. U.S. Government Restricted Rights. Software acquired with United States Federal Government funds or intended for use within or for any United States federal agency are provided with "LIMITED RIGHTS" and "RESTRICTED RIGHTS" as defined in DFARS 252.227-7013 and/or FAR 52.227-19. Contractor/Manufacturer is Xtremesoft Inc. 800 West Cummings Park, Woburn, MA 01801, USA.
- G. Export Administration. Licensee agrees to comply fully with all relevant export laws and regulations of the United States in accordance with the United States Bureau of Export Administration ("Export Laws") to assure that neither the Software nor any direct product thereof is exported, directly or indirectly, in violation of Export Laws; or is intended to be used for any purpose prohibited by the Export Laws, including, without limitation, nuclear, chemical or biological weapons proliferation. Licensee may not use the Software if Licensee is a national, under the control of or a resident or citizen of any country on the U.S. Department of Treasury's list of Specially Designated Nationals, Specially Designated Narcotics Traffickers or Specially Designated Terrorists or the U.S. Commerce Department's Table of Denial Orders.

The export and re-export of Xtremesoft software products are controlled by the United States Export Administration Regulations and such software may not be exported or re-exported to Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria, or any country to which the United States embargoes goods. In addition, Xtremesoft software may not be distributed to persons on the Table of Denial Orders, the Entity List, or the List of Specially Designated Nationals.

By downloading or using an Xtremesoft software product you are certifying that you are not a national of Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria, or any country to which the United States embargoes goods and that you are not a person on the Table of Denial Orders, the Entity List, or the List of Specially Designated Nationals.

- H. Relationship between the Parties. The relationship between Xtremesoft and Licensee established by this Agreement is that of independent contractors, and nothing contained in this Agreement shall be construed as creating a partnership, joint venture or agency relationship, or as granting a franchise.
- I. Force Majeure. Neither Xtremesoft nor Licensee shall be liable for damages for any delay or inability of delivery arising out of causes beyond their reasonable control and without their fault or negligence, including, but not limited to, acts of civil or military authority, fires, riots, wars, strikes, civil unrest, natural disasters or embargoes.
- J. Counterparts. This Agreement may be executed in multiple counterparts, both of which, shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument. This Agreement may be executed via facsimile transmission.
- K. Construction. It is expressly agreed that the terms of this Agreement shall supersede all terms of any unsigned or "shrink-wrap" license included in any package, media or electronic version of Xtremesoft-furnished software and any such software shall be licensed under the terms of this Agreement.
- L. Survival. In the event of any termination of this Agreement, Sections 7, 8, 9, 10, 11, 12, and 14 hereof shall survive and continue in effect and shall inure to the benefit of and be binding upon the parties and their legal representatives, heirs, successors, and assigns.

**XTREMESOFT Inc., 800 West Cummings Park, Woburn, MA 01801, USA**

By clicking on the "Agree" button, Licensee accepts the terms of this agreement

## EXHIBIT A

### FEE SCHEDULE

**In accordance with quotation provided and agreed to by both parties**

## EXHIBIT B

### ANNUAL SUPPORT PROGRAM

**1. SUPPORT SERVICES.** Subject to continuing payment by Licensee of the applicable fees, Xtremesoft shall provide the post-installation Product maintenance and support services described below ("Support Services") for a term of one (1) year from the Effective Date of this Agreement. Support Services will be renewed automatically upon payment of the applicable fee for additional one (1) year terms unless terminated as provided herein. Xtremesoft may change the Support Services offered and fees for such Support Services at any time, effective as of the commencement of any renewal period.

**A. Level of Effort.** Xtremesoft will use commercially reasonable efforts commensurate with the then-applicable industry standard to provide the Support Services set forth in this Agreement in a professional and workmanlike manner. Xtremesoft does not guarantee that issues raised by Licensee will be resolved.

**B. Subcontracting.** Xtremesoft may engage the services of sub-contractors to perform an of its Support responsibilities; provided, however, that Xtremesoft shall remain responsible for the Support responsibilities perform by such sub-contractors.

**C. On-site Assistance & Installation.** In the event that Xtremesoft determines that on-site assistance is required to perform specific support services, Licensee may contract with Xtremesoft's professional services organization for such on-site assistance. On-site assistance is not included in any support package.

Installations of the Xtremesoft product that deviate from recommended security and installation configurations, as documented in all product releases, are not supported. For any non-standard installation and security configurations, Xtremesoft strongly recommends Licensees purchase installation services from Xtremesoft, and upon completion of such services this installation will be supported and warranted in accordance with the standard terms set forth in this Agreement.

**D. Special Services.** Xtremesoft agrees to use commercially reasonable efforts to respond to any requests by Licensee for support services not specifically provided for in this Agreement. Licensee acknowledges that all such services provided by Xtremesoft shall be provided as professional services at Xtremesoft's then-current standard rates.

**E. Standard Business Hours.** Basic Telephone and Email support, as set forth below, will be provided during the hours of 9:00 a.m. to 5:00 p.m. U.S. Eastern Time (federal and local holidays generally recognized in the State of Massachusetts excepted).

**F. Basic Telephone Support.** During standard business hours, Xtremesoft shall provide Licensee technical assistance by telephone regarding the use of the Product and the identification of Software and/or Documentation problems. Licensee shall appoint no more than one (1) individual within its organization to serve as support contact between Licensee and Xtremesoft and to request and receive Support Services from Xtremesoft. Licensee's designated support contact may call Xtremesoft's Customer Support Center at any time during the standard business hours set forth above to report a new issue or check the status of an open issue. Licensee's support contacts are set forth in Section 4. Additional support contacts can be designated for Xtremesoft's then current fee.

**G. Priority Telephone Support.** If Licensee has purchased Priority Support Services (by payment of the additional fee set forth on Exhibit A), Xtremesoft will provide the telephone support services described in

subsection A above, on the terms and conditions therein set forth, twenty four hours per day, seven days a week (24 x 7) other than holidays generally recognized in Massachusetts, for any issues designated as Priority 1 as set forth in subsection F below. The purchase of Priority Support Services will not obligate Xtremesoft to provide support outside of designated normal business hours for issues designated as Priority 3 – 5.

**H. Email Support.** Xtremesoft will provide Licensee an electronic mail address to which Licensee's designated support contacts may address messages and questions concerning the Product, which will be answered by Xtremesoft Customer Support personnel within the timeframes set forth in subsection F.

**I. Web Support.** Licensee will have access to the Xtremesoft web site, to which Licensee's designated support contacts may address messages and questions concerning the Product, which will be answered by Xtremesoft Customer Support personnel within the timeframes set forth in subsection F, and which may provide other value-added services including FAQs, help files, etc..

**J. Software Updates.** Licensee will receive, at their voluntary election upon notice from Xtremesoft, one (1) copy of all product maintenance and Upgrade releases for all Products covered under this Agreement, which Xtremesoft makes available without additional charge to its Support Services customers.

**K. Service Levels and Definitions.** Xtremesoft shall use commercially reasonable efforts to correct any reproducible malfunction in the Product reported to Xtremesoft by Licensee.

- A "malfunction" means any defect, problem or condition that prevents the Product from performing substantially in accordance with the operating specifications in the then current Documentation. Xtremesoft's Customer Support personnel will contact Licensee's designated support contact(s), within the timeframes designated below (response time) to explore the nature of the malfunction experienced by Licensee, determine whether the malfunction is related to the Product and reasonably assign a priority level to the malfunction in accordance with definitions in the table below.
- A "response time" means the elapsed time between the first contact by a designated support contact to report an issue, and the target time within which Xtremesoft's Customer Support personnel report back to the designated support contact to acknowledge receipt and define an action plan for resolution. Except where Licensee has purchased Priority Support Services, which are governed by separate agreement, response times are effective during Standard Business Hours only, as set forth in subsection A above. *A response time is a guarantee of communication timeframes; Xtremesoft does not guarantee a problem fix, workaround, or other final disposition within these timeframes.*
- An "action plan" is a formal verbal or written description of the tasks to be taken by both Xtremesoft and Licensee to diagnose, triage, and address a support issue, along with an approximate timeframe for the processing and completion of each task.
- A Service Level and by extension a Service Level Guarantee defines the response times, level of effort, and escalation path that a support issue may take, based on the priority level assigned to the issue.

<i>PRIORITY</i>	<i>DEFINITION</i>	<i>INITIAL RESPONSE</i>
1 - Critical	Licensee reports a malfunction that (i) renders the Product inoperative or intermittently operative; or (ii) causes any material feature to be unavailable or substantially impaired; or (iii) compromises overall system integrity or data integrity when the Product is installed and operational (that is, causes a system crash or hang, or causes loss or corruption of data); or (iv) causes a complete failure of the Product.	Within 2 hours
2 - High	Licensee reports a malfunction that (i) renders a required program or feature of the Product inoperative or intermittently operative; or (ii) substantially degrades performance.	Within 4 hours
3 - Medium	Licensee reports a malfunction that (i) renders an optional program or feature inoperative or intermittently operative; or (ii) causes only a minor impact on Licensee's use of Product.	Within 8 hours
4 - Normal	Licensee reports a malfunction (i) that has only a minor effect on Product functionality; or (ii) cosmetic flaws; or (iii) inquiries and questions about configuration and management of the Product.	Within 8 hours
5 - RFE	Licensee submits a Product request for enhancement (RFE).	Best efforts

**L. Retirement of Releases.** Xtremesoft provides Support Services for each Product version from the date the version becomes generally available until such version is retired. Prior commercial releases of the Product are retired twelve (12) months after the general availability of a subsequent release

**M. Termination.** Licensee may terminate Support Services at the end of an annual term by giving written notice to Xtremesoft at least thirty (30) days prior to the end of any such term. Xtremesoft may cancel or suspend Support Services if Licensee fails to make payment pursuant to Section 2 below. Either party may terminate Support Services if the other party breaches any material term or condition of these Support Services terms and conditions and the breach is not remedied within thirty (30) days after receiving written notice of the breach. In the event the Agreement is terminated, Support Services will also terminate automatically. Once terminated the Licensee shall be required to pay a fee equal to the entire unpaid support fees, plus an amount equal to 25% of the unpaid fees, as a penalty, to return back on to support.

**N. Exclusions.** Xtremesoft shall have no obligation to support: (i) Products modified without Xtremesoft's prior written consent; (ii) use of the Products other than in accordance with the Agreement or the Documentation; (iii) Licensee applications; (iv) Products installed on any computer hardware or used with any software not specified in the Documentation; (v) any Product that has been retired.

Support fees do not include services requested as a result of, or with respect to causes or errors that are not attributable to Xtremesoft or cannot be reproduced by Xtremesoft on unmodified software. In the event that Licensee requests Xtremesoft to provide, and Xtremesoft does so provide, any services in connection with causes and errors which are not attributable to Xtremesoft, Licensee shall pay Xtremesoft for such additional services on a time and materials basis at Xtremesoft's then current professional services rates.

**O. Licensee Obligations.** Licensee is responsible for:

- **Training.** Licensee shall train or arrange to have trained its personnel in the proper use and application of the Product, and the equipment and software environment on which the Product is loaded or operating, including ensuring that support contacts are qualified to operate the Product on Licensee's equipment and who are familiar with the information, calculations and reports that serve as input and output of the Product.
- **Procedures.** Licensee shall implement procedures for the protection of information and the implementation of Product backup procedures in the event of errors or malfunction of the Product or equipment or software environment upon which the Product is loaded or operating. Further, Licensee shall grant Xtremesoft access to all such information as may be reasonably necessary for Xtremesoft to provide assistance and Xtremesoft shall not be liable for failure to provide Support hereunder in the event Licensee denies Xtremesoft such access.
- **Reporting.** Licensee shall document and promptly report all errors or malfunctions of the Product to Xtremesoft. Xtremesoft will provide Licensee with procedures to rectify such errors or malfunctions where possible, accompanied by a Case number which Licensee will use to track status of each issue.
- **Diagnostics.** Licensee shall take all steps to cooperate with Xtremesoft in identifying, isolating, verifying and, if possible, reproducing the reported malfunction. Further, Licensee shall take all steps necessary to carry out the procedures for the rectification of such errors or malfunctions within a reasonable time after such procedures have been instructed by Xtremesoft. Xtremesoft reserves the right to close a case without further responsibility or liability if Licensee does not provide appropriate feedback or status to Xtremesoft within thirty (30) days of receiving new Product and/or a workaround for the issue, or fails to respond to a request for further information.
- **Access.** Licensee shall provide Xtremesoft personnel with access to Licensee's personnel and equipment during standard business hours. In addition, Licensee acknowledges that where feasible it will provide Xtremesoft Customer Support personnel with remote access to the computer hardware on which the Product is operating.
- **Support Contacts.** Licensee shall promptly notify Xtremesoft in the event a new or replacement support contact is assigned.

**2. FEES AND PAYMENT.** The Support Services fees for the initial one (1) year term are set forth in Exhibit A of this Agreement. The applicable fees for any renewal period shall be at Xtremesoft's then current price. Support Services fees will be billed on an annual basis and are payable in advance. Payment terms for renewals are net thirty (30) days from date of invoice.

3. **LIMITATION OF LIABILITY.** Xtremesoft's liability for damages from any cause of action whatsoever relating to Xtremesoft's obligations to provide Support Services under this Agreement shall be limited to the amount paid by Licensee for such services for the applicable year. Xtremesoft's liability may be further limited as provided in this Agreement.
4. **SUPPORT CONTACTS.** Licensee's support contacts are set forth below. In the event Licensee designates different support contacts to replace the individuals named below, Licensee shall promptly notify the Xtremesoft Customer Support organization.

Name	Title	Phone	Email address

If no Support Contact is set forth herein, Licensee must provide Xtremesoft with a written designation of its support contact prior to or simultaneously with such support contact's first contacting Xtremesoft for support.

## EXHIBIT C

### PROFESSIONAL SERVICES

From time to time, Licensee may order and Xtremesoft may provide professional services consulting ("Professional Services") as described in the Statement of Work ("SOW") attached to this Agreement (the "Initial SOW"), or any additional SOW specifically referencing this agreement. Unless otherwise specified in a SOW, all Professional Services shall be subject to the terms of this Agreement, including the following:

#### 1. RATES; INVOICES

- A. Rates. Xtremesoft performs Professional Services engagements on a time and materials basis, exclusive of Reimbursable Expenses. Reimbursable Expenses are all reasonable, actual travel and out-of-pocket expenses incurred by Xtremesoft, its employees and consultants in connection with on-site Professional Services requested by Licensee. In consideration for the completion of the work described in the Initial SOW Licensee agrees to pay Xtremesoft at the rates specified in Exhibit A. Subsequent Professional Services engagements will be billed at Xtremesoft's then current rates, as set forth in the applicable SOW.
- B. Invoices. Xtremesoft will invoice Licensee monthly for Professional Services performed during the previous month, payable net thirty (30) days from date of invoice.
- C. Cancellation of Services. Should Licensee cancel a Professional Services engagement less than five (5) business days prior to the date that such engagement was to commence, Licensee shall pay Xtremesoft fifty percent (50%) of the estimated Professional Services fees. Such fees shall be waived if Xtremesoft is able to reassign Professional Services staff to another Professional Services engagement prior to the scheduled commencement date.

#### 2. CHANGES TO SCOPE OF SERVICES

- A. Changes to Scope of Professional Services. Licensee may make changes to the scope of Professional Services covered by a SOW. Such changes shall be agreed to in writing in accordance with a change order process as described in the applicable SOW. Xtremesoft agrees to integrate agreed upon changes into the related project with reasonable promptness. If such changes affect Xtremesoft's obligations set forth in the applicable SOW, Xtremesoft and Licensee shall negotiate appropriate adjustment of time required and costs. Upon agreement of the parties, the applicable SOW shall be modified in writing accordingly.

- B. Tolling. In the event that Xtremesoft notifies Licensee of Licensee's failure to perform any of its obligations under a SOW, which failure shall have prevented Xtremesoft from meeting any deadline, such deadline shall be extended by an amount of time equal to the length of such failure to perform on the part of Licensee.

### 3. PERSONNEL

- A. Control of Xtremesoft Personnel. During the term of this Agreement, employees of Xtremesoft and any subcontractors shall at all times remain employees of Xtremesoft or subcontractors and shall remain under Xtremesoft's sole control.
- B. Compensation of Xtremesoft Personnel. Xtremesoft shall bear sole responsibility for payment of compensation to its personnel and subcontractors.
- C. No Obligation for Benefits/Commitments to Xtremesoft Personnel. As neither Xtremesoft nor its personnel or subcontractors are Licensee's employees, Licensee shall not take any action or provide Xtremesoft's personnel or subcontractors with any benefits or commitments inconsistent with any of such undertakings by Xtremesoft. In particular: (i) Licensee will not withhold FICA (Social Security) from Xtremesoft's payments; (ii) Licensee will not make state or federal unemployment insurance contributions on behalf of Xtremesoft or its personnel or subcontractors; (iii) Licensee will not withhold state and federal income tax from payment to Xtremesoft; (iv) Licensee will not make disability insurance contributions on behalf of Xtremesoft; (v) Licensee will not obtain workers' compensation insurance on behalf of Xtremesoft or its personnel or subcontractors.
- D. Independent Contractor Status. It is the express intent of the parties that Xtremesoft is an independent contractor and not an employee, agent, joint venturer or partner of Licensee. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between Licensee and Xtremesoft. Both parties acknowledge that Xtremesoft is not an employee for state or federal tax purposes. Xtremesoft shall retain the right to perform Professional Services for others during the term of this Agreement.
- E. Method of Performing Professional Services. Xtremesoft shall have the right to determine the method, details, and means of performing the work to be performed for Licensee. Licensee shall not direct, control or supervise Xtremesoft personnel as to the details by which Professional Services are accomplished.
- F. Non-solicitation of Employees. Each party agrees that it will not, without prior written consent of the other party, solicit any employee of the other party who was directly involved in the provision of Professional Services hereunder, or induce such employee to leave the other party's employment, directly or indirectly, for a period of one (1) year after the most recent time such employee has performed or received Professional Services hereunder. The foregoing restriction shall not apply with respect to advertisements in newspapers, job fairs or unsolicited resumes or applications for employment.

### 4. WARRANTY

- A. Professional Services Warranty. Xtremesoft represents and warrants that each of its employees, subcontractors and agents assigned to perform any Professional Services hereunder shall have the proper skill, training and background so as to be able to perform in a competent and professional manner, with a reasonable standard of care in accordance with general industry standards, and that all work will be so performed.
- B. No Conflict of Interest. Xtremesoft represents and warrants that it is not bound by the terms of any agreement with any other party that is in any way conflicting with Xtremesoft's obligations under this Agreement or imposes any restrictions on Xtremesoft's proposed activities with Licensee. Xtremesoft further represents that Xtremesoft's performance of Professional Services under this Agreement does not and will not breach any agreement to keep in confidence proprietary information, knowledge or data acquired in confidence or in trust prior to the provision of Professional Services to Licensee.

- C. THE PROFESSIONAL SERVICE TERMS AND CONDITIONS IN THIS ADDENDUM DO NOT CONSTITUTE A PRODUCT WARRANTY. THIS ATTACHMENT IS AN ADDITIONAL PART OF THE AGREEMENT AND DOES NOT CHANGE OR SUPERSEDE ANY TERM OF THE AGREEMENT EXCEPT TO THE EXTENT UNAMBIGUOUSLY CONTRARY THERETO.

**5. LIMITATION OF LIABILITY**

Xtremesoft's liability for damages from any cause of action whatsoever relating to Xtremesoft's obligations to provide Professional Services under this Agreement shall be limited to the amount paid by Licensee for the specific engagement in dispute. Xtremesoft's liability may be further limited as provided in this Agreement.

**6. OWNERSHIP OF MATERIALS**

Xtremesoft shall own all right, title and interest (including any copyrights, patents, trade secrets or other intellectual property rights) in and to materials developed by Xtremesoft under this Agreement. Licensee shall not sell, transfer, publish, display, disclose or otherwise make such materials available to others. Licensee will take appropriate action by instruction or agreement with its employees or agents to satisfy its obligations hereunder.