

SOFTWARE MAINTENANCE SERVICES TERMS AND CONDITIONS VERSION 1.1

These following Software Maintenance Services Terms and Conditions (these "Terms & Conditions") are an integral part of the Software Maintenance Services Agreement (this "Services Agreement") between Sunbird Software, Inc. ("Sunbird") and Customer. Sunbird shall provide maintenance services as more fully described herein to Customer for the Software.

If Customer does not consent to these Terms & Conditions, then Customer may either decline the "click-through" agreement question presented at the time of registration of the Services Agreement at the Sunbird Software Support Website. Alternatively, if these Terms & Conditions are presented outside of the registration process, then Customer may e-mail a refusal of this Services Agreement to sales@Sunbirdcim.com within ten (10) business days of registration, for a full refund of the separately purchased Software Maintenance Services.

NOW THEREFORE, in consideration of the foregoing, the mutual covenants set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Sunbird and Customer agree as follows:

1. DEFINITIONS

- 1.1. Customer means the end-user entity whose authorized agent has ordered Maintenance Services from Sunbird or from an authorized distributor. Alternatively, Customer means the end-user entity whose authorized agent has registered this Services Agreement at the Sunbird Software Support Website with the Software Maintenance Services Identification Number provided by Sunbird.
- 1.2. Enhancement means any modification or addition that, when made or added to the Software, materially changes its utility, efficiency, functional capability, or application, but that does not constitute solely an Error Correction. Enhancements may be designated by Sunbird as minor or major, depending on Sunbird's assessment of their value and of the function added to the preexisting Software.
- 1.3. Error Correction means either a modification or an addition that, when made or added to the Software, establishes material conformity of the Software to the functional specifications, or a procedure or routine that, when observed in the regular operation of the Software, eliminates the practical adverse effect on Customer of such nonconformity.
- 1.4. Error means any failure of the Software to conform in all material respects to its functional specifications as published from time to time by Sunbird. However, any nonconformity resulting from Customer's misuse, improper use, alteration, or damage

of the Software, or Customer's combining or merging the Software with any hardware or software not supplied or identified as compatible by Sunbird, shall not be considered an Error.

- 1.5. Sunbird Software Support Website means the website designated either within these Terms & Conditions or elsewhere by Sunbird at which Customer may, among other activities, register a Services Agreement, obtain manuals and other technical information, and reviewed Customers software licenses and services portfolio.
- 1.6. Releases mean new versions of the Software, which may include both Error Corrections and Enhancements. Such Releases may be either provided either as patches to or complete replacement of the Software. A "generally available" release is a release which is available to the public at large. Releases do not include new products, optional enhancements or new or add-on products that are priced and sold separately by Sunbird. Sunbird is the sole determiner of the availability and designation of a Release.
- 1.7. Software Maintenance Services Identification Number is the identification and tracking number generated by Sunbird and provided to Customer to allow registration and tracking of the Software Maintenance Services Agreement.
- 1.8. Software means the Sunbird software product designated by the Customer's order. Alternatively, Software means the Sunbird software product designated for support under the Software Maintenance Services Identification Number.

2. SCOPE OF MAINTENANCE SERVICES

- 2.1. During the maintenance term, Sunbird shall provide maintenance services in support of the Software. Maintenance Services shall include both technical support services and software releases.
- 2.2. **Support.** Subject to the terms and conditions of this Agreement, Sunbird shall provide Customer with support services as described in this section.
 - 2.2.1. **Support Hours.** Sunbird shall maintain standard service hours between 09:00 – 18:00 Monday to Friday, Eastern Standard Time excluding all public holidays.
 - 2.2.2. **Telephone Support.** Sunbird shall provide a support telephone line.
 - 2.2.3. **E-mail Support.** Sunbird shall provide e-mail support sufficient to respond to support requests in all major commercial markets worldwide, including, but not

limited to, markets in Asia, Europe including the U.K., North America and South America.

2.2.4. **Support requests outside standard service hours.** All voicemails and emails will receive a response during the next normal business day. Urgent voicemail requests receive a live response within one hour of the start of the next normal business day.

2.2.5. **Remote Support.** Initial support will be provided in part by directing Customer to use certain diagnostic tools available on the Software. If this proves insufficient to resolve the support request, if Customer grants explicit permission, and if Customer establishes and maintains the appropriate network configuration, Sunbird personnel will access the Software remotely and provide remote systems via an SSH2 connection to a server designated by Sunbird.

2.3. **Software Releases.** As part of its maintenance services, Sunbird may provide periodic Software Releases.

2.3.1. **Maintenance Releases.** Sunbird may provide periodic Maintenance Releases. Maintenance Releases are generally available release of Software that only provides error corrections. Such a release shall be denoted by a change in the digit to the right of the second decimal point - for example, 3.0.0 to 3.0.1.

2.3.2. **Minor Releases.** Sunbird may provide periodic Minor Releases. A Minor Release is a generally available release of the Software that provides Enhancements designated minor by the Sunbird, as well as bug fixes (error corrections). Such a release shall be denoted by a change in the digit to the right of the first decimal point - for example, 3.0 to 3.1.

2.3.3. **Major Releases.** Sunbird may provide periodic Major Releases. Major Releases are generally available releases of the Software that provides Enhancements designated major by Sunbird, as well as minor new Enhancements and Error Corrections. Such a release is denoted by a change in the digit to the left of the first decimal point - for example, 3.0 to 4.0.

2.4. **Limitations on Scope of Maintenance Services.**

2.4.1. Sunbird shall have no obligation to provide Releases or Support for the Software except as set forth in this Services Agreement. Sunbird shall not have any responsibility to develop subsequent components for the Software or additional processes for Customer, except as explicitly set forth herein.

2.4.2. Sunbird shall have no obligation to fix errors in the Software within a specific time duration due to the nature of software operating in a multivendor environment.

2.4.3. Customer rights and obligations concerning the use of any Releases (Error Corrections, Enhancements, or any other programming provided by Sunbird relating to the Software) shall be as provided under the End-User License Agreement between Customer and Sunbird. Sunbird shall have sole and exclusive ownership of all right, title, and interest in and to such works (including ownership of all copyrights and other intellectual property rights pertaining thereto), subject only to the license expressly granted to Customer therein.

2.4.4. Maintenance Services do not include: (a) development of custom computer programs, (b) repairs or service relating to any third party software or hardware, or (c) hardware modifications or changes to existing hardware configurations, outside the scope of warranty support.

3. WARRANTIES AND LIMITATIONS OF LIABILITY

3.1. **Limited Maintenance Services Warranty.** Sunbird warrants, for a period of ninety (90) days following the performance of the applicable Maintenance Service, that such Maintenance Services was performed in a professional manner and in a manner that was at least equal to applicable industry standards prevailing at the time of performance. Sunbird's entire liability and Customer's exclusive remedy under this limited warranty is, at Sunbird's option, either (a) return of the Maintenance Fees paid by Customer with respect to the annual maintenance period during which such Maintenance Services were performed; or (b) re-performance of such Maintenance Services in a manner that conforms with the foregoing limited warranty. Any Maintenance Services that are re-performed will be warranted in accordance with the terms and conditions of this Section for the remainder of the original warranty period or thirty (30) days, whichever is longer.

3.2. **Warranty Disclaimer and Limitation of Liability.** CUSTOMER ACKNOWLEDGES THAT EXCEPT AS EXPRESSLY SET FORTH IN THESE TERMS & CONDITIONS, SUNBIRD HAS NOT MADE ANY REPRESENTATION OR WARRANTY TO CUSTOMER REGARDING THE MAINTENANCE SERVICES. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, SUNBIRD DISCLAIMS ANY IMPLIED WARRANTY, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY WITH RESPECT TO TITLE, NON-INFRINGEMENT, MERCHANTABILITY, DESIGN, CONDITION, DURABILITY, PERFORMANCE, QUALITY,

CAPACITY OR TECHNICAL COMPATIBILITY OF THE MAINTENANCE SERVICES OR FITNESS OF THE MAINTENANCE SERVICES FOR A PARTICULAR PURPOSE. CUSTOMER AGREES THAT SUNBIRD WILL NOT BE LIABLE FOR EXEMPLARY, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, WHICH ARISE DIRECTLY OR INDIRECTLY OUT OF THE PURCHASE, SALE, USE OF AND/OR INABILITY TO USE THE MAINTENANCE SERVICES WHETHER SUCH DAMAGES ARE BASED UPON CONTRACT, TORT, INTENTIONAL CONDUCT, EQUITY OR PURSUANT TO SOME OTHER THEORY, INCLUDING, WITHOUT LIMITATION, BREACH OF WARRANTY, NEGLIGENCE OR STRICT LIABILITY, WHETHER THE POSSIBILITY OF SUCH DAMAGES WAS MADE KNOWN TO OR WAS FORESEEABLE BY SUNBIRD AND WHETHER SUCH DAMAGES ARE ASSERTED BY CUSTOMER OR SOME OTHER PARTY .

3.3. CUSTOMER FURTHER ACKNOWLEDGES THAT SUNBIRD' MAXIMUM AGGREGATE LIABILITY TO CUSTOMER UNDER ANY LEGAL THEORY (INCLUDING ITS OWN NEGLIGENCE) FOR DAMAGES ARISING DIRECTLY OR INDIRECTLY OUT OF THE PURCHASE, SALE, USE OF AND/OR INABILITY TO USE THE MAINTENANCE SERVICES WILL NOT IN ANY EVENT EXCEED THE LESSER OF (a) THE ACTUAL DAMAGES SUFFERED BY CUSTOMER OR (b) AN AMOUNT EQUAL TO TWO (2) TIMES THE MAINTENANCE FEE PAID BY CUSTOMER TO SUNBIRD WITH RESPECT TO THE ANNUAL PERIOD DURING WHICH THE APPLICABLE CLAIM FOR DAMAGES FIRST ACCRUED .

3.4. CUSTOMER ACKNOWLEDGES THAT THE PRICING OF THE MAINTENANCE SERVICES REFLECTS THE INTENT OF THE PARTIES TO LIMIT SUNBIRD' LIABILITY AS PROVIDED HEREIN. THE LIMITATIONS OF LIABILITY SET FORTH HEREIN ARE INTENDED TO LIMIT SUNBIRD'S LIABILITY AND WILL APPLY NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. ANY ACTION, CLAIM OR PROCEEDING RELATING TO THIS AGREEMENT AND/OR THE MAINTENANCE SERVICES OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, MUST BE BROUGHT WITHIN TWELVE (12) MONTHS FOLLOWING THE ACTION OR EVENT GIVING RISE TO SUCH ACTION, CLAIM OR PROCEEDING .

4. TERM AND TERMINATION

4.1. **Term.** Maintenance Services provided under this Software Agreement shall run from the date of registration of this Software for the term in years ordered by the Customer.

4.2. **Early Termination.**

4.2.1. Notwithstanding the foregoing, this Agreement may be terminated as follows:

- 4.2.1.1. at any time upon mutual written agreement of the parties;
 - 4.2.1.2. by either party (the “notifying party”) by written notice to the other party (the “notified party”) if the notified party (a) breaches a material obligation of the notified party under this Agreement and such breach continues uncorrected for a period of thirty (30) days after notice in writing thereof to the notified party,
 - 4.2.1.3. by either party (the “notifying party”) by written notice to the other party (the “notified party”) if the notified party becomes insolvent or is adjudged as bankrupt; makes an assignment for the benefit of creditors; has a receiver appointed for all or a material portion of its property, assets and/or business; or files a voluntary petition of bankruptcy; or
- 4.2.2. In addition, if Customer is acquired by, merged into, or consolidated with another corporation or organization or sells, transfers, or leases all or a substantial portion of its assets or stock (including any software) to another corporation or other organization which is a direct competitor of Sunbird, Sunbird reserves the right to consider such event as a material and incurable breach of this Agreement and proceed to termination under this Section 4.2. A direct competitor of Sunbird is any entity that markets, sells or develops a product substantially similar to any software of Sunbird.
- 4.2.3. Effect of Early Termination. Upon termination or expiration of this Agreement Customer shall pay any and all undisputed sums then owing to Sunbird hereunder within ten (10) business days from the effective date of termination. Upon termination of this Agreement, Customer shall not be entitled to any refund of any payments made by Customer unless explicitly provided for herein.

5. MISCELLANEOUS

5.1. Entirety of Agreement.

5.1.1. This Software Agreement includes these Terms & Conditions, as well the terms in any acknowledging e-mail if used to deliver the Software Maintenance Services Identification Number for this Services Agreement. In case of conflict, the terms of these Terms & Conditions will prevail.

5.1.2. This Software Agreement represents the parties' entire agreement with respect to the subject matter of this Agreement and supersedes and replaces any prior agreement or understanding with respect to that subject matter. All prior and all

oral representations, warranties and covenants with respect to the subject matter of this Agreement will be deemed to have been merged into and superseded by this Agreement. This Agreement may not be amended or supplemented except pursuant to a written instrument signed by the party against whom such amendment or supplement is to be enforced. This Agreement will prevail over any additional, conflicting or inconsistent terms and conditions which may appear on any purchase order, confirmation or other similar document sent or delivered by a party to this Agreement.

- 5.2. Survival. The respective rights and obligations of Sunbird and Customer under the provisions of Sections 3, 4 and 5 shall survive termination of this Agreement.
- 5.3. Governing Law/Arbitration. The laws of the State of New Jersey, excluding its choice of law provisions, will govern the formation, interpretation, and performance of this Agreement. Customer agrees to submit any dispute, claim or controversy that may arise out of the rendering of Services or providing of Materials as set forth in this Agreement to arbitration by a single arbitrator in New Jersey, in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. Judgment upon the arbitration award shall be final, binding and conclusive and may be entered in any court having jurisdiction. Nothing contained herein will be deemed to be a waiver of any right that may exist to remove an action filed in state court to federal court.
- 5.4. Notices. All notices, demands, requests or other communications that may be or are required to be given, served or sent by either party to the other party pursuant to this Agreement will be in writing and will be mailed by first class, registered or certified mail, return receipt requested, postage prepaid, sent by a reputable, national, overnight courier service (with a requirement for receipt of delivery) or transmitted by hand delivery, telegram or facsimile transmission addressed to the parties at their principal office. Either party may designate by written notice a new address to which any notice, demand, request or communication may thereafter be given, served or sent. Each notice, demand, request or communication that is mailed, delivered or transmitted in the manner described above will be deemed sufficiently given, served, sent and received for all purposes at such time as it is delivered to the addressee with the return receipt, the delivery receipt, the affidavit of messenger or (with respect to a facsimile transmission) the answer back being deemed conclusive evidence of such delivery or at such time as delivery is refused by the addressee upon presentation .
- 5.5. Severability. The parties acknowledge that if any provision of this Agreement is determined to be invalid or unenforceable, it is their desire and intention that such

provision be reformed and construed in such manner that it will, to the maximum extent practicable, be deemed to be valid and enforceable. Accordingly, in lieu of such invalid or unenforceable provision, there will be added automatically as a part of this Agreement a provision as similar in its terms to such invalid or unenforceable provision as may be possible and be valid and enforceable.

- 5.6. Third Party Beneficiaries. Except as expressly set forth or referred to in this Agreement, nothing in this Agreement is intended or will be construed to confer upon or give to any party other than the parties to this Agreement and their successors and permitted assigns, if any, any rights or remedies under or by reason of this Agreement .
- 5.7. No Waiver. No failure or delay in exercising any right hereunder will operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or further exercise or the exercise of any other right .
- 5.8. Force Majeure. Neither party to this Agreement shall be liable to the other for any delay or failure by such party to perform its obligations (excluding obligations to pay money) under this Agreement if such delay or failure arises from any cause or causes beyond the reasonable control of such party, including, without limitation, labor disputes, strikes, acts of God, floods, lightning, shortages of materials, rationing, utility or communication failures, earthquakes, casualty, war, acts of the public enemy, riots, insurrections, embargoes, blockades or regulations or orders of governmental authorities. If a party to this Agreement shall be delayed or prevented from performing such party's obligations pursuant to this Agreement due to any cause beyond such party's reasonable control, such delay shall be excused during the continuance of such delay and the period of performance shall be extended to the extent necessary to enable such party to perform its obligations after the cause of such delay has been removed; provided, however, if such performance is delayed for thirty (30) or more days, the party entitled to the benefit of such performance may elect to terminate this Agreement .
- 5.9. Assignment. Customer may transfer or assign its rights under this Agreement but only with the advance written consent of Sunbird, which shall not be unreasonably withheld. As a condition precedent to any such assignment or transfer (a) the assignee/transferee must agree in writing to comply with all of the obligations of Customer under this Agreement, (b) Sunbird must be given a copy of the assignee/transferee's written undertaking to comply with all of the obligations of Customer under this Agreement, and (c) all maintenance transfer fees, if any, must be paid to Sunbird.