

## Motivation<sup>®</sup> License and Support Agreement

Brittingham Software Design, Inc. ("BSDI<sup>®</sup>") agrees to provide the Customer a non-transferable and non-exclusive license to use BSDI's Motivation<sup>®</sup> Web Application Software ('the Software'), as defined below. The following states the license agreement that governs use of the Software.

### Definitions:

"Software" includes the Motivation<sup>®</sup> web application software, supporting documents, configuration files, utilities, help systems and all other content delivered via the Internet or in physical form.

"Website Service" is the provision of a web site running a copy of the Motivation Software on BSDI's server farm.

"Service License" is the license granted by BSDI to you, the customer, to use the Software, as provided by BSDI via its online servers, in a manner consistent with the rights and restrictions expressly described in this agreement. Note that "Service License" pertains strictly to the provision of the technologies whereby the Software is made available on the Internet generally and does not include either explicitly or by default or assumption include the provision of the Internet connectivity needed to access the Internet or this server, the provision of which is strictly the responsibility of the user.

"Service Renewal Date" is the month and day, occurring each year, on which the Service License will automatically renew unless Customer requests cancellation of the Service License.

"Customer" refers to the organization purchasing the Software and accepting this agreement. In various places in this Agreement, the Customer may be referred to as "you" or "your" with no loss of generality with respect to the original definition of "Customer."

"Clients" are the people whose data you or your staff enter into the Software and those who enter their own data whether or not they do so with your explicit knowledge or permission. "Clients" shall also include any other individual to whom you provide "Services" as defined below but who are not explicitly entered into a BSDI software system. "Clients" and "Participants" are used interchangeably and should be interpreted as the same entity as defined here.

"Active Clients" are Clients whose records are not disabled and who thus have the ability to log in to the Motivation Software.

A "Block" is a count of Active Counts rounded up to the nearest 1,000 or other value as mutually agreed to by Customer and BSDI.

"Client Limit" is the count of Active Clients permitted in your database, calculated in Blocks.

“Services” includes but is not limited to medical, lifestyle, nutritional, health and/or fitness advice, treatment or recommendations, exercises and exercise programs, incentive programs, fitness assessments, invoices and/or sales receipts, automatic charges or account histories; all of which are included whether they be printed, written, displayed electronically or spoken.

“Services” explicitly includes the recommendation of and the recording of client activities and activity levels, durations, and intensities either by you, your staff or the clients themselves.

“BSDI” is the long-established trade name for “Brittingham Software Design, Inc.” and shall be used in its place throughout this document. In various places in this Agreement, BSDI may be referred to as “we” or “our” with no loss of generality with respect to the original definition of “BSDI.”

“Support” is a service offered by BSDI under which BSDI provides advice regarding the proper installation and use of the software as described below in Section 8.

“Content” consists of the articles, images, flash animations, questionnaires, and/or other multimedia information delivered via the Motivation web site either directly or via BSDI’s Content Server.

“Customer Content” consists of the articles, images, flash animations and/or other multimedia information created by the Customer and uploaded to the Customer’s instance of the Motivation web site.

“Check-In Module” is a set of web pages and their associated Content that adds the ability to provide individualized member services such as fitness testing, wellness coaching and exercise programming to the Motivation web site. The Check-In Module is optional and must be purchased separately.

"Documentation" means, collectively: (a) all of the written, printed, electronic or other format materials published or otherwise made available by BSDI that relate to the functional, operational and/or performance capabilities of the Software and Website Service; and (b) all user, operator, system administration, technical, support and other manuals and all other written, printed, electronic or other format materials published or otherwise made available by BSDI that describe the functional, operational and/or performance capabilities of the Software and/or Website Service.

"Defect(s)" means any failure of the Software or Website Services to operate in accordance with the specifications or the performance standards contained herein.

## **1 Website Service License**

### **1.1 Permitted Uses of the Website Service**

- (a) Customer may permit their staff and program participants to use the Website Service on any computer having access to the Internet.
- (b) Customer may enter new clients into the Website Service manually, automatically via data import, or via the Motivation self-enrollment feature. The Website Service will prohibit the Customer from entering more than the number of clients allowed by the “Client Limit” set at the time of purchase or subsequent upgrade. This Client Limit is shown on your sales receipt or invoice.

- (c) You may sell access to the Website Service to individuals and/or to other organizations so long as such access does not result in a total population count greater than that allowed by the Client Limit set at the time of purchase or subsequent upgrade.
- (d) Customers may add or alter the Content provided with the Website Service as long as such Content is available for alteration via features built into Motivation's standard administrative interface; this provision thus not granting the Customer a right to force BSDI into providing additional interfaces should a given Content item be unavailable via the standard interface.

## **1.2 Prohibited Uses of the Website Service**

Without the express written permission of BSDI:

- (a) You may not make any attempt to discover the source code of the Software used to provide the Website Service.
- (b) You may not translate or create derivative works based on the Website Service.
- (c) You may not sell, sub-license, rent, lease, give or lend copies of the Content to any other entity except as such Content is delivered within the Motivation Website Service, said delivery being only for the purposes of informing, educating and tracking Customer's clients via the Motivation Website Service.
- (d) You may not enter more than the permitted number of Active Clients as described on your sales receipt or invoice.
- (e) You may not share your Staff login account name(s) and/or password(s) with any organization, entity, or person except for those individuals working directly or as paid consultants for your organization and who are cleared to view Personal Health Information as defined under the HIPAA regulations.
- (f) You may not assert property rights in the Software used to provide the Website Service or represent to any party that the Software is your intellectual property nor represent that the Software is created, owned or developed by you or your technical, creative or other staff.
- (g) You may not use the Website Service or its content creation tools for the purposes of harassing, threatening, or intimidating any party, group or individual or otherwise use the Website Service or its content creation tools for any illegal or illicit purpose.

## **1.3 Customer Acknowledgement of Prior Research**

Customer acknowledges that they have evaluated and presently understand the purpose, content and capabilities of the Motivation Website Service. Customer agrees not to pursue either a full or a pro-rata refund at any point beyond the 30-day Warranty period based on the premise that they did not understand the capabilities offered by the Software and/or Website Service.

## **2 License Term and Payment**

### **2.1 Website Service Date**

The Website Service Date is the date of first use of Motivation by an Active Client or 30 days after the site is made available to Customer on a publicly accessible URL, whichever is earlier.

After your purchase, you have the right to cancel your Website Service and receive a refund of the full purchase price paid if said cancellation occurs within the first thirty (30) days after the Website Service Date. "Full purchase price" shall not include any custom work already completed by BSDI at Customer's request; refunds on custom work are not available.

### **2.2 Payment and the Service Renewal Date**

Customer shall be invoiced on an annual basis starting with the Website Service Date. This is the "Service Renewal Date."

Customer agrees to remit payment so that BSDI receives said payment within thirty (30) days of receipt of the invoice. If payments are to be made via credit card, Customer authorizes BSDI to charge the card supplied by Customer as of the annual billing date.

### **2.3 Failure to Pay Initial or Renewal Fees**

If Customer fails to remit payment on an initial or renewal invoice within the period stated above, BSDI may, at that time or at any later time and at its sole discretion, cancel the Service License and any obligations under the Support Plan subject only to a requirement that BSDI notify client of said cancellation for nonpayment. BSDI's failure to enforce this provision within 30 days does not constitute or imply that licenses are automatically extended for any time period; BSDI reserves the right to cancel the Service License at any point, following the expiration of the thirty (30) day period set forth in Section 2.2, in the event payment has fallen into arrears.

Customer recognizes that BSDI does not offer pro-rated refunds on the Service License even if the Software is abandoned before an annual license has expired.

### **2.4 Other Terms**

If a dispute arises regarding whether an Initial or Renewal fee has been paid, BSDI shall not be obligated to provide the Website Service or Support until the customer can provide reasonable proof of payment.

BSDI shall assess the count of Active Clients in Customer's database each month. If the count of Active Clients exceeds Customer's designated database capacity before the next Service Renewal Date, BSDI shall submit a pro-rated invoice to cover the additional Active Client Block(s) for the period remaining until the Service Renewal Date. Customers paying via credit card shall be notified before any pro-rated charge is made.

If the count of Active Clients in Customer's database exceeds Customer's designated database capacity on the Service Renewal Date, Customer authorizes BSDI to bill for the total database Blocks in use when BSDI submits new invoice or charges the credit card on file.

### **3 Termination**

This Agreement shall terminate upon the occurrence of any of the following events:

- (i) Upon mutual agreement of parties;
- (ii) Upon Customer's failure to timely pay as described in Section 2.3.
- (iii) BSDI may terminate this Agreement, for any reason or no reason, with thirty (90) calendar days written notice to the Customer, at which time service will be terminated.
- (iv) Customer may terminate this Agreement as of the Service Renewal Date by providing written notice to BSDI of their intent to cancel, at least 7 days before the Service Renewal Date.
- (v) Immediately upon written notice by the non-breaching party, in the event of the breach by the other party of any provision of this Agreement and the failure of such party to cure such breach to the reasonable satisfaction of the non-breaching party within thirty (30) days of the receipt of a notice from the non-breaching party that specifies the nature of the breach.
- (vi) In the event that either party terminates or suspends its business, is adjudicated bankrupt, files a voluntary petition in bankruptcy, has a receiver appointed for it, or makes an assignment of the benefit of creditors, the other party may, at its option, within thirty (30) days after the occurrence of any of the above events, terminate this Agreement.
- (vii) In the event that either party commits a breach of the HIPAA Business Associate Agreement attached hereto as Exhibit A.
- (viii) At the termination of this Agreement, Customer has up to 5 days to request a copy of their database. After 5 days, BSDI has the affirmative obligation to permanently delete the Customer's database and any and all backups. If the Customer exercises their right to a copy of the Customer Client data, BSDI shall deliver said data in the form of a SQL Server database backup (SQL Server 2008 or later).

### **4 Warranty**

#### ***4.1 Performance Warranty***

BSDI warrants that the Software performs its intended tasks as described in BSDI's system documentation. If the Software does not conform to the operational specifications found in BSDI's system documentation and BSDI has not provided alternative or superior means for achieving the same or similar functionality, then BSDI will design, code, test and deliver amendments or alterations to the Software in order to bring it into conformance with the above-described sources or will provide alternative or superior means for achieving the target functionality within 60 days of notification of such nonconformities.

#### ***4.2 Documentation Warranty***

BSDI represents and warrants to Customer that Documentation for the Software and Website Services accurately describes the functional and operational characteristics of the Software and Website Services.

### **4.3 Disabling Code Warranty**

BSDI represents and warrants that the Software does not contain any limiting or surveillance software that could, if triggered, erase data or programming, or have any adverse impact on any Customer or Clients or cause the Website Service to become inoperable or otherwise incapable of being used in the full manner for which the system was intended to be used.

Notwithstanding the foregoing, BSDI shall have the right to limit the number of Active Clients to the number of Active Clients licensed and to prohibit access to Modules that have not been purchased. BSDI shall also provide mechanisms within the software that permit the BSDI and/or Customer to disable a Client's account for reasons of withdrawal from the program, abuse of the Website Service or termination of employment.

Also notwithstanding the above, if a Client marks his or her record in the Software as "Private" then Client will not be able to access or use Client's data. If a client marks his or her record in this manner, customer agrees that this is not covered under the "adverse impact/inoperable" paragraph above but is part of the normal operation of the Software. Note that the ability to mark one's records as Private is an optional capability in the Software.

### **4.4 Warranty of Authority**

Each party represents and warrants to the other that it has the right to enter into this Agreement and that there are no outstanding assignments, grants, licenses, encumbrances, obligations or agreements (whether written, oral or implied) that are inconsistent with this Agreement and the rights granted or transferred herein. This warranty shall survive the expiration or termination of this Agreement.

## **5 No Other Warranties, Limit of Liability and Use of Software**

### **5.1 No Other Warranties.**

BSDI makes no other warranty or representation, either expressed or implied, with respect to the Software, its performance, merchantability, or fitness for a particular purpose. BSDI does not warrant that the Software is free from all bugs, errors or defects but it does warrant that such bugs, errors, defects will be repaired within 60 days once they have been brought to BSDI's attention. The classification of an event reported by a Customer as a bug, error or defect shall be at BSDI's sole discretion: the above clause shall not be construed in such a way as to imply that BSDI is required to add new or enhanced functionality at the demand of the Customer, such services being offered separately and under a custom development agreement.

### **5.2 Limitation of Liability; Rights Upon Termination.**

#### **5.2.1 Limitation Upon Recoverable Damages**

**EXCEPT AS OTHERWISE PROVIDED IN SECTION 5.2.3, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, PUNITIVE, LOST SAVINGS, PROFIT OR BUSINESS INTERRUPTION DAMAGES, REGARDLESS OF WHETHER THE CLAIM GIVING RISE TO SUCH DAMAGES IS BASED UPON BREACH OF WARRANTY, BREACH OF CONTRACT,**

**NEGLIGENCE, TORT OR OTHER THEORY OF LIABILITY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY THEREOF.**

#### 5.2.2 Cap on Damages

**EXCEPT AS OTHERWISE PROVIDED IN SECTION 5.2.3, EACH PARTY'S CUMULATIVE LIABILITY TO THE OTHER PARTY FOR ANY AND ALL CAUSES OF ACTION ARISING OUT OF OR RELATING TO THE AGREEMENT SHALL NOT EXCEED, IN THE AGGREGATE, THE TOTAL FEES PAID BY CUSTOMER UNDER THE AGREEMENT, REGARDLESS OF WHETHER THE CLAIM GIVING RISE TO SUCH DAMAGES IS BASED UPON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, TORT OR OTHER THEORY OF LIABILITY.**

#### 5.2.3 Exclusions from Limitations of Liability

Notwithstanding anything contained herein to the contrary, the limitations of liability set forth in this **Section 5**, shall not apply to: (a) claims relating to the disclosure of Confidential Information in contravention of the terms of **Section 18**; and (b) the indemnification obligations under **Section 12**.

#### 5.2.4 Equitable Relief

Notwithstanding anything contained in this Agreement to the contrary, the parties shall be entitled to seek injunctive or other equitable relief whenever the facts or circumstances would permit a party to seek equitable relief in a court of competent jurisdiction.

### **5.3 Use of Software**

**It is the Customer's sole responsibility to verify that the Website Service and the Software fully meet their needs and requirements and that the Website Service and Software provides advice, tools and feedback appropriate for the Customer's Clients.**

The Software permits you and your staff to create, customize, deliver and store Services and Content for your Clients and it enables your Clients to create and store records and to perform Services for themselves. By signing this Agreement, you agree to bear sole responsibility for the Services and Content that you create, enter, store or deliver to your Clients and for all Services that Clients may perform, enter or store for themselves and you agree that BSDI shall be held harmless in any litigation initiated by your Clients based on any Service created and/or delivered using the Software and/or its associated Content. By using the Software, you knowingly accept sole and explicit responsibility for the outcomes that the Services and Content produce including any adverse effects, injuries or deaths to you or your Clients even if the adverse affects from such Services or Content could reasonably have been foreseen by BSDI.

By using the Software, you acknowledge that you are aware that it does not and can not provide any insight into any Client's actual readiness for exercise or other care nor can it ensure that Content delivered to any given Client is appropriate, complete, safe and/or reasonable. While we provide feedback and Content based on principles established by credible organizations and/or research, we have no means, mechanism or method for verifying the suitability or applicability of any Service, Content, classification or recommendation for any actual client. The suitability or applicability of any Services, Content, classification or recommendation generated by the Software for an individual under your care must be independently evaluated by suitable

personnel in your organization before such Services, Content, classification or recommendation is considered accurate and/or appropriate.

You acknowledge that BSDI does not provide mechanisms or means to warn you, your staff and/or your clients of all possible conditions, states, or injuries that may affect a Client's readiness for exercise or the possibility of adverse outcomes. BSDI provides no controls or limitations on the Services and/or Content that you and/or your Clients create with the Software and we provide no means, methods or algorithms for detecting inappropriate Services or Content nor do we provide a means, method or algorithm for detecting that your Clients are logging or otherwise recording an inappropriate exercise or level of activity. You are solely responsible for judging the appropriateness of the Services and Content provided by the Software for any given client. You acknowledge that we do not recommend or encourage any particular Service for any given Client or for your Clients in general. There are mechanisms for bulk distribution of Services within the Software and, should you choose to make use of these mechanisms, you bear complete responsibility for assuring that each and every Client to whom such Services are delivered is an appropriate recipient.

## **6 Links to Third-Party Sites or Content from Motivation**

If Customer elects to customize Motivation by linking to third-party sites and/or content using standard HTML tags, you acknowledge and agree that BSDI is not responsible for the availability of such external sites or resources, and do not endorse and are not responsible or liable for any content, advertising, products, or other materials on or available from such sites or resources. You further acknowledge and agree that BSDI shall not be responsible or liable, directly or indirectly, for any damage or loss caused or alleged to be caused by or in connection with the use of or reliance on any such content, goods or services available on or through any such site or resource.

## **7 Database Security**

BSDI represents and warrants that it follows industry standards for data security such as the use of strong passwords, database server patching, physical security, and frequent backups of customer data. Please see BSDI's *Security Policies and Procedures* document for more information.

## **8 Terms of Support**

BSDI warrants that the Customer shall be provided with Support for the Software in accordance with these Clauses:

- (a) BSDI shall provide support only if Customer has paid all outstanding balances as described in Sections 2.2-2.4.
- (b) Support will include basic instructions as to the use of the Software and the diagnosis and rectification of faults in the Software, but not in respect of use or malfunction in computer hardware, operating systems, other software packages, printers or related Customer equipment.

- (c) Support is meant to supplement, but not replace the documentation provided with the Software or the online or on-site training.
- (d) Technical support will be provided by email in response to your email request for such support at Support@BSDIweb.com. At BSDI's discretion, support may also be provided via telephone, fax or live Internet "chat". "Live" services shall be provided, when appropriate, between the hours of 9:30 AM and 4:30 PM Monday to Friday EST (excluding company and public holidays). BSDI does not warrant that a support engineer will be available during these hours but rather that it shall use reasonable endeavors to respond within 24 hours of your request. All support calls to BSDI must be made at (908) 832-2949. Please do not call our sales line for technical support!
- (e) BSDI will endeavor to ensure that Customers on the Support plan are provided a complete resolution of any technical support issue and are provided with full use of the software within its normal operating parameters as described in BSDI's written documentation.
- (f) Technical support is meant to answer questions about the functionality in the Software as already provided. Thus, technical support does not include the creation of additional software or the addition of new features.
- (g) BSDI may, at its sole discretion, create and upload from time to time modifications to the Software (including new pages, queries, data tables or reports) at no charge in order to address technical support issues.
- (h) BSDI is not obligated to provide Support as described above in circumstances where a fault arises out of the improper use, operation or neglect of the Software, any modification or merger of the Software that you have performed, your failure to implement recommendations or solutions to faults already addressed by BSDI, any repair, adjustment or alteration made by any person other than BSDI without its previous consent, or any hardware or equipment deficiencies or problems.
- (i) Technical support is meant to answer specific questions about the use and installation of the Software. It is not a framework under which BSDI will provide extended training sessions in the use or organization of the software. Extended training options are available separately.

## **9 Customer Obligations**

The Customer shall:

- (a) Ensure the Software is used only for the number of Active Clients for which the software has been licensed.
- (b) If you request changes or assistance, you shall make available to BSDI, without charge, any information or facilities to enable BSDI to discharge its obligation under this Agreement including, but not limited to, computer print-outs, screen-shots, configuration information, or photocopies of documents, provided always that BSDI shall hold as confidential any such information provided by you.
- (c) Notify BSDI of any Defect or alleged Defect within a period not exceeding 15 (fifteen) days from the date the said Defect becomes apparent.

- (d) Operate the software in such a manner as to be compliant with the provisions of the Health Insurance Portability and Accountability Act and the regulations promulgated thereunder (collectively “HIPAA”).

## **10 Copyright**

BSDI’s software is Copyright © Brittingham Software Design Inc., 1991-2011. All rights are reserved. United States Copyright Law protects the Software and documentation. No part of BSDI’s Software or its associated materials may be copied or reproduced without the express written permission of BSDI.

Should BSDI design and upload replacement, upgraded or custom software for the Customer or on the Customer’s request for new features or functionality, the Copyright and any other intellectual property rights in the source and object codes of the replacement, upgrade or custom software shall vest exclusively in BSDI.

Should BSDI design and upload replacement, upgraded or custom software for the Customer or on the Customer’s request for new features or functionality, the Customer shall receive a license to use said changes and customizations under the same terms and conditions as the licensed software.

## **11 Trademarks**

BSDI<sup>®</sup>, True Age<sup>®</sup> and Motivation<sup>®</sup> are registered trademarks of BSDI.

## **12 Intellectual Property Indemnity**

BSDI shall indemnify, defend and hold Customer harmless from and against any costs (including reasonable attorney’s fees), damages, claims, suits, actions, liabilities and judgments, based upon a claim that the Software infringes upon the patent, copyright, or other intellectual property right of any third party. As a condition to this and all other indemnification obligations of BSDI under this Agreement, (A) Customer will promptly notify BSDI upon the assertion of any such claim against it and will provide BSDI with a copy of all information received by Customer with respect to the proceedings, and (B) Customer hereby grants BSDI the right to control the defense or settlement of any such claim, in its sole discretion, with counsel of its own choosing and (C) Customer will provide any reasonable assistance requested by BSDI in support of the defense of the claim. If, as a result of any claim within the scope of this Section, Customer is enjoined from using the Website Service, BSDI, at its sole option and cost, will either:

- (a) Promptly modify the Website Service so that it is non-infringing; or
- (b) Obtain the royalty-free right for Customer to continue to use the Software in accordance with all of the terms of this Agreement; or
- (c) In the event that BSDI is unable to cure the infringement in the manner described above, Customer may request and BSDI shall provide an immediate termination of the Website Service and a refund of the current year’s service fees.

The foregoing indemnification will only apply to the extent the claim is based upon Content delivered or modified by BSDI. This indemnification does not cover any Content added to the Software by the Customer, their staff or their appointed agents or representatives.

The provisions of this Section 12, including Section 12.1, shall survive beyond the termination of this Agreement.

### **12.1 Customer Content Indemnification**

Customer shall indemnify, defend and hold BSDI harmless from and against any costs (including reasonable attorney's fees), damages, claims, suits, actions, liabilities and judgments, based upon a claim that the Customer Content infringes upon the patent, copyright, or other intellectual property right of any third party. As a condition to this and all other indemnification obligations of Customer under this Agreement, (A) BSDI will promptly notify Customer upon the assertion of any such claim against it and will provide Customer with a copy of all information received by BSDI with respect to the proceedings, and (B) BSDI hereby grants Customer the right to control the defense or settlement of any such claim, in its sole discretion, with counsel of its own choosing and (C) BSDI will provide any reasonable assistance requested by Customer in support of the defense of the claim. If, as a result of any claim within the scope of this Section, Customer is enjoined from using some or all of Customer Content, then customer agrees to remove Customer Content from the Web Site immediately. In the event that Customer Content is not removed, Customer agrees that BSDI at its sole discretion may remove the offending Customer Content. Notwithstanding the above, Customer agrees that BSDI is not under any obligation to remove any Customer Content regardless of a claim upon the Customer and cannot be held liable for Customer's failure to remove same.

## **13 Service Level**

### **13.1 Uptime Guarantee**

BSDI guarantees that the Software will be available 24 hours a day, 7 days per week, 365 days per year, except for unavailability that may result from (a) general Internet brown-outs, blackouts or slow-downs, (b) downtime in the ordinary course during regularly scheduled maintenance windows that is necessary to maintain, update or refresh the Software, (c) "hacking" or "denial of service" activity by an unauthorized third party, and (d) any other reason beyond Company's reasonable control ("Permissible Downtime Events"). Subject only to downtime caused by Permissible Downtime Events, the aggregate total availability during any 1 calendar month will not be below 99% ("Uptime Guarantee").

BSDI and Customer agree to a regularly scheduled maintenance window during low usage periods (e.g., overnight) that shall not be in excess of four (4) hours. Emergency maintenance and any resulting Website downtime or instability will be communicated to Customer as the need for said maintenance is identified.

### **13.2 Service Level Credits**

In the event the Uptime Guarantee is not met for any given month, Customer shall receive service level credits based on the cumulative duration of the service outages or the amount by which page load times exceed the guarantee for the month ("Credits"). Customer shall receive a

Credit equal to five percent (5%) of its fees for each one percent (1%) of downtime below the 99% guarantee by which BSDI fails to achieve such level, calculated on the monthly pro-rated charge, up to 100% of the fees for such month.

### **13.3 Payment of Credits**

Credits shall be applied against fees owed by Customer on the next invoice for services following the date on which such Credits are incurred and shall be separately stated on such invoice.

## **14 Complete Agreement**

This agreement contains the entire Agreement between the parties hereto with respect to the matters covered herein. No other agreements, representations, warranties or other matters, oral or written, purportedly agreed to or represented by or on behalf of BSDI by any of its employees or agents, or contained in any sales materials or brochures, shall be deemed to bind the parties hereto with respect to the subject matter hereof. Client acknowledges that it is entering into this Agreement solely on the basis of the representations contained herein. In the event of a conflict in the provisions of any attachments hereto and the provisions set forth in this Agreement, the provisions of this Agreement shall govern.

## **15 Scope of Agreement**

If the scope of any of the provisions of the Agreement is too broad in any respect whatsoever to permit enforcement to its full extent, then such provisions shall be enforced to the maximum extent permitted by law, and the parties hereto consent and agree that such scope may be judicially modified accordingly and that the whole of such provisions of this Agreement shall not thereby fail, but that the scope of such provisions shall be curtailed only to the extent necessary to conform to law.

Failure by BSDI to enforce any of the terms and conditions of this Agreement shall not be construed as a waiver of its rights. BSDI shall not be under liability to you in respect of any circumstance beyond its reasonable control.

## **16 Applicable Law**

This Agreement shall be governed and construed in accordance with the laws of New Jersey and any dispute under this Agreement or the Program shall be submitted to the exclusive jurisdiction of the New Jersey Courts, save where BSDI otherwise agrees. No other variation, amendment or addition to this Agreement shall have been obtained should such agreement be granted.

## **17 Dispute Resolution**

At the option of either party, any disputes as to the performance of a party's obligation under this Agreement, or any related matter, shall first be referred to non-binding mediation by a neutral third party in Morristown, New Jersey, the costs of whom shall be paid equally and jointly by BSDI and customer. Each party shall cooperate in mediation, but may terminate mediation at any time after expiration of thirty (30) days from commencement thereof. Nothing herein shall

preclude either party from exercising any and all legal rights available to it in a court of competent jurisdiction in Morristown, New Jersey, and nothing contained in this paragraph shall prevent or preclude resort to mediation or other dispute resolution while litigation is pending. No finding, action, inaction or recommendation made or taken in or as a result of mediation shall be considered for any purpose an admission of a party.

## **18 Confidentiality**

Both parties agree that the substance of negotiations between BSDI, Customer, and Affiliates are confidential and will not be disclosed to persons outside the contract discussions, except to the extent that disclosure may be required by law or by order of a court or other government agency having authority to require such disclosure. Customer agrees to notify BSDI concerning any such law or order requiring disclosure prior to complying, so that BSDI can take appropriate action to protect such confidential information from improper disclosure.

BSDI shall keep in confidence and will not disclose to persons outside the parties, except to the extent that disclosure may be required by law or by order of a court or other government agency having authority to require such disclosure, all statistical, Protected/Patient Health Information, financial, and personnel data relating to the business of Customer to which BSDI may have access as a result of performing its obligations under this agreement. Notwithstanding the aforementioned, the provisions of this section shall survive beyond the termination of this Agreement.

### **18.1 Notification Obligation.**

If the receiving party ("Receiving Party") of confidential information becomes aware of any unauthorized use or disclosure of the confidential information of the disclosing party ("Disclosing Party"), the Receiving Party promptly and fully shall notify the Disclosing Party of all facts known to it concerning such unauthorized use or disclosure. In addition, if the Receiving Party or any of its employees or agents are requested or required (by oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or other similar process) to disclose any of the Confidential Information of the Disclosing Party, the Receiving Party shall not disclose the Confidential Information without providing the Disclosing Party with reasonable prior written notice of any such request or requirement so that the Disclosing Party may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. The Receiving Party shall exercise its best efforts to preserve the confidentiality of the Confidential Information, including without limitation, by cooperating with the Disclosing Party to obtain an appropriate protective order or other reliable assurance that confidential treatment shall be accorded the Confidential Information by such tribunal.

## **19 Availability of Records**

Upon written request of the Secretary of Health and Human Services, or the Comptroller General, or any of their duly authorized representatives, BSDI will make available those contracts, books, documents, and records necessary to verify the nature and extent of the costs of providing its services. Such inspection shall be available up to seven (7) years or otherwise required by law, after the rendering of such services. If BSDI carries out any of the duties of this

agreement through a subcontract with a value of ten thousand dollars (\$10,000) or more over a twelve (12) month with a related individual or organization, BSDI agrees to include this requirement in any such subcontract. This section is included pursuant to and governed by the requirements of Public Law 96-499, (s 1861) (v) (1) of the Social Security Act and the regulations promulgated thereunder. No attorney-client, account-client, or other privilege will be deemed to have been waived by Customer or BSDI by virtue of this Agreement.

## **20 FDA and Other Governmental/Regulatory Bodies**

Customer and BSDI agree to cooperate fully with each other in meeting any obligation imposed upon BSDI by the FDA and other governmental laws, rules, and/or healthcare regulatory bodies with respect to the Licensed Software.

## **21 Amendment**

This Agreement may not be amended, modified or changed orally. Any amendments, modifications and changes must be in writing and executed by an authorized representative of each of the parties hereto.

## **22 Counterparts**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

## **23 Data Rights**

Customer shall own all Customer Client data and Customer Content stored by the Software in Customer's database. BSDI agrees not to publish, discuss, market, sell or otherwise use Customer's data except as agreed to in writing by the Customer and only for purposes of scientific research and, even in this case, only after ensuring that no risk of exposing PHI is inherent in the approved use of the data (e.g. the use of aggregate or anonymous data only).

## **24 Relationship of the Parties**

Customer and BSDI are independent contractors with respect to the services provided pursuant to this Agreement, and nothing in this Agreement shall be construed or interpreted to create an employer/employee, partnership or joint venture relationship among them. Customer shall have no obligation to undertake any withholding or make any tax filings in connection with the compensation paid pursuant to this Agreement which shall be the sole responsibility of BSDI; provided, however, that Customer shall file such Forms 1099 as may be required by law. Neither BSDI nor Customer will have the power to bind the other or incur obligations on the other's behalf without the other party's prior written consent.

## **25 Titles and Subtitles**

The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

## 26 Successors and Assigns

The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

## 27 Notification

Any notice to be given by either party to the other under the terms of this Agreement shall be given by mail. All such notices shall be sent to:

If to Customer: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If to BSDI: Dr. Mark Brittingham, President  
Brittingham Software Design, Inc.  
P.O. Box 357  
Califon, NJ 07830

The address for BSDI may change from time to time and Customers shall be notified via mail. Said notifications shall constitute reasonable notification of any address change.

## 28 Execution

Customer may cause this Agreement to be executed either upon signing a copy received from and signed by a duly authorized officer of BSDI or upon use of a Website Service prepared for Customer by BSDI. Use of the Website Service prepared by BSDI shall constitute effective acceptance of this agreement just as if both the Customer and BSDI had signed this agreement.

*- Signatures Next Page -*

**Executed by Customer:**

Date: \_\_\_\_\_  
Signature: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Email: \_\_\_\_\_  
Fax: \_\_\_\_\_

**Executed by BSDI:**

Date: \_\_\_\_\_  
Signature: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Email: \_\_\_\_\_  
Fax: \_\_\_\_\_

## Exhibit A: HIPAA Business Associate Agreement

This Business Associate Agreement, is effective \_\_\_\_\_ and is entered into by and between **BSDI** (“Business Associate”) and \_\_\_\_\_ (“Customer”).

WHEREAS, Customer has engaged Business Associate to carry out services which may include the use and disclosure of Protected Health Information (“PHI”), while performing and fulfilling their obligations of service and support for the above-defined Software products; and,

WHEREAS, the parties intend to protect the privacy and provide for the security of PHI disclosed to Business Associate pursuant to the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and all regulations promulgated thereunder, and other laws;

NOW THEREFORE, the parties agree as follows:

### 1. DUTIES OF BUSINESS ASSOCIATE.

- A. Business Associate shall only use or disclose PHI for purposes necessary to perform its obligations under the Agreement and to carry out any legal responsibilities. Business Associate may also disclose PHI to subcontractors, representatives or agents to carry out its responsibilities under the Agreement. However, Business Associate shall require these subcontractors, representatives, or agents to agree to the terms of this Addendum to the same extent they apply to Business Associate. Business Associate shall not use or disclose PHI in any manner that would constitute a violation of 42 C.F.R. Parts 160 and 164.
- B. Business Associate shall use appropriate safeguards to prevent use or disclosure of PHI other than as provided for in this Agreement, including the maintenance of a written information privacy and security program that addresses the implementation of administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the EPHI that it creates, receives maintains or transmits on behalf of the covered entity.
- C. Within ten (10) business days of a request by Customer to:
  - (i) Accommodate an individual’s access to his PHI, and/or;
  - (ii) Amend PHI.

In the event an individual contacts Business Associate directly about accommodation or amendment, Business Associate shall forward such requests to Customer within three (3) business days.
- D. Business Associate shall record all use and disclosures of PHI. At a minimum, such records shall contain the date of use or disclosure, names of individuals receiving PHI, their addresses, a brief description of the PHI implicated, and a statement regarding the basis of the use or disclosure. These records, along with internal practices, books, records, and all other documents related to the treatment of PHI shall be made available to Customer or the Secretary of the United States Department of Health and Human Services for the purposes of compliance with 45 C.F.R. Parts 160 and 164.
- E. Business Associate shall notify Customer within 24 hours of any suspected or actual breach or security intrusion, or unauthorized use or disclosure of PHI. Business Associate shall take prompt corrective action.

### 2. TERMINATION.

A. **Criminal Proceeding**

Customer may terminate the Motivation License Agreement immediately if Business Associate is named a defendant in a criminal proceeding for a potential violation of HIPAA.

B. **Material Breach**

A breach by Business Associate of any provision of this Addendum shall constitute a material breach of the Motivation License Agreement and shall provide Customer grounds for immediate termination of that agreement. If Customer knows of a pattern of activity or practice of Business Associate that constitutes a material breach of this Addendum or any other arrangement, and Customer does not terminate the Motivation License Agreement, then Customer shall take reasonable steps to cure the breach or end the activity or practice. If Customer's efforts are unsuccessful, it shall terminate the Motivation License Agreement if feasible. If termination is not feasible, Customer shall report the breach or violation to the Secretary of the United States Department of Health and Human Services.

C. Upon termination, Business Associate shall return or destroy all PHI and will retain no copies of such information. If return or destruction is not feasible, then Business Associate shall continue to extend the protections of this Addendum to PHI, and limit future use or disclosure to those purposes that make return or destruction infeasible.

**3. AMENDMENT.**

This Agreement may be amended by the written mutual agreement of the parties.

**4. SURVIVAL.**

The responsibilities of Business Associate under this Agreement shall survive termination or expiration of the Motivation License Agreement.