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- x. *"Software Updates"* means a revision to a component of Licensed Software that includes updates, bug fixes, corrections, patches and revisions containing enhancements and modifications to the Licensed Software that is reflected by a new version number to the right of the decimal point (e.g., from version 1.6 to 1.7) . Software Updates are released from time to time in PredictionProbe's discretion.
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Terms not defined herein have the meanings given to them in the Order.

2. Licensee Systems, Evaluation License and Final Acceptance

- a. *Licensee Systems.* Licensee is responsible for ensuring that the Designated PCs, Designated LANs and Designated Locations stated in the Order meet the minimum requirements described in the Specifications. Licensee is responsible for its own hardware and related software, including upgrades, maintenance, warranty repairs, etc. used or needed to run the Licensed Software in accordance with the Specifications to analyze Licensee Data.
- b. *Evaluation License.* It is expected, but not required, that all Licensees will first take an Evaluation License for at least thirty days (as stated in the Order for Evaluation License) for the purpose of assessing the Licensed Software and Licensee's related requirements and objectives.
- c. *Installation.* Licensee will install the Licensed Software at the Designated Location(s) upon the Designated PCs and/or Designated LANs in accordance with the Specifications and at its own expense.
- d. *Final Acceptance.* Following the later of the end of the applicable Evaluation License term, or immediately after receipt of Licensed Software, Licensee will have ten days to test the Licensed Software for final acceptance against the Specifications. ("Final Acceptance").
- e. *License or Return.* At the end of the ten-day Final Acceptance period, unless Licensee rejects the Licensed Software and returns it, all Security Keys, and all Confidential Information to PredictionProbe at Licensee's risk and expense, Licensee will be deemed to have finally accepted the Licensed Software for the term stated in the Order and is limited to warranty or Software Maintenance (defined below) remedies thereafter.
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- b. *New Releases.* New Releases will be offered to Licensee on the same terms and at the same time offered to all licensees of the Licensed Software. New Releases will require an additional license fee determined at the time of the New Release at the absolute and sole discretion of PredictionProbe. New Releases may be provided or made available by PredictionProbe at such times as determined by PredictionProbe in its discretion. In the absence of a separate licensing agreement for the New Release, this Agreement, including its limitations and obligations imposed upon the Licensee, will be applicable to any New Releases submitted or distributed to Licensee. All New Releases become part of the Licensed Software.
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- e. *Payment Terms.* Payment terms are as stated in the Order or any subsequent Order, subject to PredictionProbe's continuing credit approval. Past due uncontested amounts will bear interest of one and one-half percent per month from the due date or the highest rate permitted by law if less.
- f. *Non-refundable.* All payments made hereunder are non-refundable except as specifically provided otherwise in this Agreement.

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 - i. If Licensee needs to permit access to Confidential Information by any Contract User, Licensee covenants that (a) Licensee is responsible for that individual's and/or entity's compliance with this subsection and (b) access will be conditioned upon all such individuals and entities agreeing in writing only to perform services for Licensee and to be bound by this Agreement.
- b. Licensee agrees that a breach of its confidentiality obligations will cause immediate and irreparable monetary damage to PredictionProbe and will entitle PredictionProbe to seek injunctive relief in addition to all other remedies.
- c. *Notification.* Licensee will immediately notify PredictionProbe upon discovery of any loss or unauthorized disclosure of Confidential Information.

9. Limited Warranty, Warranty Exclusions and Disclaimers, Exclusive Remedies, Limitation of Liability, and Limitation of Damages

- a. *Limited Warranty.* PredictionProbe warrants to Licensee only, and not to Licensee's customers, clients or to third parties, that for a period of ninety days following Final Acceptance (the "Limited Warranty Period"), the Licensed Software provided under an Annual License or a Perpetual License will perform substantially in accordance with the Specifications in effect at Final Acceptance under normal operating conditions. PredictionProbe does not warrant that the Licensed Software will operate uninterrupted or error free. Technical Support is included in the Limited Warranty during the Limited Warranty period.
 - i. The media containing the Licensed Software programs is warranted for a period of ninety days after Licensee's receipt of same. Licensee's sole and exclusive remedy, and PredictionProbe's sole responsibility, is to replace the media.
- b. *Warranty Exclusions and Disclaimers.*
 - i. Notwithstanding anything to the contrary in this Agreement, PredictionProbe does not warrant Software provided under Academic Licenses, Demo Licenses, Development Licenses, Evaluation Licenses, Marketing Licenses, or any licenses granted without a License Fee.
 - ii. PredictionProbe will not provide any warranty for the Licensed Software on any operating system not included in the Specifications.
 - iii. PredictionProbe will not provide any warranty if the Licensee is in material uncured breach of any part of this Agreement.
 - iv. Licensee is solely responsible for Licensee's Data and Licensee's decisions and actions taken before, during or following use of the Licensed Software. The Licensed Software cannot be tested in advance in every possible operating combination and environment; and was not written for Licensee's specific requirements. PredictionProbe expects Licensee to use the Licensed Software and Licensee Data in conjunction with other analyses, software and information available to Licensee to consider or make decisions.
 - v. Licensee acknowledges and agrees that PredictionProbe does not warrant the accuracy or the applicability of the Licensed Data or other results obtained from the use of the Licensed Software or the related documentations. Licensee is responsible for identifying all factors to take into account before acting with respect to Licensee Data.

- vi. PredictionProbe has no responsibility for problems in the Licensed Software or Licensee Data that are caused by unauthorized modifications or changes by Licensee, or by a third party (including but not limited to "hackers" and harmful codes or viruses), arising out of the malfunction of Licensee's System, or that are caused by third party hardware or software not part of the Licensed Software. The warranties provided in this section will only apply to the most current version or release of the Licensed Software provided to Licensee and no warranty, either implied or express, is provided for any software which is not the most current version of such software.
 - vii. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, PREDICTIONPROBE DISCLAIMS ANY AND ALL WARRANTIES, CONDITIONS, OR REPRESENTATIONS, WHETHER EXPRESS OR IMPLIED, FOR MERCHANTABILITY, OR FITNESS OR SUITABILITY FOR ANY PARTICULAR PURPOSE, OR ANY ACCESSIBILITY STANDARDS, WHETHER ALLEGED TO ARISE BY LAW, BY REASON OF CUSTOM OR USAGE IN THE TRADE, OR BY COURSE OF DEALING.
- c. *Exclusive Remedies.* For any breach of warranties contained in Section 9 of this Agreement, Licensee's exclusive remedy is as follows:
- i. at PredictionProbe's option to: (a) provide suggestions to modify, correct, or work around existing procedures in order to resolve the problems, or (b) modify the Licensed Software to conform substantially to the Specifications; or (c) use commercially reasonable efforts to correct, at no charge, any material non-conformances in the Licensed Software of which PredictionProbe receives written notification during the Warranty Period.
 - ii. In the event that PredictionProbe cannot resolve the problem within the Warranty Period, PredictionProbe will continue to work on it during the Maintenance Period provided that Maintenance Fees are paid or, in its discretion, will refund to Licensee the proportional value of the License Fees paid and terminate this Agreement.
- d. *Limitation of Liability.* PREDICTIONPROBE HAS NO LIABILITY FOR LICENSEE'S USE OF THE LICENSED SOFTWARE, LICENSEE DATA OR DECISIONS MADE BY LICENSEE OR AUTHORIZED USERS.
- e. *Limited Damages.* EXCEPT FOR THE SPECIFIC INDEMNIFICATION PROVISIONS CONTAINED IN THIS AGREEMENT BELOW, UNDER NO CIRCUMSTANCES WILL PREDICTIONPROBE BE LIABLE TO PAY LICENSEE OR ANY OTHER PARTY ANY DIRECT, INDIRECT, SPECIAL, PUNITIVE, CONSEQUENTIAL, EXEMPLARY OR INCIDENTAL DAMAGES OR FOR LOSSES OR INJURIES, INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS OR GOODWILL WHICH MAY OCCUR AS A RESULT OF PREDICTIONPROBE'S BREACH OF THIS AGREEMENT OR THE USE BY LICENSEE OF, OR INABILITY OF LICENSEE TO USE, THE LICENSED SOFTWARE WHETHER ARISING IN CONTRACT, TORT OR OTHERWISE, EVEN IF PREDICTIONPROBE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT WILL PREDICTIONPROBE BE LIABLE TO LICENSEE FOR A MONETARY AMOUNT GREATER THAN THE TOTAL AMOUNTS RECEIVED BY PREDICTIONPROBE IN CONNECTION WITH THE LICENSED SOFTWARE. THE LIMITATIONS SET FORTH IN THIS SECTION WILL APPLY EVEN IF ANY REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE.

10. Indemnities

- a. *Intellectual Property.* For all licenses other than Academic Licenses, Demo Licenses, Development Licenses, Evaluation Licenses, Marketing Licenses, or any licenses granted without a License Fee, PredictionProbe will indemnify, defend and hold Licensee harmless from and against any loss, cost, damage, liability, or expense (including reasonable legal fees) suffered or incurred by Licensee in connection with any U.S. patent, or any copyright or other intellectual property infringement claim by any third party with respect to the Licensed Software. This indemnity obligation will apply only to the extent that Licensee promptly notifies PredictionProbe after Licensee becomes aware of such claim, grants to PredictionProbe the authority to defend, compromise or settle the claim of infringement, and provides PredictionProbe any Licensee information relevant to such claim.
- b. *Exclusions.* PredictionProbe will have no liability for any claims of infringement that are based on (i) an unauthorized modification to the Licensed Software, (ii) the use of a prior or modified version or release if the infringement claim could have been avoided by the use of a current unmodified release of the Licensed Software, (iii) upon a use of the Licensed Software in a manner not contemplated by the Specifications, (iv) the combination of the Licensed Software with third party software, hardware or Licensee Data, (v) Licensee Data, or (vi) the use of Licensed Software by Licensee under an Academic License, Demo License, Development License, Evaluation License, Marketing License, or any license granted without a License Fee.
- c. *Remedies.* For all licenses other than Academic Licenses, Demo Licenses, Development Licenses, Evaluation Licenses, Marketing Licenses, or any licenses granted without a License Fee, PredictionProbe further agrees that if Licensee is prevented from using the Licensed Software due to an actual or claimed

PredictionProbe Standard Software License Terms and Conditions

infringement, then at PredictionProbe's option, PredictionProbe will promptly either: (i) procure for Licensee, at PredictionProbe's expense, the right to continue to use the Licensed Software; (ii) replace or modify the Licensed Software, at PredictionProbe's expense, so that the Licensed Software becomes non-infringing; or (iii) terminate the Agreement as it relates to the infringing Licensed Software and return Licensee's License Fees for the infringing Licensed Software in the event that neither (i) or (ii) are reasonably feasible.

- d. *Exclusive Remedy.* Subsections a, b and c of this Section constitute PredictionProbe's entire obligation to Licensee with respect to any claim of infringement.
- e. *By Licensee.* Licensee will defend, indemnify and hold PredictionProbe, its affiliates, employees, officers, directors and agents harmless from and against any and all claims, costs, liability and damages (including reasonable attorney's fees) arising directly or indirectly from Licensee's use or misuse of the Confidential Information including but not limited to the Licensed Software, or Licensee Data as well as Licensee's decisions and actions (or Licensee customer or client decisions and actions) taken or made with respect to Licensee Data.

11. Allocation of Risk

The parties agree that the sections on limited warranty, exclusive remedy, limited liability, warranty disclaimers, warranty exclusions and indemnification allocate certain risks between the parties. This allocation is reflected in the License Fees, Maintenance Fees, and charges in the Order and is an essential element of the basis of the bargain between the parties.

12. Limitation on Actions

Any dispute Licensee may have against PredictionProbe with respect to this Agreement must be brought within two years after the cause of action arises.

13. Term and Termination

- a. *Term.* The initial term of this Agreement is that period of time for each type of Software License, excluding a Perpetual License, commencing upon the Start Date and terminating upon the End Date, as specified in the Order (the "Initial Term"). A Perpetual License has a perpetual term provided that Licensee is not in material uncured breach of the Agreement. Technical Support begins with the Start Date if applicable Maintenance Fees are paid. An Annual License and Technical Support will automatically be renewed for successive one-year terms unless earlier terminated in accordance with the terms of this Agreement or by giving the other party not less than 90 days' prior written notice of termination.
- b. *Termination for Breach.* If either party materially breaches this Agreement, the other party may give written notice of its desire to terminate and the specific grounds for termination and, if such default is capable of cure and the party in default fails to cure the default within thirty days of the notice, the other party may terminate this Agreement. If such default is incapable of cure, the other party may terminate this Agreement immediately upon written notice of its desire to terminate.
- c. *Insolvency.* This Agreement may be terminated by either party on written notice to the other in the event of any assignment by the other party for the benefit of creditors, or if a receiver, trustee in bankruptcy or similar officer is appointed to take charge of a material portion of the other party's property or if the other party files a voluntary petition under federal bankruptcy laws or similar state statutes or such a petition is filed against the other party and is not dismissed within ninety days.
- d. *Other Remedies.* Termination of this Agreement, or any portion of it, will not limit either party from pursuing other remedies available to it, including injunctive relief. Such termination will not relieve Licensee of its obligation to pay all fees that have accrued or are otherwise owed by Licensee under the Order.
- e. *Destruction or Return of Licensed Software.* Upon termination, Licensee's license to use the Licensed Software will be immediately revoked, and the Licensed Software, Confidential Information, and Security Keys, and other supporting materials must be returned to PredictionProbe within ten days, with an affidavit supplied to PredictionProbe certifying complete return.
- f. *Survival.* Notwithstanding any termination or expiration of this Agreement, the following Sections will survive indefinitely: 3, 4, 8, 9, and 10. The termination or expiration of this Agreement will not relieve either party of any liability it may have to the other party arising out of acts or omissions occurring prior to such termination or expiration.

14. General

- a. *Notices.* All notices, demands, requests, consents, approvals or other communications (collectively, "Notices") required or permitted to be given hereunder or which are given with respect to this Agreement will

be in writing and may be personally served, by confirmed facsimile or by reputable overnight courier to the Administrator Contact named in the Order if for the Licensee, or to the representative of PredictionProbe named in the Order at the address shown therein, if for PredictionProbe, or such other address or person as either party will have specified most recently by written notice provided in accordance with this Section. Notice will be deemed given on the date of service if personally served or sent by confirmed facsimile. Notice mailed as provided herein will be deemed given on the next day if sent by overnight courier.

- b. *Counterparts.* This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which taken together will constitute but one and the same instrument.
- c. *Modifications and Amendments.* This Agreement may not be modified, amended, changed or supplemented, nor may any obligations hereunder be waived or extensions of time for performance granted, except as expressly provided in this Section. This Agreement may be modified only by a written amendment executed by duly authorized officers or representatives of PredictionProbe and Licensee. Any modifications to these Terms and Conditions must be specific, identifying this Agreement, the Order defined in this Agreement, the License Agreement Number defined in the Order, the provisions that are affected, and further expressly state its intent to either supersede, modify, or delete the provisions that are affected.
- d. *Licensee's Agent.* In the event that Licensee uses a third party as a middleman ("Licensee's Agent") to facilitate the Parties entering into this Agreement, Licensee acknowledges and agrees that Licensee's Agent is serving as its agent in connection with this Agreement, and not PredictionProbe's representative or agent. Licensee further agrees that Licensee will be responsible and liable to PredictionProbe in the event Licensee's Agent misappropriates or discloses the Licensed Software, License Keys, Security Keys, or any Confidential Information or takes any other action contrary to this Agreement while such License Keys, Security Keys or Confidential Information is in the custody or control of Licensee's Agent.
- e. *Waivers and Extensions.* No waiver of any breach of any agreement or provision herein contained will be deemed a waiver of any preceding or succeeding breach thereof or of any other agreement or provision herein contained. No extension of time for performance of any obligations or acts will be deemed an extension of the time for performance of any other obligations or acts.
- f. *Attorneys' Fees.* Should any party institute any action or proceeding to enforce this Agreement or any provision hereof, or for damages by reason of any alleged breach of this Agreement or of any provision hereof, or for a declaration of rights hereunder, the prevailing party in any such action or proceeding will be entitled to receive from the other party all reasonable costs and expenses, including, without limitation, attorneys' fees and disbursements, incurred by the prevailing party in connection with such action or proceeding.
- g. *Consents and Approvals.* Whenever the consent or approval of either party is provided for in this Agreement, such consent or approval will be given in writing to the requesting party.
- h. *Further Assurances.* Each party agrees to do such further acts and things and to execute and deliver such additional agreements and instruments as the other party may reasonably require to consummate, evidence or confirm the agreements contained herein in the manner contemplated hereby.
- i. *Entire Agreement.* The terms of this Agreement are intended by the parties as a final expression of their agreement with respect to its subject matter and may not be contradicted by evidence of any prior or contemporaneous agreement. No extrinsic evidence whatsoever may be introduced in any judicial or arbitration proceeding, if any, involving this Agreement. The terms and conditions contained herein will supersede any conflicting provisions contained in the Order. No purchase order, addendum, amendment or other document issued by Licensee, whether or not signed or acknowledged by PredictionProbe, and notwithstanding such purchase order's language providing that it takes precedence over any other agreement between the parties, will be effective to contradict, modify, delete from or add to any provisions of this Agreement in any manner whatsoever, unless such document is prepared pursuant to the Section 12c herein.
- j. *Independent Contractor.* Each party hereto is and at all times will be deemed to be an independent contractor and will be wholly responsible for the services performed by it under this Agreement. Nothing contained herein will be construed as creating the relationship of employer/employee or principal/agent. Each party hereto assumes full responsibility for the actions of its employees as related to the services provided under this Agreement. Neither party is a legal representative of the other party and neither may assume or create any obligation, representation, warranty or guarantee, express or implied, on behalf of the other party for any purpose whatsoever.
- k. *Governing Law and Jurisdiction.* This Agreement will be governed by and construed in accordance with the internal laws of the State of California without reference to the conflict of laws principles. Jurisdiction of any dispute arising out of this Agreement lies solely in the Superior Courts of the State of California, and proper venue lies in Orange County Superior Court.

PredictionProbe Standard Software License Terms and Conditions

- l. *Assignments and Successors.* Licensee cannot assign this Agreement to any third party without prior written consent of PredictionProbe. Any assignment without PredictionProbe's prior written consent is void. This Agreement is otherwise binding upon and inure to the benefit of the parties hereto and their respective successors and authorized assigns.
- m. *Severability.* If any provision of this Agreement will be deemed invalid by a court of competent jurisdiction, or by any arbitrator(s) so authorized to rule upon such issue, such provision will be ineffective only to the extent of such invalidity without invalidating the remainder of this Agreement.
- n. *No Third Party Beneficiaries.* This Agreement is personal to Licensee and no third party has any rights or claims against PredictionProbe by virtue of this Agreement.