

SUBSCRIPTION LICENSE AGREEMENT

THIS SUBSCRIPTION LICENSE AGREEMENT ("Agreement") between Xosphere, Inc. ("Xosphere"), a Delaware corporation and _____ ("Customer") is effective as of _____, 20__ ("Effective Date") and governs the terms under which Xosphere provides software ("Software") to Customer. Each Order Form ("Order Form") executed by the parties and appended hereto will become incorporated by reference as of its effective date.

1. DEFINITIONS

1.1 "Documentation" means any manuals, guides, documentation and other supporting materials related to the Software that Xosphere makes generally available to its customers.

1.2 "License Key" means a data file utilized by the Software's access control mechanism that allows Customer to use the Software for a certain number of Nodes within a certain time period.

1.3 "Node" means virtual server instance (for example an Amazon Web Services EC2 instance).

1.4 "Support" means support services being purchased from Xosphere in connection with Customer's license of the Software. The Support purchased will be either "Basic Support" or "Premier Support" as indicated on the applicable Order Form and as described in Xosphere's Support Policy.

2. SOFTWARE, SUPPORT, AND ORDER FORMS

Software and Support will be provided to Customer only in accordance with a fully-executed Order Form. Each Order Form will be numbered sequentially as a schedule to this Agreement. Each Order Form will set forth the starting date ("Order Effective Date") and time period ("Subscription Term") for the licensing of the Software and/or access to Support. If no time period is set forth on the Order Form, the Subscription Term will be one (1) year from the Order Effective Date.

3. PRICE AND PAYMENT

3.1 **Price.** Customer will pay Xosphere the price for the Software and Support to be purchased as listed on the Order Form.

3.2 **Payments.** Customer will pay to Xosphere all amounts required under Section 3.1 within thirty (30) days after receipt of Xosphere's invoice therefor. For subscription services, invoices will be issued in advance of service. For any amount that is not paid when due Xosphere reserves the right to charge a late payment fee of the lower of 1.5% per month or the maximum rate permitted by applicable law from the due date until paid. All payments must be made in U.S. dollars.

4. LICENSE GRANT

Subject to Customer's compliance with the terms of this Agreement (including payment of all applicable Fees), Xosphere hereby grants Customer a non-exclusive, non-transferable, worldwide, royalty-free, limited-term license to install, execute, and use the Software for internal business purposes during the Subscription Term, in accordance with the Documentation, and solely for the number of Nodes indicated on the Order Form.

Customer's agents and contractors can use the Software too, so long as they are using it on Customer's behalf, and provided that: (i) Customer agrees to be fully responsible for their behavior under this Agreement; and (ii) Customer does not collectively exceed the Node restrictions set forth in the Order Form. Customer agrees that the Software may transmit data to Xosphere via the Internet regarding Customer's use of the Software, and Customer gives Xosphere permission to use such data to assist in providing Support to Customer and to ensure that Customer is complying with the parameters of the license(s) purchased under the applicable Order Form.

5. RESTRICTIONS

Except with respect to the OSS Components (as defined below) described below, Xosphere owns all right, title and interest in and to the Software, and any intellectual property rights associated with it and with Xosphere. We reserve all rights in and to the Software that we do not expressly grant Customer in this Agreement. Customer agrees not to, nor permit nor authorize any third party to: (i) sublicense, sell, rent, lease, transfer, assign, or distribute the Software to third parties; (ii) permit any third party to use the Software, except as expressly permitted in Section 4 above; (iii) host the Software for the benefit of third parties; (iv) hack or modify the License Key, or try to avoid or change any license registration process Xosphere may implement; (v) modify or create derivative works of the Software; (vi) disassemble, decompile, bypass any code obfuscation, or otherwise reverse engineer the Software or attempt to derive any of its source code, in whole or in part, except to the extent such activities are expressly permitted by law or applicable license notwithstanding this prohibition; (vii) modify, obscure, or delete any proprietary rights notices included in or on the Software or Documentation.

6. OPEN SOURCE

The Software may contain open source components (“OSS Components”). As a result, in addition to the proprietary code that Customer may be licensing under this Agreement, Customer use of the OSS Components in the Software may be subject to certain open source licenses. A description of the OSS Components, and references to those licenses, can be found in the Documentation. Customer agrees that customer is responsible for complying with the terms of all applicable open source licenses in Customer’s use of the Software and the OSS Components.

7. CONFIDENTIALITY

7.1 Confidential Information. Each party (the “Disclosing Party”) may from time to time during the term of this Agreement disclose to the other party (the “Receiving Party”) certain information regarding the Disclosing Party’s business, including technical, marketing, financial, employee, planning, and other confidential or proprietary information (“Confidential Information”). The Disclosing Party will mark all Confidential Information in tangible form as “confidential” or “proprietary” or with similar legend. The Disclosing Party will identify all Confidential Information disclosed orally as confidential at the time of disclosure. Regardless of whether so marked or identified, however, any information that the Receiving Party knew or should have known, under the circumstances, was considered confidential or proprietary by the Disclosing Party, will be considered Confidential Information of the Disclosing Party. The Receiving Party will not use any Confidential Information of the Disclosing Party for any purpose not expressly permitted by this Agreement, and will disclose the Confidential Information of the Disclosing Party only to employees or contractors of the Receiving Party who have a need to know such Confidential Information for purposes of this Agreement and who are under a duty of confidentiality no less restrictive than the Receiving Party’s duty hereunder. The Receiving Party will protect the Disclosing Party’s Confidential Information from unauthorized use, access, or disclosure in the same manner as the Receiving Party protects its own confidential or proprietary information of a similar nature and with no less than reasonable care.

7.2 Exceptions. The Receiving Party’s obligations under Section 7.1 will not apply to any Confidential Information that: (a) was already lawfully known by the Receiving Party at the time of disclosure by the Disclosing party; (b) was rightfully disclosed to the Receiving Party by a third party; (c) through no fault of the Receiving Party has become generally available to the public; or (d) was independently developed by the Receiving Party without access to, or use of, the Disclosing Party’s Confidential Information. In addition, the Receiving Party will be allowed to disclose Confidential Information of the Disclosing Party to the extent that such disclosure is required by law or by the order of a court or similar judicial or administrative body, provided

that the Receiving Party promptly notifies the Disclosing Party in writing of such required disclosure, and cooperates with the Disclosing Party, at the Disclosing Party's reasonable request and expense, in any action to contest or limit the scope of such required disclosure.

7.3 Return of Confidential Information. The Receiving Party will either, at its option, return to the Disclosing Party or destroy all Confidential Information of the Disclosing Party in the Receiving Party's possession or control and permanently erase all electronic copies of such Confidential Information promptly upon the written request of the Disclosing Party or the expiration or termination of this Agreement, whichever comes first.

8. WARRANTIES AND GUARANTEES

8.1 Warranties by Both Parties. Each party warrants that it has full power and authority to enter into and perform this Agreement, and the person signing this Agreement on such party's behalf has been duly authorized and empowered to enter into this Agreement.

8.2 Limited Warranty. Xosphere offers Customer (and only Customer) the following limited warranties with respect to the Software: (i) that the unmodified Software, at the time Xosphere makes it available to Customer for download, will not contain or transmit any malware, viruses, or worms (otherwise known as computer code or other technology specifically designed to disrupt, disable, or harm your software, hardware, computer system, or network); and (ii) that, for ninety (90) days from the date the Software is made available for download, the unmodified Software will substantially conform to its Documentation. Xosphere does not warrant that Customer use of the Software will be uninterrupted, or that the operation of the Software will be error-free. These warranties will not apply if Customer modifies the Software, or if Customer uses the Software in any way that is not expressly permitted by this Agreement or the Documentation. Xosphere's only obligation, and Customer's only remedy, for any breach of these limited warranties will be, at Xosphere's option and expense, to either (i) repair or replace the Software; or (ii) terminate this Agreement with respect to the defective Software, and provide Customer with a prorated refund of the Fees that have paid for the defective Software during the then-current Subscription Term, once Customer has returned it to Xosphere (or destroyed it).

8.3 Disclaimer. THE EXPRESS WARRANTIES IN THIS SECTION 8 ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, REGARDING THE XOSPHERE SOFTWARE, SUPPORT, OR ANY SERVICES PROVIDED BY XOSPHERE, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT OF THIRD-PARTY RIGHTS. CUSTOMER ACKNOWLEDGES THAT IT HAS RELIED ON NO WARRANTIES OTHER THAN THE WARRANTIES IN THIS AGREEMENT AND THAT NO WARRANTIES ARE MADE BY ANY OF XOSPHERE'S SUPPLIERS.

9. INDEMNIFICATION

9.1 Obligations. Subject to Section 8, Xosphere will indemnify, defend and hold harmless Customer and its shareholders, officers, directors, employees and agents (each an "Indemnified Party") from and against any and all damages, liabilities, costs, expenses, and losses (including, without limitation, reasonable legal fees) ("Losses") awarded by a court of final appeal against such Indemnified Party arising out of any claim, suit, action or proceeding by a third party to the extent that such Losses arise from any allegation that Customer's use of the Software as permitted under this Agreement infringes a U.S. patent or copyright or misappropriates a trade secret of any third party (each, a "Claim"), provided that (i) Customer notifies Xosphere in writing within five (5) business days of any such Claim, (ii) Customer provides Xosphere with assistance and information reasonably necessary to carry out Xosphere's obligations under this Section 9.1, and (iii) Customer allows Xosphere to control, and will reasonably cooperate with Xosphere in the defense of, any such Claim and related settlement negotiations, however, Customer will have the right, at Customer's option, to participate in the

settlement or defense of any Claim with Customer's own counsel and at Customer's own expense.

9.2 Right to Ameliorate Damages. If Customer's use of the Software is, or in Xosphere's reasonable opinion is likely to be, subject to a Claim under Section 9.1, Xosphere may, at its sole option and at no charge to Customer (and in addition to Xosphere's indemnity obligation to Customer in Section 9.1): (i) procure for Customer the right to continue using the Software; (ii) replace or modify the Software so that it is non-infringing and substantially equivalent in function to the original Software; or (iii) if options (i) and (ii) above are not commercially practicable in Xosphere's reasonable estimation, Xosphere can terminate the applicable Order Form and all Software licenses granted pursuant to that Order Form (in which event, Customer will immediately stop using the Software licensed pursuant to that Order Form) and provide Customer with a prorated refund of the Fees paid under that Order Form for the then-current Subscription Term.

10. LIMITATION OF LIABILITY.

IN NO EVENT WILL XOSPHERE BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, EXEMPLARY, SPECIAL OR INCIDENTAL DAMAGES, INCLUDING ANY LOST DATA AND LOST PROFITS, ARISING FROM OR RELATING TO THIS AGREEMENT. XOSPHERE'S TOTAL CUMMULATIVE LIABILITY IN CONNECTION WITH THIS AGREEMENT AND THE SOFTWARE, WHETHER IN CONTRACT OR TORT OR OTHERWISE, WILL NOT EXCEED THE AMOUNT OF FEES PAID TO XOSPHERE BY CUSTOMER UNDER THIS AGREEMENT IN THE PREVIOUS TWELVE (12) MONTHS. Customer acknowledges that the fees set forth in this Agreement reflect the allocation of risk set forth in this Agreement and that Xosphere would not enter into this Agreement without these limitations on its liability. Customer agrees that Xosphere's suppliers will have no liability of any kind under or as a result of this Agreement. The foregoing limitations of liability are independent of any exclusive remedies for breach of warranty set forth in this Agreement.

11. TERM AND TERMINATION

11.1 Term. The term of this Agreement will begin on Effective Date and will conclude until terminated in accordance with Section 11.2 herein. Customer acknowledges and agrees that Customer will not be entitled to any compensation or damages of any nature as a result of the termination of this Agreement pursuant to Section 11.2.

11.2 Termination. Either party may terminate this Agreement for convenience with thirty (30) days written notice to the other party. Xosphere may terminate this Agreement, effectively immediately upon written notice to Customer, if (a) Customer breaches any provision in Section 5, or (b) Customer breaches any other provision of this Agreement and does not cure the breach within thirty (30) days after receiving written notice thereof from Xosphere. Customer may terminate this Agreement, effectively immediately upon written notice to Xosphere, if Xosphere breaches any provision of this Agreement and does not cure the breach within thirty (30) days after receiving written notice thereof from Customer.

11.3 Effects of Termination.

(a) **Payment; Licenses; Return of Materials.** Upon termination or expiration of this Agreement for any reason, any amounts owed to Xosphere under this Agreement before such termination or expiration will be immediately due and payable, all licensed rights granted under this Agreement will immediately cease to exist, and Customer must promptly discontinue all further use of the Software. Customer must destroy or return to Xosphere all Xosphere materials (including Confidential Information).

(b) **Survival.** Sections 1 (Definitions), 3 (Price and Payment), 5 (Restrictions), 6 (Open Source), 8 (Warranties and Guarantees), 9 (Indemnification), 10 (Limitation of Liability), 11.3 (Effects of Termination), and 12 (General) will survive expiration or termination of this Agreement for any reason.

12. GENERAL

12.1 Relationship of the Parties and Taxes. This Agreement is not intended to create a relationship such as a partnership, franchise, joint venture, agency, or employment relationship. Neither party may act in a manner which expresses or implies a relationship other than that of independent contractor, nor bind the other party. As a consequence, Customer is not responsible for withholding or deducting any sums for federal or state income taxes, social security, medical, dental, worker's compensation or disability insurance coverage, pension or retirement plan or the like. Xosphere agrees to pay any and all taxes and other payments lawfully due in connection with Xosphere net income from the sale of the Services.

12.2 Notices.

(a) Any notice hereby required or permitted to be given shall be sufficiently given if in writing and delivered in person or sent by facsimile, electronic mail, overnight courier or First Class mail, postage prepaid, to either party at the address of such party or such other address as shall have been designated by written notice by such party to the other party.

(b) Any notice or other communication required or permitted to be given under this Agreement will be deemed given (i) upon personal delivery to the party to be notified, (ii) on the day when delivered by electronic mail to the proper electronic mail address, (iii) when sent by confirmed facsimile if sent during normal business hours of the recipient, if not, then on the next business day, (iv) the first business day after deposit with a nationally recognized overnight courier, specifying next day delivery, or (v) the third business day after the day on which such notice was mailed in accordance with this Section 12.2.

12.3 Severability. If any provision of this Agreement is unenforceable, such provision will be changed and interpreted to accomplish the objectives of such provision to the greatest extent possible under applicable law and the remaining provisions will continue in full force and effect.

12.4 Governing Law and Venue. This Agreement will be governed by the laws of the State of California without regard to conflict of laws principles that would require the application of the laws of another jurisdiction. The United Nations Conventions on Contracts for the International Sale of Goods does not apply to this Agreement. Any action or proceeding arising from or relating to this Agreement must be brought in a federal court in the Southern District of California or in state court in Los Angeles County, California, and each party irrevocably submits to the jurisdiction and venue of any such court in any such action or proceeding.

12.5 Construction. The headings and sections of this Agreement are for convenience and are not to be used in interpreting this Agreement. As used in this Agreement, the word "including" means "including but not limited to."

12.6 Counterparts. This Agreement may be executed in counterparts, each of which will be considered an original, but all of which together will constitute the same instrument.

12.7 Force Majeure. Any delay in the performance of any duties or obligations of either party (except the payment of money owed) will not be considered a breach of this Agreement if such delay is caused by a labor dispute, shortage of materials, fire, earthquake, flood, or any other event beyond the control of such party, provided that such party uses reasonable efforts, under the circumstances, to notify the other party of the circumstances causing the delay and to resume performance as soon as possible.

12.8 Amendment. This Agreement may not be amended in any respect other than by written instrument executed by the party against whom enforcement is sought.

12.9 Publicity. Xosphere will have the right to publicize the parties' relationship, by listing Customer as an Xosphere customer or the like. Customer hereby grants to Xosphere, during the term of this Agreement, a nonexclusive, royalty-free and fully-paid, worldwide license to use Customer's name, logo, and other marks as is reasonably necessary for Xosphere to exercise its rights as set forth above. Xosphere agrees to comply with any commercially reasonable trademark usage guidelines provided to Xosphere in writing.

12.10 Entire Agreement. The terms and conditions herein, together with any Order Form executed by the parties and appended hereto, constitute the entire agreement between the parties and supersede all previous agreements and understandings, whether oral or written, between the parties hereto with respect to the subject matter hereof, and no agreement or understanding varying or extending the same shall be binding upon either party hereto unless in a written document which expressly refers to this Agreement and which is signed by the party to be bound thereby.

IN WITNESS WHEREOF, the parties have authorized their representatives to execute this License Agreement effective as of the Effective Date.

XOSPHERE

By: _____
Name: _____
Title: _____
Date: _____

Address: _____

E-Mail: _____

CUSTOMER

By: _____
Name: _____
Title: _____
Date: _____

Address: _____

E-Mail: _____