

SOFTWARE ESCROW AGREEMENT TEMPLATE APRIL 2023 VERSION

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Agreement terms follow on page 2

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SaaS Single Beneficiary Software Escrow Agreement
[Agreement Number EL_____]

This Escrow Agreement (“Agreement”) is made on [INSERT DATE] by and among:

- 1) [Depositor Name, registered company number #####] located at [registered address] (“Depositor”),
- 2) [Beneficiary Name, registered company number #####] located at [registered address] (“Beneficiary”),
- 3) Escrow London LTD (registered number: 09997952) located at Level 5, 100 High Street, London, N14 6BN, United Kingdom (“Escrow London”)

Recitals:

- A. Depositor and Beneficiary have entered into a SaaS Agreement (the “SaaS Agreement”) pursuant to which Depositor has licensed the Beneficiary the rights to use a certain hosted software package and hosted Database.
- B. Continuous availability of such Product and the maintenance thereof are critical to Beneficiary in the conduct of its business.
- C. Beneficiary wishes to ensure that the build, maintenance and support of Product is available if Depositor fails to fulfill its obligations as set forth in the SaaS Agreement or if Depositor does not remain in business.
- E. Escrow London is in the business of providing third-party escrow protection by storing, retaining and allowing limited access to proprietary technology.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

1. DEFINITIONS

1.1. In this Agreement the following terms shall mean the following:

“Agreement” means this Agreement including all Schedules and Appendices.

“Beneficiary” means the organisation, company or individual listed under this Agreement that has been granted a license to use the Product.

“Business Day” means a day, other than a Saturday, Sunday or public holiday in England, on which clearing banks in the city of London are generally open for business.

“Data” means the Beneficiary data hosted within the Product Database.

“Databases” means the database hosting the Beneficiary’s Data.

“Default” means any acts of negligence or willful misconduct by Escrow London, its employees, agents or sub-contractors in connection with or in relation to the subject matter of this agreement in respect of which Escrow London is liable to the Depositor or the Beneficiary.

“Deposit Materials” means the proprietary technology including source codes, system images, deployment scripts, other materials and documentation required to build the Product.

“Electronic Upload” means an upload of data or Databases through the internet to a Virtual Server.

“File Integrity Test” means the tests performed by Escrow London on the Deposit Materials to ensure the Deposit Materials can be accessed.

“Intellectual Property” means any patents, copyrights, database rights, trademarks, confidential information, domain names and any other similar rights.

“Product” means the proprietary technology including any updates licensed to the Beneficiary as listed in Schedule 2.

“SaaS Agreement” means the agreement that entitles the Beneficiary to use the Product.

“Source Code” means the computer code that was used to program the Product.

“Third-Party” means an individual, organization or corporation that becomes an owner of the rights to the Intellectual Property in the Deposit Materials following an assignment of rights by the Depositor.

“Third-Party Codes” means the Source Code that is not Intellectual Property of the Depositor.

“Verification Test” means the tests performed by Escrow London on the Deposit Materials as agreed between the parties as described in Schedule 3.

“Virtual Server” means a virtualised server hosted within the infrastructure of a third-party cloud vendor.

2. DEPOSIT OF DEPOSIT MATERIALS

- 2.1. Promptly following the date hereof, and in any event within twenty (20) Business Days following the date hereof, Depositor shall submit to Escrow London a complete copy of the Deposit Materials by Electronic Upload.
- 2.2. The Depositor shall submit a further copy of the Deposit Materials following a new release of the Product and ensure that it contains the Source Code of the relevant version that has been updated.
- 2.3. The Depositor shall obtain any third-party rights, consents and permissions that are required in order for Escrow London to provide the services envisaged under this agreement and for the Beneficiary and Escrow London to exercise the rights granted to it under this Agreement.
- 2.4. For the initial deposit of Deposit Materials, the Depositor shall supply a deposit form including:
 - 2.4.1. Title name and version of Product.
 - 2.4.2. Password and/or Encryption keys to access the Deposit Materials and Database.
 - 2.4.3. Detailed documentation detailing the operating system, hardware, third-party software and software tools required for recompiling the Product.
 - 2.4.4. Names and contact details of personnel that maintain the knowledge of the Product development and structure.
- 2.5. The Depositor shall submit an updated deposit form in the event of;
 - 2.5.1. Any changes to the password and/or encryption keys required to access the Deposit Materials and Database.
 - 2.5.2. Any material changes to the documentation detailing the operating system, hardware, third-party software and software tools required for recompiling the Product.
 - 2.5.3. Any material changes to the names and contact details of personnel that maintain the knowledge of the Product development and structure.
- 2.6. In the event that the Depositor utilises the Electronic Upload service, on a scheduled basis as agreed upon by all the parties, the Depositor shall deposit with Escrow London a complete copy of the Source Code by Electronic Upload. It is the responsibility of the Depositor to provide and update Escrow London with a complete list of git or other version control system repository addresses active for the Source Code used in the Product licensed to the Beneficiary.
- 2.7. On a scheduled basis as agreed upon by all the parties, the Depositor shall replicate the encrypted Beneficiary Database to a Virtual Server maintained by Escrow London.
- 2.8. Depositor represents and warrants to Beneficiary and Escrow London that it has the right and authority to enter into this Agreement and grant to Escrow London and Beneficiary the rights as provided in this Agreement.
- 2.9. Depositor represents and warrants to Beneficiary that the Deposit Materials are sufficient to permit the build, use and support of the Product, as it may be modified and updated from time to time.
- 2.10. Depositor represents and warrants to Beneficiary and Escrow London that it owns the Intellectual Property rights in the Product.
- 2.11. If the Deposit Materials contain Third-Party Codes, the Depositor warrants that it has been granted the valid rights under a license agreement with the owner of the Third-Party Codes. The Depositor must supply written authorisation by the Third-Party Codes owner consenting to the deposit of the Third-Party Codes under this Agreement. In the event of a release of the Deposit Material, the Beneficiary shall be responsible to obtain the necessary licenses from the third-party to utilise the Third-Party Codes.
- 2.12. If the Deposit Material contains third-party object code, the Depositor warrants that it has full authority from the owner of the third-party object code to make such a deposit.
- 2.13. Escrow London shall have no obligation to Depositor or Beneficiary with respect to the preparation, accuracy, execution or submission to it (including delivery of a public network) of the Deposit Materials.
- 2.14. The Depositor grants Escrow London the rights to upload the Data, Deposit Materials and Databases onto a Virtual Server to perform Verification Tests and File Integrity Tests.
- 2.15. Escrow London shall perform Verification Tests of the Deposit Materials according to additional services ordered by Depositor or Beneficiary to verify the existence and legibility of the Deposit Materials as detailed in the Escrow London deposit form. Escrow London will invoice the party that ordered the Verification Test services according to the fees in Schedule 1.
- 2.16. If Escrow London is not satisfied that the deposit is complete and accurate, Escrow London will send a notice to the Depositor to make a new deposit within thirty (30) days to ensure that it complies with its obligations under this Agreement.
- 2.17. If a Verification Test is performed, Escrow London will provide a report to the Depositor and Beneficiary following the Verification Test. The purpose, obligations and limitations of the Verification Test are further

set out in Schedule 3 (e.g., Escrow London is not responsible on advising the Beneficiary of the suitability of the Deposit Materials to the Beneficiary's business).

- 2.18. It is hereby agreed by the Depositor and Beneficiary that the File Integrity Test does not warrant the usability of the Deposit Materials and Product and does not warrant that the Deposit Materials and Product are accurate and complete.
- 2.19. Notwithstanding any other provisions of this Agreement, Escrow London shall be free to appoint subcontractors for part, but not all, of the delivery of this Agreement. Escrow London shall at all times remain liable for the acts and omissions of any subcontractor appointed and used in the course of this Agreement.

3. STORAGE AND SECURITY

- 3.1. Escrow London shall act as custodian of the Deposit Materials and Databases until the escrow is terminated pursuant to Section 8 of this Agreement.
- 3.2. Subject to Section 5.6 below, Depositor shall remain at all times the sole owner of the Deposit Materials and Databases deposited with Escrow London pursuant to this Agreement and shall retain all rights and interests attached thereto.
- 3.3. Except as provided in this Agreement, Escrow London agrees that:
 - 3.3.1. It shall not divulge, disclose or otherwise make available the Deposit Materials and Databases to any parties other than Depositor, or make any use whatsoever of the Deposit Materials and Databases;
 - 3.3.2. It shall not permit any person access to the Deposit Materials and Databases, except as may be necessary for Escrow London's authorised representatives to perform its functions under this Agreement; and
 - 3.3.3. Access to the Deposit Materials and Databases by Depositor shall be granted by Escrow London only to those persons duly authorised in writing by an officer of Depositor.

4. EVENTS OF DEFAULT

- 4.1. The occurrence of any of the following shall constitute an "Event of Default" for purposes of this Agreement:
 - 4.1.1. Depositor's material failure to support the Product in accordance with the SaaS Agreement and failed to cure such material failure within 10 Business Days of Beneficiary's written notice to Depositor of such material failure;
 - 4.1.2. Depositor becomes unable to pay its debts or is deemed to be unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;
 - 4.1.3. Depositor applies for or consents to the appointment of a trustee, receiver or other custodian for Depositor, or makes a general assignment for the benefit of its creditors;
 - 4.1.4. Any bankruptcy, reorganisation, debt arrangement, or other case or proceeding under any bankruptcy or insolvency law, or any dissolution or liquidation proceedings commenced by or against Depositor, and if such case or proceeding is not commenced by Depositor if it is acquiesced in or remains undismissed for sixty (60) days;
 - 4.1.5. Depositor ceases active operation of its business or discontinues the licensing or maintenance of the Deposit Materials in material breach of the SaaS Agreement; or
 - 4.1.6. Depositor assigns its Intellectual Property rights to the Product to a "Third-Party" and within sixty (60) days, the Third-Party does not agree to offer the Beneficiary substantially similar protection to that provided by this Agreement without significantly increasing the cost to the Beneficiary.

5. RELEASE OF DEPOSIT MATERIALS

- 5.1. Upon the occurrence of any Event of Default (as defined in Section 4.1), an officer of Beneficiary must notify Escrow London by sending a declaration as to such Event of Default (a "Notice"). The Notice must include a list of circumstances of the Event of Default and should include any supporting facts. Escrow London shall send a copy of the Notice to the Depositor by email.
- 5.2. Unless Escrow London receives Contrary Instructions (as defined below) by an officer of Depositor within 10 Business Days after sending the Notice, the Deposit Materials and Databases then in escrow shall be made available to the Beneficiary by Escrow London within the next 10 Business Days following the end of such ten-day period.
- 5.3. "Contrary Instructions" for the purposes of this Agreement means a certificate executed by an officer of Depositor stating that the Events of Default specified in the Notice have not occurred or have been cured prior to the applicable period. This certificate must be sent to Escrow London by email.

- 5.4. Upon receipt of such Contrary Instructions, Escrow London shall send a copy of the Contrary Instructions to the Beneficiary and shall not release the Deposit Materials and Databases then in escrow but shall continue to store the Deposit Materials and Databases until otherwise directed in writing by Depositor and Beneficiary jointly or until resolution of the dispute pursuant to Section 6 of this Agreement.
- 5.5. Escrow London shall be entitled to receive payment of costs, fees and expenses due to it, prior, and as a condition precedent, to release of the Deposit Materials and Databases.
- 5.6. Unless otherwise provided in the SaaS Agreement, upon release of the Deposit Materials and Databases in accordance with this Agreement, Beneficiary shall have the right to, and Depositor hereby grants the Beneficiary a worldwide, royalty-free, irrevocable, freely sublicensable, non-exclusive license to, use the Deposit Materials and Databases for the sole purpose of continuing the benefits afforded to Beneficiary pursuant to the SaaS Agreement. The Beneficiary shall be obligated to maintain the confidentiality of the released Deposit Materials and Databases.

6. DISPUTE RESOLUTION

- 6.1. A dispute resolution may be requested within ten (10) Business Days of receipt of any Contrary Instructions. If Escrow London receives a call for dispute resolution by any of the parties pursuant to section 5 hereof, Escrow London shall appoint an independent arbitrator in London, England.
- 6.2. The parties shall submit all their claims including supporting documents in writing to the arbitrator within 10 Business Days following delivery of the request for dispute resolution. The sole question to be determined by the arbitrator shall be whether or not there existed an Event of Default at the time that the Contrary Instructions were delivered under Section 5. The decision by the arbitrator will be established on the written documentation submitted by all the parties without the requirement for a hearing.
- 6.3. Notwithstanding the applicable rules or arbitration, all arbitration awards shall be in writing and shall set forth in detail the findings of fact and conclusions of law of the arbitrator. The decision of the arbitrator shall be final and binding upon the parties and enforceable in any court of competent jurisdiction. The arbitrator shall immediately deliver a copy of such decision to Depositor, Beneficiary and Escrow London.
- 6.4. If the arbitrator finds that the Notice was properly given by the Beneficiary and that an Event of Default existed at the date Depositor had delivered the Contrary Instructions, Escrow London shall promptly make the Deposit Materials and the Databases available to the Beneficiary.
- 6.5. All fees and expenses charged by the arbitrator in the arbitration shall be paid by the non-prevailing party in the arbitration. Each party shall bear the cost of its own counsel's fees and expenses in connection with any arbitration or judicial proceeding brought hereunder.

7. INDEMNIFICATION; LIABILITY

- 7.1. Depositor in the case of sections 7.1.1 and 7.1.2 and Beneficiary in the case of sections 7.1.3 and 7.1.4 hereby indemnify, and shall keep indemnified, and hold Escrow London (and any of its officers, employees and agents) harmless from and against any and all damages, losses, costs, and any other liabilities or expenses or whatsoever kind, all whether direct or indirect and either awarded against, or agreed to be paid by, Escrow London (including reasonable attorneys' fees and expenses) ("Damages") that are suffered or incurred by Escrow London or to which it may otherwise become subject as result of:
 - 7.1.1. Escrow London becoming involved in, or required to be involved in, any form of dispute resolution proceedings or litigation arising out of or in relation to any matter between the Beneficiary and Depositor in relation to the subject matter of this Agreement or the SaaS Agreement; and
 - 7.1.2. any claim by any third-party for actual or alleged infringement of Intellectual Property rights in the Deposit Materials or Databases, including as a result of Escrow London conducting itself in accordance with the terms of this Agreement.
 - 7.1.3. Beneficiary requiring Escrow London to become involved in any form of dispute resolution proceedings or litigation arising out of or in relation to any matter between the Beneficiary and Depositor in relation to the subject matter of this Agreement or the SaaS Agreement; and
 - 7.1.4. any claim by any third-party against Escrow London for actual or alleged infringement of Intellectual Property rights in the Deposit Materials or Databases as a result of Escrow London releasing the Deposit Materials or Databases in accordance with Section 5 of this Agreement ("Third-Party Claim") where (i) an Event of Default referred to in section 4.1.1 to 4.1.6 has occurred and (ii) Beneficiary requested or confirmed that Escrow London release the Deposit Materials and Databases in accordance with Section 5 of this Agreement notwithstanding that Beneficiary had been notified in writing by Escrow London of the Third-Party Claim. (collectively, "Claims").

- 7.2. Nothing in this Agreement excludes or limits the liability of any party for fraud, fraudulent misrepresentation, death or personal injury caused by its negligence.
- 7.3. The total aggregate liability of Escrow London for loss in respect of Defaults, whether arising in contract, tort (including negligence) or otherwise howsoever (other than those governed by clauses 7.2) shall in no event exceed £2,000,000 (Two Million Pounds).
- 7.4. Subject always to Clause 7.2, to the extent any loss or liability incurred by Escrow London is not as a result of a Default (which are governed solely by Clauses 7.3 and 7.5) but as a result of any other event or cause, whether arising in contract, tort, or otherwise howsoever, Escrow London's total aggregate liability shall be limited to an amount equal to the fees paid to it under this Agreement in the twelve (12) months prior to the event giving rise to the claim.
- 7.5. In no event shall Escrow London be liable in contract, tort (including negligence), breach of statutory duty or otherwise howsoever for:
 - 7.5.1. any loss of profit, loss of business, loss of goodwill, loss of contracts, loss of revenues or loss of anticipated savings; or
 - 7.5.2. any increased costs or expenses; or
 - 7.5.3. loss of, damage to or corruption of data; or
 - 7.5.4. any special, indirect or consequential loss or damage of any nature whatsoever, whatever the cause thereof, arising out of or in connection with the Agreement.
- 7.6. Escrow London shall incur no liability for or in respect of any action taken or omitted to be taken or anything suffered by it in reliance upon, any notice, direction, consent, certificate, affidavit, statement or other paper or document reasonably believed by Escrow London to be genuine and to have been presented or signed by the proper party or parties or a representative thereof.
- 7.7. Escrow London shall not at any time be under any duty or responsibility to make a determination of any facts contained in any certificate delivered pursuant hereto or to make any independent verification of the statements or signatures in such certificate or amounts delivered thereby. Escrow London shall not be responsible for any failure by Depositor or Beneficiary to comply with any of their respective covenants contained in this Agreement, the SaaS Agreement or any other agreement.
- 7.8. Escrow London shall be under no duty or obligation to take any legal action in connection with this Agreement or to enforce, through the institution of legal proceedings or otherwise, any of its rights as escrow agent hereunder or any rights of any other party hereto pursuant to this Agreement or any other agreement, nor shall it be required to defend any action or legal proceeding which, in its opinion, would or might involve Escrow London in any cost, expense, loss or liability.
- 7.9. Escrow London (and its affiliates for that matter) may engage or be interested in any financial or other transaction with the parties hereunder as freely as if it were not escrow agent hereunder, other than with respect to any and all matters pertinent hereto.
- 7.10. Depositor and Beneficiary hereby authorise Escrow London, if Escrow London is threatened with litigation or is sued, to interplead all interested parties in any court of competent jurisdiction and to deposit the Deposit Materials and Databases with the clerk of that court.

8. TERMINATION

- 8.1. Unless earlier terminated as set forth below, the term of this Agreement shall commence on the date hereof for a period of one year and shall automatically renew from year-to-year.
- 8.2. If any party fails to pay an outstanding invoice issued for services under this Agreement. Escrow London will provide that party with written notice providing an additional thirty (30) days to pay that invoice.
- 8.3. In the event that the Beneficiary fails to pay the outstanding invoice following the notice period, Escrow London shall have the right to immediately terminate the Agreement by giving notice in writing.
- 8.4. In the event that the Depositor fails to pay the outstanding invoice following the notice period, Escrow London shall provide the Beneficiary the option of paying the due fees of the Depositor within thirty (30) days.
- 8.5. In the event that the Beneficiary fails to pay the outstanding invoice of the Depositor following the notice period, Escrow London shall be entitled to cancel the Agreement by providing immediate notice in writing to all the parties.
- 8.6. The Beneficiary may terminate this Agreement at any time by providing thirty (30) days' notice in writing.
- 8.7. Escrow London may terminate this Agreement (for whatever reason) by providing sixty (60) days written notice to Depositor, and Beneficiary.
- 8.8. In the event that the SaaS Agreement has been terminated, the Beneficiary or the Depositor must notify Escrow London in writing to terminate the rights of the Beneficiary under this Agreement. Upon receipt of

such notice, Escrow London will notify the other party of the intention to terminate the rights of the Beneficiary under this Agreement. If within thirty (30) days, Escrow London does not receive a notice disputing the termination of the Agreement, then it will be deemed that the other party consented to the termination and the rights of the Beneficiary under this Agreement will be immediately terminated. If Depositor or Beneficiary disputes the termination of the SaaS Agreement, this Agreement will continue in full force.

- 8.9. In the event that the Depositor elects to terminate this Agreement, they must provide sixty (60) days written notice to Escrow London after receiving confirmation in writing from the Beneficiary.
- 8.10. Following the termination of this Agreement, Escrow London shall then have the option, without further notice to Depositor or Beneficiary, to delete or destroy all Deposit Materials and Databases then in escrow (and this provision shall take precedence over any other obligation of Escrow London to store or hold the Deposit Materials and Databases as set out herein).
- 8.11. At the time of Termination, all parties will be liable in full for their part of unpaid fees due to Escrow London.
- 8.12. The provisions of Sections 1, 5 through 13 shall survive the termination or expiration of this Agreement.

9. FEES

- 9.1. In consideration of performing its function as escrow agent hereunder, Escrow London shall be compensated by both parties in accordance with Schedule 1 attached hereto.
- 9.2. The fees listed in Schedule 1 for services ordered shall be invoiced (together with VAT if applicable) and shall be payable upon the date of execution of this Agreement and upon each subsequent anniversary thereof. Invoices are payable by the paying party/parties within thirty (30) days from the date of invoice. Verification Tests ordered shall be booked and performed within twelve (12) calendar months from the execution date of this Agreement and annual Verification Tests shall be booked and performed within twelve (12) calendar months upon the execution date of this Agreement and each subsequent anniversary thereof.
- 9.3. Increase in Consumer Price Index. If during the term of the Agreement there is an increase in the Consumer Price Index as published by the National Office for Statistics over the Consumer Price Index reported for the month in which the Agreement was signed, Escrow London may increase the fees by the same percentage as the increase in the Consumer Price Index; provided that Escrow London does not increase the fees under this subsection more often than once per twelve (12) months. Escrow London will provide at least sixty (60) days advance written notice of the increase.
- 9.4. After the initial twelve (12) month term, the fees may be amended by Escrow London from time to time by giving written notice to both parties of at least sixty (60) days prior to any increase in its fees.

10. FORCE MAJEURE

- 10.1. No party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances the time for performance shall be extended by a period equivalent to the period during which performance of the obligation has been delayed or failed to be performed. If the period of delay or non-performance continues for three (3) months, the parties not affected may terminate this agreement by giving seven (7) days' written notice to the affected party.

11. DATA PROTECTION AND DATA PROCESSING

- 11.1. The parties shall process each other's data in accordance with Schedule 4.

12. NOTICES

- 12.1. All notices or other communications provided for by this Agreement shall be made in writing and shall be deemed properly delivered 48 hours after having been sent by email to the email addresses set forth below or to such other email address as any party may designate from time to time by notice, provided, however, that notice of change of email address shall be effective only upon actual receipt.

13. MISCELLANEOUS

- 13.1. This Agreement, including the Schedules hereto, constitutes the entire agreement among the parties regarding the subject matter hereof and supersedes all previous agreements, either oral or written, between the parties. For the avoidance of doubt, where there is any existing contract that sets out any obligation of confidentiality on Escrow London, the parties expressly confirm and acknowledge that the performance by Escrow London of its obligations under this Agreement (including the disclosure of the Deposit Materials) shall not constitute a breach of that earlier agreement.

- 13.2. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.
- 13.3. If any of the provisions of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, the remaining provisions of this Agreement will remain in full force and effect.
- 13.4. The section headings in this Agreement do not form a part of it, but are for convenience only and shall not limit or affect the meaning of the provisions.
- 13.5. This Agreement may not be amended, modified, altered or supplemented other than by means of a written instrument duly executed and delivered on behalf of all parties hereto.
- 13.6. This Agreement shall be exclusively governed by and construed in accordance with English Law without regard to the provisions regarding conflicts of law. Except as provided in Section 6, any dispute arising under or in relation to this Agreement shall be resolved exclusively by the courts of England, and the parties hereto irrevocably submit to the jurisdiction of such courts for such purposes.