



NIGHTINGALE SOFTWARE AND SERVICES AGREEMENT

IMPORTANT NOTICE: This Agreement governs use of Nightingale’s Software and Services and other services by and on behalf of the client named on the Products and Services Schedule (or legal entity to be bound by this Agreement for such client) (“**Client**”). This Agreement limits and excludes warranties and remedies regarding Nightingale’s Software and Services, exempts Nightingale and other persons from liability or limits their liability, specifies the jurisdiction for resolution of disputes, and contains other important provisions that you should read.

PLEASE READ THIS AGREEMENT CAREFULLY. By subscribing for Nightingale Software and Services, you acknowledge and signify Client’s acceptance and agreement, without limitation or qualification, to be bound by this Agreement, and you represent and warrant that you have the legal authority to accept and agree to this Agreement on behalf of Client. If Client does not agree with each provision of this Agreement, or you are not authorized to agree to this Agreement on behalf of Client, then neither you nor any other person on behalf of Client may use Nightingale Software or Software or Services.

INTRODUCTION

This Agreement is between Nightingale and Client (collectively the “**Parties**” and each a “**Party**”). This Agreement is comprised of the following documents (each a “**Contract Document**”): (a) the relevant Products and Services Schedules; (b) the General Terms and Conditions set forth below; and (c) the Additional Terms and Conditions (if any) applicable to each Nightingale Service accepted (either online or in writing) by or on behalf of Client.

GENERAL TERMS AND CONDITIONS

1. Interpretation

1.1 **Definitions:** In this Agreement, the following terms have the following meanings:

- (a) “**Additional Terms and Conditions**” means any additional terms relating to a Nightingale Service, as set out in the Products and Services Schedule for such Subscription or Professional Services;
- (b) “**Administrator**” has the meaning set out in Section 2.8(a);
- (c) “**Aggregated Data**” means anonymous, de-personalized, aggregated web traffic data and other metrics regarding use of EMR Services that do not reference or identify, and cannot be used to identify, Client, its Representatives or any individual;
- (d) “**Agreement**” means this Nightingale Software and Software or Services Agreement, together with all Schedules, Products and Services Schedules and statements of work hereunder, in each case as they may be amended or supplemented from time to time in accordance with Section 13.9;
- (e) “**Authorized User**” means an individual who is authorized by Client to use a Nightingale Service on Client’s behalf;
- (f) “**Client Data**” has the meaning set out in Section 6.1;
- (g) “**Contract Document**” has the meaning set out in the Introduction;
- (h) “**Credentials**” has the meaning set out in Section 2.8(d);

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- (i) “**Disputes**” has the meaning set out in Section 13.3;
- (j) “**EMR Service**” means the online service provided by Nightingale under this Agreement described in the Products and Services Schedule;
- (k) “**Fees**” has the meaning set out in Section 5.1;
- (l) “**Hosting, Support and Maintenance**” means the hosting, support and maintenance services provided by Nightingale as outlined in the Products and Services Schedule;
- (m) “**License**” if specified in the Products and Services Schedule, a license granted by Nightingale for a perpetual, personal, restricted, non-transferable (except as provided herein) and non-exclusive license to access the Software for the sole purpose of supporting the internal operations of Client’s medical business. Client may not use the software in any re-sale capacity, to transfer, or to distribute in any form, or to process and/or analyze the data of a third party as a service. Client may only use the Software as permitted by this Agreement
- (n) “**Nightingale Documentation**” means user manuals and other documents and materials regarding the EMR Service provided or otherwise made available by Nightingale to Client pursuant to this Agreement, and all updates to any of those items provided or otherwise made available by Nightingale to Client from time to time;
- (o) “**Nightingale IP**” has the meaning set out in Section 6.2;
- (p) “**Nightingale Service**” means the Service or a Professional Service as outlined in the Products and Services Schedule;

“**Products and Services Schedule**” means a document that provides details of a License or Subscription or Professional Services requested by Client and that is either: (i) in paper format signed by Client and Nightingale, or (ii) in electronic format issued by Nightingale to Client to confirm an order placed by Client using an online or similar electronic ordering process. The initial Products and Services Schedule is set out in Schedule “A”;

- (q) “**Parties**” and “**Party**” have the meaning set out in the Introduction;
- (r) “**Professional Service**” means a service performed by Nightingale relating to Client’s implementation, training and use of the Software;
- (s) “**Proprietary Information**” has the meaning set out in Section 7.1;
- (t) “**Representatives**” means a Party’s partners, directors, officers, employees, subcontractors, resellers, agents, licensors, service providers, suppliers, and other representatives;
- (u) “**Subscription**” means Client’s subscription for use of the Software as specified in the Products and Services Schedule;
- (v) “**Support Services**” has the meaning set out in Section 3.1; and
- (w) “**Taxes**” has the meaning set out in Section 5.3.
- (x) “**Term**” means the initial term and all renewal terms of a Subscription or Hosting, Support and Maintenance Agreement has the meaning set out in Section 2.1;

1.2 **Contract Documents:** If there is a conflict or inconsistency between Contract Documents, then a Contract Document that expressly states that it amends or revises another Contract Document takes precedence over that other Contract Document, and in the absence of an express statement of amendment or revision the order of precedence is as follows: (a) the applicable Products and Services Schedule; (b) the relevant Additional Terms and Conditions (if any); and (c) these General Terms and Conditions.

2. Software and Services

2.1 **Subscription Term / Hosting, Support and Maintenance:** The duration of the initial term of the Agreement will be specified in the applicable Products and Services Schedule. The initial term will commence on the commencement date specified in the applicable Products and Services Schedule and will continue until the end of the initial term, unless terminated earlier pursuant to this Agreement. Following the initial term, the Agreement will automatically renew on a month-to-month basis unless the Client agrees to renew for a longer period or the Agreement is terminated earlier pursuant to this Agreement or unless either Party gives a written notice of non-renewal to the other Party by no later than **[sixty (60)]** days before the end of the initial term or the then-current renewal term.

2.2 **General:** Subject to the provisions of this Agreement and Client's prompt payment of all applicable Fees, for each valid and subsisting Subscription, Nightingale hereby grants to Client a non-exclusive, personal, non-sub-licensable, non-transferable, restricted and limited license during the relevant Term to: (a) access and use the applicable Software or Software or Service for Client in accordance with the details of the Subscription (as set forth in the applicable Products and Services Schedule), the applicable Nightingale Documentation, and the restrictions and requirements set forth in this Agreement; and (b) to make and use a reasonable number of copies of the Nightingale Documentation for the Software or Software or Service to the extent reasonably necessary to facilitate Client's use of the Software or Software or Service in accordance with this Agreement. Unless the applicable Products and Services Schedule expressly states otherwise, a License or Subscription relates to the specific, named Client, and Client may use the Software or Software or Service pursuant to the License or Subscription solely for supporting the internal operations of Client's medical or other health-related business.

2.3 **Restrictions:** Client and Authorized Users will not: (a) use, or provide or permit access to or use of, the Software or Software or Service or Nightingale Documentation except as expressly permitted by this Agreement; (b) use the Software or Software or Service in a way that interferes with or disrupts the integrity or performance of the Software or Software or Service or related systems, networks or data, or to attempt to gain unauthorized access to the Software or Software or Service or related systems, networks or data; (c) copy, reproduce, translate, modify, enhance, or create derivative works from any part of the Software or Software or Service; (d) alter, attempt to circumvent, destroy, obscure, or remove any notices (including trademark and copyright notices), proprietary codes or locks, means of identification, digital rights tools or management information, security or control measures, or agreements on, in or in relation to the Software or Software or Service or Nightingale Documentation; (e) reverse engineer or otherwise access or use the Nightingale Software or Software or Service in order to create a competitive product or service, or a product or service using similar ideas, features or functions; (f) license, sublicense, grant, sell, resell, lend, lease, loan, share, transfer, assign, pledge, publish, transmit, publicly display or perform, distribute, rent, create any interest in, or otherwise give or make available or permit the use of the Nightingale Services or Nightingale Documentation to or for the benefit of any other person, whether as a service bureau or otherwise, and with or without charge, except as expressly permitted by this Agreement; or (g) permit, assist or encourage any other person to do any of the foregoing in this Section 2.3. The restrictions in this Section 2.3 do not apply to the extent that the restrictions are prohibited by applicable law.

2.4 **Acceptable Use Restrictions:** Without limiting the generality of any other provision of this Agreement, Client will not use the Software or Software or Service for any unlawful purpose, or which infringes the rights of other persons, or in any way which may be abusive, deceptive, defamatory, discriminatory, fraudulent, harmful, indecent, invasive of the privacy rights of other persons, misleading, obscene, sexually explicit, or otherwise objectionable (as determined by Nightingale in its discretion), or that advocates, depicts, encourages, or tends to incite any such conduct, the commission of a crime or other unlawful activities.

2.5 **Data Storage:** Client acknowledges and agrees that Client Data will be stored at Nightingale's facilities.

2.6 **Service Levels:** Nightingale will provide the Software and Software or Services in accordance with the service level agreements and the service level agreements will set out Client's limited rights to recover certain service credits.

2.7 **Changes:** Nightingale may in its discretion change the functionality or operation of the Software or Software or Service from time to time without any notice or liability to Client or any other person, provided that any change will not materially adversely affect the functionality or operation of the Software or Software or Service that is relevant to Client's actual use of the Software or Software or Service.

2.8 **Authorized Users:**

- (a) **General:** The Products and Services Schedule for a License or Subscription may specify the maximum number of Authorized Users who may be registered with the relevant Software or Software or Service to access and use the Software or Software or Service on Client's behalf. Client will appoint and authorize one Authorized User (an "**Administrator**") to administer Client's use of the Software or Software or Service, including the appointment and termination of other Authorized Users. Client will ensure that Authorized Users use the Software or Software or Service only on behalf of Client and strictly in accordance with the restrictions and requirements set forth in this Agreement.
- (b) **Client Responsibility:** Client is fully responsible and liable for all acts and omissions by or on behalf of Authorized Users and their access to and use of Software or Services and Nightingale Documentation and the results obtained therefrom. Client will ensure that each Authorized User fully complies with all of Client's obligations under this Agreement, and all of the requirements, restrictions and limitations regarding Software or Services and Nightingale Documentation set forth in this Agreement.
- (c) **Registration/Changes/Termination:** The Software or Service may permit an Administrator to authorize and terminate other Authorized Users' registration to use the Software or Service using online controls. Client may submit a written request (including by email) to Nightingale requesting that Nightingale terminate an Administrator's registration to use the Software or Service. Nightingale, acting reasonably, may refuse to register an individual as an Authorized User, and may restrict, suspend or terminate (in whole or in part) an Authorized User's registration to access and use the Software or Service. Each Authorized User will be considered to be an active Authorized User of the Software or Service unless and until his or her registration to use the Software or Service is terminated by an Administrator or Nightingale in accordance with this Agreement.
- (d) **Credentials:** Each Authorized User will access and use the Software or Service using a valid and subsisting user name and password registered with the Software or Service (collectively, "**Credentials**"). Credentials are specific to the Authorized User for whom they are registered, and may not be shared with or transferred to any other person. Client will ensure that each Authorized User keeps their Credentials secure and confidential at all times, does not permit any other person to use their Credentials, and immediately notifies Nightingale if they know or suspect that their Credentials have become known to or used by any other person. Client is fully responsible and liable for the security of all Credentials and all use and misuse of Credentials. If Nightingale, in its discretion, considers a Credential to be unsecure or to have been used inappropriately, then Nightingale may immediately cancel the Credential without any notice to Client, the affected

Authorized User, or any other person. Nightingale may require Authorized Users change their Credentials from time to time.

- (e) **Monitoring Use:** The Software or Service may contain technologies that monitor, record and report to Nightingale information regarding an Authorized User's access to and use of the Software or Service, and Nightingale may use that information for system administration purposes and to provide the Software or Service and related services to Client, and may disclose that information to Client and Client's other personnel.

2.9 **Additional Client Obligations:** Client will perform the obligations set out in Schedule "B".

3. Support Services

3.1 **Support Services for Software or Services:** Nightingale will provide technical support services for the Software or Services as described in each Products and Services Schedule ("**Support Services**").

4. Professional Services

4.1 **Professional Services:** Upon request by Client, Nightingale may in its discretion agree to provide Professional Services to Client relating to training, implementation or use of the Software or Services, or other services, as set forth in a Products and Services Schedule and, if applicable, a related statement of work. A Products and Services Schedule or statement of work regarding Professional Services will not be valid or binding unless and until it is in writing and signed by both Parties. Professional Services will be provided subject to Additional Terms and Conditions referenced in the applicable Products and Services Schedule or statement of work.

4.2 **Training:** The Software or Service may include limited online training materials for use by Authorized Users. Additional training services may be available as Professional Services for additional Fees.

4.3 **Client Facilities:** If Nightingale is required to perform any Professional Services at the facilities of Client or its Representatives, Client will provide Nightingale prompt and adequate access to such facilities and their systems as needed for Nightingale to perform its obligations under this Agreement. Nightingale will use all commercially reasonable efforts to avoid any disruption to Client's or its Representatives' operations and will abide by the rules and policies of general application at the premises of the Client and Representatives that are provided to Nightingale.

5. Fees

5.1 **Fees:** Client will pay to Nightingale the fees, disbursements and charges for each Nightingale Service (collectively, "**Fees**") specified in applicable Products and Services Schedules and as otherwise set forth in this Agreement. Fees for a Nightingale Service may vary depending upon the nature and extent of Client's use of the Nightingale Service, as set forth in the applicable Products and Services Schedule. Nightingale may in its discretion change Fees from time to time, provided that Nightingale will give Client not less than ninety (90) days' notice before a change in Fees comes into effect and a change in Fees will not be retroactive. All Fees and pricing terms are confidential to Nightingale, and Client will not disclose that information to any other person.

5.2 **Disbursements:** Subject to limits listed in a Products and Services Schedule, Client will pay, or reimburse Nightingale for, the reasonable out-of-pocket expenses, including travel and travel-related expenses incurred by Nightingale in connection with Nightingale's performance of Professional Services. Nightingale will not be subject to any expense guidelines or requirements of Client unless expressly set out in the Products and Services Schedule.

5.3 **Taxes:** Fees are exclusive of all applicable federal, state, provincial, and municipal sales, use, value-added, property, excise, import, foreign, withholding and other governmental taxes, duties, charges, levies, fees, excises, tariffs and assessments, of any nature whatsoever now or hereafter imposed (collectively, “**Taxes**”). Client is solely responsible and liable for, and will pay and remit, all Taxes (other than corporate income taxes payable by Nightingale) associated with, based on or due as a result of Fees, and all related interest, penalties and expenses.

5.4 **Payments:** Nightingale will issue invoices for Fees and Taxes on a monthly basis or as otherwise set forth in the applicable Products and Services Schedule. Each invoice is due and payable in accordance with the payment terms and method specified in the applicable Products and Services Schedule, provided that if payment terms are not specified in the applicable Products and Services Schedule then invoiced amounts for Software or Services are due and payable prior to commencement of Software or Services for the specified period or no later than thirty (30) days after Client’s receipt of the invoice. Clients paying monthly are required to keep a credit card or other automatic payment method on file with Nightingale. Nightingale may deliver invoices to Client by email. Payment obligations are not cancellable and advance payments are non-refundable. Overdue payments will be subject to interest at a rate of 1½% for each month (18% per annum) or fraction thereof that the payment is overdue, or the highest rate permitted by applicable law, whichever is lower. Except to the extent required by law, all amounts payable to Nightingale are payable in full without any deduction or withholding. If Client is prohibited by law from making a payment free of deductions or withholdings, Client will pay an additional amount to Nightingale as may be necessary to ensure that the actual amount received by Nightingale after deductions and withholdings and after payment of any additional Taxes or other charges due as a consequence of the payment of the additional amount will equal the amount that would have been received by Nightingale if the deductions and withholdings were not required.

5.5 **Suspension of Service:** If Client fails to make any payment when due, Nightingale may in its discretion suspend the provision of Nightingale Services to Client until Client makes the required payment, and the suspension will not be a breach of this Agreement by Nightingale, entitle Client to a refund or suspension of Fees, or give rise to any liability by Nightingale to Client or any other person.

6. Ownership/Proprietary Rights

6.1 **Ownership of Client Data:** Nightingale acknowledges and agrees that except as expressly set forth in this Agreement, Nightingale receives no ownership rights to the data or records furnished by Client (“**Client Data**”). Client represents and warrants that Client and those providing information to Client have the right to transmit to Nightingale and receive any materials, data or records from Nightingale, that are required to enable Nightingale to perform its obligations under this Agreement.

6.2 **Ownership of Nightingale Services/Materials:** As between the Parties, Nightingale and its suppliers and licensors will at all times own and retain all rights, title and interests (including all intellectual property rights) throughout the world in, to and associated with Nightingale Services and all software, technologies and infrastructure used by or on behalf of Nightingale to provide Nightingale Services and Nightingale Documentation (collectively, “**Nightingale IP**”). Client will not acquire any right, title or interest in, to or associated with Nightingale IP.

6.3 **Feedback:** If Client or its personnel (including Authorized Users) give feedback about a Nightingale Service, Nightingale Documentation or other Nightingale IP (including any ideas or suggestions for enhancements or improvements) to Nightingale, then Nightingale and its suppliers and licensors and their respective successors, assigns and licensees may use and commercialize the feedback in any way and for any purpose without providing any compensation or attribution to Client or any other person.

6.4 **Aggregated Data:** Nightingale may in its discretion use and disclose Aggregated Data to monitor and improve the quality and performance of Software or Services and other purposes as Nightingale considers appropriate.

6.5 **Reservation of Rights:** All rights not expressly granted by a Party under this Agreement are reserved by the Party.

7. Confidentiality

7.1 **Confidentiality:** Each of Nightingale and Client have made and will continue throughout the term of this Agreement to make available to the other Party confidential and proprietary materials and information (“**Proprietary Information**”). All material and information provided by one Party to the other relating to the business, policies, procedures, customs and forms of providing Party or any of its Representatives, including but not limited to Client Data and Nightingale IP, as well as information previously divulged or delivered regarding the aforementioned subject matter, is hereby designated as confidential and proprietary and will be considered to be Proprietary Information. Except for confidential client information included in Client Data, the Parties agree that the obligations set forth above in this Section 7.1 do not apply to materials or information that: (a) are already, or otherwise become, generally known by third parties as a result of no act or omission of the receiving Party; (b) subsequent to disclosure hereunder are lawfully received from a third party having the right to disseminate the information and without restriction on disclosure; (c) are generally furnished to others by the disclosing Party without restriction on disclosure; (d) were already known by the receiving Party prior to receiving them from the disclosing Party and were not received from a third party in breach of that third party’s obligations of confidentiality; or (e) are independently developed by the receiving Party without the use of Proprietary Information of the disclosing Party.

7.2 **Obligation to Maintain Confidentiality:** Each Party will maintain the confidentiality of the other’s Proprietary Information and will not disclose such Proprietary Information without the written consent of the other Party, except as may be reasonably necessary for the performance of its obligations pursuant to this Agreement or as otherwise permitted hereunder. Each Party will also keep confidential the terms of this Agreement.

7.3 **Permitted Disclosure:** Notwithstanding the foregoing, a Party may disclose the other’s Proprietary Information: (a) to its Representatives solely on a “need to know” basis and only to the extent necessary or reasonably appropriate to permit it to exercise its rights or perform its obligations under this Agreement, provided that all third parties are bound by confidentiality obligations that are at least as stringent as the confidentiality obligations set out in this Section 7; or (b) to the extent required by a court of competent jurisdiction or other governmental authority or otherwise as required by law (provided that the Party gives the other an opportunity to oppose the disclosure or to seek a protective order protecting such Proprietary Information); or (iii) as necessary to its bankers, financiers and prospective purchasers, subject to confidentiality obligations that are at least as stringent as the confidentiality obligations set out in this Section 7.

8. Representations and Warranties

8.1 **Mutual Representations and Warranties:** Each Party represents and warrants to the other Party that it has the right, power, capacity and authority to enter into and perform its obligations and exercise its rights under this Agreement.

8.2 **Limited Performance Warranty:** Nightingale represents and warrants that: (a) the Software or Services will perform substantially in conformance with the Nightingale Documentation for such Software or Services; and (b) the Software or Services to be delivered hereunder have been tested for viruses using a commercially available virus scanning utility which is generally used in the industry, and

are to the best of its abilities free of any time bombs, back doors, worms, trojan horses and any other similar device or mechanism designed to disable or adversely affect the functionality of the Software or Services. Notwithstanding the foregoing, Client will be responsible for its own virus scanning utility on the hardware where the Software or Services are accessed or used.

8.3 Professional Services Warranty: Nightingale represents and warrants that the Professional Services will be performed in a professional and workmanlike manner and will be of a quality conforming to the standards generally accepted in the information technology industry. Except to the extent that Client's remedies for breach of an applicable service level are set out in the applicable service level agreement, Nightingale's sole obligation, and Client's sole remedy, for any breach of the foregoing warranty will be that Nightingale will use commercially reasonable efforts to re-perform the relevant Professional Services.

9. Additional Matters

9.1 Incident Management: If Client identifies a problem or other incident affecting the performance of the Software or Service, Client will promptly report the problem or incident to Nightingale in accordance with Nightingale's published incident reporting and management procedures.

9.2 Technical Requirements: Client is solely responsible and liable for obtaining, provisioning, configuring, maintaining, paying for, and protecting from loss and damage, all equipment, software and services necessary for Client's use of Nightingale Services and all data used by or on behalf of Client in connection with Nightingale Services.

9.3 Procedures and Documentation: Upon request, Client will be supplied with information summarizing Nightingale's procedures and policies including backup, disaster recovery, security and privacy

9.4 Client Data: Client will be responsible to validate for correctness all output and reports generated by the Nightingale Services. Client hereby waives any damages occasioned by lost or corrupt data, incorrect reports or incorrect data files resulting from a programming error, operator error, equipment or software malfunction, or from the use of third party software.

9.5 Unauthorized Use: Client will promptly notify Nightingale if Client knows of or suspects any unauthorized access to or use of a Nightingale Service.

9.6 Publicity: Nightingale may publicly announce (including in press releases) Client's use of Nightingale's Software or Services and may reference Client (using Client's name and logo) in published lists or directories of Nightingale's customers (including on Nightingale's website).

9.7 Non-Solicitation: During the term of this Agreement and for six (6) months after the term of this Agreement, Client will not employ or engage, or solicit for employment or engagement, any employee, independent contractor, consultant, agent or representative assigned by Nightingale to perform Nightingale Services under this Agreement, or attempt to do any of the foregoing or assist any other person to do so.

9.8 Subcontractors/Service Providers: Nightingale may in its discretion engage subcontractors or third party service providers to assist Nightingale to perform and provide Nightingale Services, but Nightingale will remain fully responsible for the Nightingale Services.

9.9 Continuation of Software or Services: Nightingale hereby covenants and confirms that in the event Nightingale ceases to carry on business, to provide continued Software or Services, Nightingale will contract with a third party to continue providing the Software or Services for 90 days beyond the closure of operations. During this period, the third party will deliver to Client, in electronic form, a copy of the Client Data.

10. Disclaimers

10.1 **GENERAL DISCLAIMER:** EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NIGHTINGALE SERVICES AND NIGHTINGALE DOCUMENTATION ARE PROVIDED “AS IS” AND “AS AVAILABLE”, AND WITHOUT ANY REPRESENTATIONS, WARRANTIES, CONDITIONS OR GUARANTEES OF ANY NATURE OR KIND WHATSOEVER, WHETHER EXPRESS, IMPLIED OR STATUTORY, OR ARISING FROM CUSTOM OR TRADE USAGE OR BY ANY COURSE OF DEALING OR COURSE OF PERFORMANCE, INCLUDING ANY REPRESENTATIONS, WARRANTIES, CONDITIONS OR GUARANTEES OF OR RELATING TO: ACCURACY, ACCESSIBILITY, AVAILABILITY, COMPLETENESS, DURABILITY, ERRORS, FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, NON-INFRINGEMENT, LACK OF VIRUSES OR OTHER DISABLING OR HARMFUL CODE, PERFORMANCE, QUALITY, RESULTS, SUITABILITY, SECURITY, TIMELINESS, TITLE, QUIET ENJOYMENT OR UNINTERRUPTED SERVICE; ALL OF WHICH ARE HEREBY WAIVED BY CLIENT AND DISCLAIMED BY NIGHTINGALE TO THE FULLEST EXTENT PERMITTED BY LAW. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY OR ON BEHALF OF NIGHTINGALE WILL CREATE ANY LEGALLY BINDING OR EFFECTIVE REPRESENTATION, WARRANTY OR PROMISE BY NIGHTINGALE. CLIENT IS SOLELY RESPONSIBLE FOR THE SELECTION AND USE OF NIGHTINGALE SERVICES TO ACHIEVE CLIENT’S INTENDED RESULTS AND CLIENT USES NIGHTINGALE SERVICES AT CLIENT’S OWN RISK.

10.2 **TECHNOLOGY DISCLAIMER:** NIGHTINGALE SERVICES MAY BE AFFECTED BY NUMEROUS FACTORS BEYOND NIGHTINGALE’S CONTROL, AND MAY NOT BE CONTINUOUS, UNINTERRUPTED OR SECURE. CLIENT ACKNOWLEDGES THAT NIGHTINGALE SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS, AND NIGHTINGALE IS NOT RESPONSIBLE OR LIABLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM THOSE PROBLEMS.

10.3 **EXCEPTIONS:** THE LAWS IN SOME JURISDICTIONS PROHIBIT OR LIMIT THE DISCLAIMER OF CERTAIN WARRANTIES AND CONDITIONS, AND SO THE DISCLAIMERS IN THIS AGREEMENT MIGHT NOT APPLY TO CLIENT.

11. Liability Exclusions/Limitations and Indemnity

11.1 **EXCLUSIONS/LIMITATIONS:** NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT EXCEPT SECTION 11.2, AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW:

- (a) **EXCLUSIONS:** THE LIABILITY (IF ANY) OF EACH PARTY AND ITS REPRESENTATIVES TO THE OTHER PARTY AND ITS REPRESENTATIVES ARISING FROM, CONNECTED WITH OR RELATING TO THIS AGREEMENT, THE SUBJECT MATTER OF THIS AGREEMENT (INCLUDING NIGHTINGALE SERVICES AND NIGHTINGALE DOCUMENTATION), THE TERMINATION OF THIS AGREEMENT, THE RELATIONSHIP BETWEEN THE PARTIES, OR ANY RELATED MATTER, IS LIMITED TO DIRECT DAMAGE SUFFERED BY THE OTHER PARTY ONLY, AND IN NO EVENT AND UNDER NO CIRCUMSTANCES WILL EITHER PARTY OR ITS REPRESENTATIVES BE LIABLE TO THE OTHER PARTY OR ITS REPRESENTATIVES FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY LOSS OR DAMAGE OF ANY NATURE OR KIND WHATSOEVER OR FOR ANY LOSS OF DATA, INFORMATION, BUSINESS, MARKETS, SAVINGS, INCOME, PROFITS, USE, PRODUCTION, OR GOODWILL, ANTICIPATED OR OTHERWISE (INCLUDING BY REASON OF ANY EXPENDITURES, INVESTMENTS OR COMMITMENTS MADE IN ANTICIPATION OF THE CONTINUANCE OR PERFORMANCE OF THIS AGREEMENT);
- (b) **LIMITATIONS:** IN NO EVENT AND UNDER NO CIRCUMSTANCES WILL THE TOTAL AGGREGATE LIABILITY OF EITHER PARTY AND ITS REPRESENTATIVES TO THE OTHER PARTY AND ITS REPRESENTATIVES, UNDER THIS AGREEMENT OR OTHERWISE, ARISING FROM, CONNECTED WITH OR RELATING TO THIS AGREEMENT, THE SUBJECT MATTER OF THIS AGREEMENT (INCLUDING NIGHTINGALE SERVICES AND NIGHTINGALE DOCUMENTATION), THE TERMINATION OF THIS

AGREEMENT, THE RELATIONSHIP BETWEEN THE PARTIES, OR ANY RELATED MATTER, EVER EXCEED THE TOTAL AMOUNT OF ALL FEES ACTUALLY PAID BY CLIENT TO NIGHTINGALE FOR NIGHTINGALE SERVICES DURING THE TWELVE (12) MONTHS PRIOR TO THE DATE ON WHICH THE LIABILITY AROSE; AND

- (c) **APPLICATION/DEFINITION:** THIS SECTION 11.1 APPLIES TO LIABILITY UNDER ANY THEORY OF LIABILITY (INCLUDING CONTRACT, TORT, STRICT LIABILITY, STATUTORY LIABILITY, OR ANY OTHER THEORY OF LAW OR UNDER ANY STATUTE), REGARDLESS OF ANY NEGLIGENCE OR OTHER FAULT OR WRONGDOING (INCLUDING FUNDAMENTAL BREACH OR GROSS NEGLIGENCE) BY THE LIABLE PARTY OR ITS REPRESENTATIVES, AND EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF THE POTENTIAL LOSS OR DAMAGE BEING INCURRED.

11.2 **EXCEPTIONS:** THE EXCLUSIONS AND LIMITATIONS SET FORTH IN SECTION 11.1 DO NOT APPLY TO: (A) THE NON-PAYMENT OF FEES AND TAXES UNDER THIS AGREEMENT; (B) LIABILITY FOR PERSONAL INJURY TO OR THE DEATH OF AN INDIVIDUAL; (C) THE LIABILITY AND OBLIGATIONS SET FORTH IN SECTION 11.3; OR (D) LIABILITY FOR BREACH OF ANY OF SECTIONS 2.3 AND 2.4. THE LAWS IN SOME JURISDICTIONS PROHIBIT OR LIMIT THE EXCLUSION OR LIMITATION OF CERTAIN LIABILITIES, AND SO THE LIABILITY EXCLUSIONS AND LIMITATIONS IN THIS AGREEMENT MIGHT NOT APPLY TO CLIENT.

11.3 **Indemnity by Client:** Client will defend, indemnify and hold harmless Nightingale and its Representatives from and against any and all losses, damages, costs, expenses (including legal fees), claims, complaints, demands, actions, suits, proceedings, obligations and liabilities (including legal fees and expenses and settlement payments) arising from, connected with or relating to Client's use of Nightingale Services or Nightingale Documentation or any negligence, misconduct, or breach of this Agreement by Client or any person for whom Client is responsible. Notwithstanding the foregoing in this Section 11.3, Nightingale and its representatives retain the right to participate (with counsel of their own selection at their sole cost and expense) in the defense of and settlement negotiations relating to any third party claim, complaint, demand, action, suit or proceeding.

11.4 **Indemnity by Nightingale:**

- (a) Nightingale will defend, indemnify and hold harmless Client and its Representatives from and against any and all losses, damages, costs, expenses (including legal fees), claims, complaints, demands, actions, suits, proceedings, obligations and liabilities (including legal fees and expenses and settlement payments) arising from, connected with or relating to claims or actions brought against Client by a third party alleging that the use or operation of the Software or Service infringes any patent, copyright, trade secret, trademark or other proprietary right.
- (b) If Nightingale is enjoined from delivering either preliminarily or permanently, or continuing to license to Client, any Software or Service and such injunction is not dissolved within thirty (30) days, or in the event that Client is adjudged, in any final order of a court of competent jurisdiction from which no appeal is taken, to have infringed upon or misappropriated any patent, copyright, trade secret, trademark or other proprietary right in the use of the Software or Service, then Nightingale will, at its expense: (a) obtain for Client the right to continue using such Software or Service; (b) replace or modify such Software or Service so that it does not infringe upon or misappropriate such proprietary right and is free to be delivered to and used by Client; or, (c) in the event that Nightingale is unable or determines, in its reasonable judgment, that it is commercially unreasonable to do either of the aforementioned, Nightingale will reimburse to Client a prorated amount of prepaid Fees paid for Software or Services.
- (c) Nightingale will have no obligation under this Section if the alleged infringement or violation is based upon the use of the Software or Service not in accordance with the Nightingale Documentation or in combination with other software or other technology not furnished by

Nightingale or reasonably contemplated by this Agreement if such alleged infringement or violation would not have occurred except for such use or combined use.

- (d) Nightingale will have no liability for infringement of the intellectual property rights of a third Party except as expressly provided in this Section.

11.5 Indemnification Procedures: Promptly after receipt by an indemnified party of a threat of any action, or a notice of the commencement, or filing of any action against the indemnified party, the indemnified party will give notice thereof to the indemnifying party, provided that failure to give or delay in giving such notice to the indemnifying party will not relieve the indemnifying party of any liability it may have to the indemnified party except to the extent that the indemnifying party demonstrates that the defense of such action is prejudiced thereby. The indemnified party will not independently defend or respond to any such claim; provided, however, that: (a) the indemnified party may defend or respond to any such claim, at the indemnifying party's expense, if the indemnified party's counsel determines, in its sole discretion, that such defense or response is necessary to preclude a default judgment from being entered against the indemnified party; and (b) the indemnified party will have the right, at its own expense, to monitor the indemnifying party's defense of any such claim. The Indemnifying Party will have sole control of the defense and of all negotiations for settlement of such action. At the indemnifying party's request, the indemnified party will cooperate with the indemnifying party in defending or settling any such action; provided, however, that the indemnifying party will reimburse the indemnified party for all reasonable out-of-pocket costs incurred by the indemnified party (including reasonable legal fees) in providing such cooperation.

11.6 FAIR ALLOCATION OF LIABILITY: THE PARTIES ACKNOWLEDGE AND AGREE THAT THIS AGREEMENT PRESENTS A FAIR ALLOCATION OF RISK AND LIABILITY, AND THAT SECTIONS 10 AND 11 ARE ESSENTIAL PARTS OF THE BARGAIN BETWEEN THE PARTIES, CONTROLLING FACTORS IN SETTING THE FEES PAYABLE BY CLIENT FOR NIGHTINGALE SERVICES, AND AN INDUCEMENT TO THE PARTIES TO ENTER INTO THIS AGREEMENT.

12. Termination

12.1 Automatic Termination: This Agreement will automatically terminate, without any notice or liability to Client, immediately upon expiration or termination of all Subscriptions or Hosting, Support and Maintenance and completion or termination of all Professional Services.

12.2 Termination for Cause: Notwithstanding any other provision of this Agreement, either Party may terminate this Agreement for cause effective immediately upon delivery of notice of termination to the other Party if the other Party breaches this Agreement (including failure to make a required payment on time) and has not remedied the breach within thirty (30) days after receipt of a default notice from the non-breaching Party identifying the breach and stating the non-breaching Party's intention to terminate this Agreement if the breach is not remedied within thirty (30) days. Nightingale may in its discretion terminate this Agreement effective immediately upon delivery of notice of termination to Client if Client becomes insolvent, ceases to conduct business in the ordinary course, takes any step or proceeding available to Client for the benefit of insolvent debtors, or is subject to a proceeding for liquidation, dissolution or winding up, or a receiver, receiver-manager, liquidator or trustee in bankruptcy is appointed in respect of all or substantially all of Client's business and undertaking.

12.3 Discontinuation of Service: Notwithstanding any other provision of this Agreement, Nightingale may in its discretion terminate a Nightingale Service at any time upon 180 days' prior notice of termination to Client if Nightingale determines in its discretion to cease making the Nightingale Service generally commercially available; and upon the termination Nightingale will refund to Client the unused portion of any pre-paid Fees for the terminated Nightingale Service.

12.4 Consequences of Termination: If this Agreement is terminated for any reason: (a) all Subscriptions will terminate immediately and automatically, without notice to either Party, and Client and all Authorized Users will immediately cease using Software or Services and Nightingale Documentation; (b) all engagements for the provision of Professional Services will terminate immediately and automatically, without notice to either Party, and Nightingale will no longer be obligated to perform any Professional Services for Client; (c) each Party will remain responsible and liable for all obligations and liabilities arising prior to the termination of this Agreement; and (d) Client will promptly pay all outstanding Fees and applicable Taxes for Nightingale Services provided prior to the termination date.

12.5 Transition Services Upon Termination: Upon termination of any Subscription or this Agreement, as the case may be, and upon Client's written request, and subject to agreement on a statement of work therefor, Nightingale will provide Professional Services at Nightingale's then-current time and materials rates to: (a) deliver to Client, in a suitable electronic format and on the media available to Nightingale at the time of the request, to the extent it is technically feasible, all of the Client Data relating to the Subscription or this Agreement, as the case may be; and (b) assist Client in the de-conversion and transfer of information to Client or a third parties identified by Client and with such other actions as may be necessary or appropriate, in Client's reasonable judgment, to facilitate the transfer of the functions performed by Nightingale to Client or its service providers.

12.6 Survival: Notwithstanding any other provision of this Agreement, if this Agreement terminates for any reason then Sections 2.3, 2.8(b), 2.8(e), 5, 6, 9.7, 10, 11, 12.4, 12.5, 12.6 and 13 of these General Terms and Conditions, and all other provisions necessary to their interpretation or enforcement, will survive the termination and will remain in full force and effect and be binding upon the Parties as applicable.

13. General

13.1 Notices: Unless a specific form of notice or notice delivery method is expressly specified in this Agreement, all notices required or permitted to be given under this Agreement will be in writing and will be delivered by courier or email to Nightingale at Nightingale Informatix Corporation, Attn: President, 55 Renfrew Drive, Suite 200, Markham, Ontario, L3R 8H3, fax: 888-415-8780, and to Client at the address indicated in the Introduction above or at such other addresses as a Party may from time to time designate in a notice to the other Party pursuant to this Section 13.1. A notice delivered personally or by courier will be deemed to have been received on the next day following the date of delivery. A notice delivered by email will be deemed to have been delivered on the next business day following the date on which the recipient acknowledges receipt of the email.

13.2 Governing Law: This Agreement and the subject matter of this Agreement and all related matters will be governed by, and construed in accordance with the laws of the Province of Ontario (for Clients located in Canada) or the laws of the State of Delaware (for Clients located in the United States) without regard to the conflict of law provisions.

13.3 Disputes: In connection with a dispute arising out of or relating to this Agreement, the parties shall attempt in good faith to resolve such dispute promptly by negotiation through an individual with the authority necessary to settle the controversy. Except for collection actions for fees and for the right of either party to apply to a court of competent jurisdiction for a temporary restraining order, a preliminary injunction, or other equitable relief to preserve the status quo or prevent irreparable harm, any controversy or claim arising out of or relating to this Agreement or to its breach shall be settled by arbitration consistent with the rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrator may be entered into in any court of competent jurisdiction. The arbitrator shall not have the authority to award punitive damages. The arbitration shall be conducted by a single arbitrator, unless the parties cannot agree upon a single arbitrator, and in such a case the arbitration shall be conducted by three

arbitrators as provided herein. Either party may initiate arbitration proceedings by sending a notice requesting arbitration to the other party naming the arbitrator chosen by the party initiating the arbitration (referred to below as “**Notice of Arbitration**”). If the other party does not agree with the choice of arbitrator indicated in the Notice of Arbitration, such other party shall within five (5) business days from the receipt of the Notice of Arbitration, send written notice to the party who initiated the arbitration and such written notice shall name a second arbitrator. The party initiating the arbitration shall have two (2) business days from receipt of the notice naming the second named arbitrator to notify the other party whether it/he will proceed solely with the second named arbitrator and in such a case the arbitration shall be conducted by the second named arbitrator as the sole arbitrator. If the party initiating the arbitration does not notify the other party that it/he will proceed solely with the second named arbitrator, then the first and second named arbitrators shall select a third arbitrator. If the other party fails to respond within the five (5) business Day period noted above or fails to appoint a second arbitrator, the arbitration shall proceed with the arbitrator named in the Notice of Arbitration. The arbitrator(s) may proceed *ex parte* in case any party, or any of its witnesses, shall at any time neglect or refuse to attend the arbitration proceeding, after three (3) business days’ notice in writing under the hand of the arbitrator(s) given to each party. The arbitration procedure to be followed shall be agreed by the parties or, in default of Agreement, determined by the arbitrator(s). The arbitrator shall have the power to proceed with the arbitration and to deliver his/her/their award notwithstanding the default by any party in respect of any procedural order made by the arbitrator(s). The decision arrived at by the arbitrator(s), howsoever constituted, shall be final and binding and no appeal shall lie therefrom.

13.4 Relationship Between the Parties: The performance by Nightingale of its duties and obligations under this Agreement will be that of an independent contractor and nothing contained in this Agreement will create or imply an agency relationship between Client and Nightingale, nor will this Agreement be deemed to constitute a joint venture or partnership between Client and Nightingale. Each Party assumes sole and full responsibility for its acts and the acts of its personnel. Neither Party will have the authority to make commitments or enter into contracts on behalf of, bind, or otherwise oblige the other Party.

13.5 Nightingale Not Engaged in Practice of Medicine: Nightingale does not, nor does it intend to, engage in the performance or delivery of medical or hospital services or other types of healthcare. Nightingale’s performance under this Agreement should not, in any case, be deemed or understood as a recommendation, endorsement, guarantee or warranty of the professional services of Client, its Representatives or any providers who render healthcare services. Nothing in this Agreement will be construed to imply that Nightingale, or any of Nightingale’s Representatives are engaged in the practice of medicine or other professions related thereto. All matters related to such field will be the exclusive province of Client and its Representatives.

13.6 Force Majeure: Notwithstanding any other provision of this Agreement, and except for payment obligations, neither Party will be liable for any delay in performing, or failure to perform, any of its obligations under this Agreement if and to the extent performance is delayed or prevented due to a cause or causes that are beyond that Party’s reasonable control, including acts of God, fire, flood, earthquake, acts of war, sabotage (including network intrusions, hacking and denial of service attacks), vandalism, riots, insurrection or civil disobedience, strikes, lock-outs or other labour disruption, or act of government or government department or agency. Any delay or failure of that kind will not be deemed to be a breach of this Agreement by the defaulting Party, and the time for the defaulting Party’s performance of the affected obligation will be extended by a period that is reasonable in the circumstances.

13.7 Miscellaneous: This Agreement will ensure to the benefit of and will be binding upon the Parties and their respective successors and permitted assigns. Client will not assign this Agreement without Nightingale’s express prior written consent, which consent may be withheld by Nightingale in its discretion. Nightingale may in its discretion assign this Agreement. If any provision of this Agreement is held by a court or arbitrator of competent jurisdiction to be invalid or unenforceable for any reason, then

the provision will be deemed severed from this Agreement and the remaining provisions will continue in full force and effect without being impaired or invalidated in any way, unless as a result of the severance this Agreement would fail in its essential purpose. No consent or waiver by Nightingale to or of any breach by Client of its obligations under this Agreement will be effective unless in writing and signed by Nightingale, or deemed or construed to be a consent to or waiver of a continuing breach or any other breach of those or any other obligations of Client. Except as expressly set forth in this Agreement, the Parties' respective rights and remedies under this Agreement are cumulative and not exclusive of any other rights or remedies to which they may be entitled under this Agreement or at law, and the Parties will be entitled to pursue all of their respective rights and remedies concurrently, consecutively and alternatively. Each of the Parties will execute any further documents and do any further acts or things that may be necessary to implement and carry out the intent of this Agreement.

13.8 **Interpretation:** In this Agreement: (a) a reference to “**this Agreement**” and other similar terms refers to this Agreement as a whole, and not just to the particular provision in which those words appear; (b) headings are for reference only and do not define, limit or enlarge the scope or meaning of this Agreement or any of its provisions; (c) reference in a document that forms part of this Agreement to a Section by number only is a reference to the appropriate Section in the document in which the reference is made; (d) “**persons**” includes individuals, corporations, partnerships, joint ventures, associations, trusts, unincorporated organizations, societies, and all other legal entities; (e) “**including**” or “**includes**” means including or includes, as applicable, without limitation or restriction; (f) “**discretion**” means a Party’s sole, absolute and unfettered discretion; (g) words importing the singular number only include the plural, and vice versa; (h) reference to a day, month, quarter, or year means a calendar day, month, quarter, or year, unless the context indicates otherwise; (i) “**law**” includes common law, equity, statutes, regulations, ordinances, orders in council, and mandatory guidelines, and reference to a specific law includes all regulations, ordinances, and orders in council and mandatory guidelines made thereunder and all amendments to, or replacements of, the law or any regulation, ordinance, order in council or mandatory guideline in force from time to time, as applicable; and (j) references to currency are to the lawful money of Canada, unless expressly stated otherwise. The Parties have expressly requested and required that this Agreement and all related documents be drawn up in the English language, and any translations of this Agreement or related documents are for convenience only and are not binding on the Parties. *Les Parties conviennent et exigent expressément que ce contrat et tous les documents qui s’y rapportent soient rédigés en langue anglaise.*

13.9 **Entire Agreement:** This Agreement sets forth the entire agreement of the Parties with respect to the subject matter of this Agreement and supersedes all previous communications, representations, negotiations, discussions, agreements or understandings, whether oral or written, between the Parties with respect to the subject matter of this Agreement. This Agreement may be modified only by a written instrument that expressly states that it is an amendment to this Agreement and is signed (including using an electronic signature) by both Parties or their successors or permitted assigns.

13.10 **Counterparts:** This Agreement in its entirety will be agreed upon by signing of the Products and Services Schedule which forms part of this Agreement.
