

Tier1app End User License Agreement

PLEASE NOTE THAT THE TERMS OF THIS END USER LICENSE AGREEMENT SHALL GOVERN YOUR USE OF TIER1APP SOFTWARE, REGARDLESS OF ANY TERMS THAT MAY APPEAR DURING THE INSTALLATION OF THE SOFTWARE.

IMPORTANT: PLEASE READ THIS END USER LICENSE AGREEMENT CAREFULLY BEFORE USING SOFTWARE FROM TIER1APP. BY USING TIER1APP SOFTWARE, YOU SIGNIFY YOUR ASSENT TO AND ACCEPTANCE OF THIS END USER LICENSE AGREEMENT AND ACKNOWLEDGE YOU HAVE READ AND UNDERSTAND THE TERMS. AN INDIVIDUAL ACTING ON BEHALF OF AN ENTITY REPRESENTS THAT HE OR SHE HAS THE AUTHORITY TO ENTER INTO THIS END USER LICENSE AGREEMENT ON BEHALF OF THAT ENTITY. IF YOU DO NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN YOU MUST NOT USE THE TIER1APP SOFTWARE. THIS END USER LICENSE AGREEMENT DOES NOT PROVIDE ANY RIGHTS TO TIER1APP SERVICES SUCH AS SOFTWARE MAINTENANCE, UPGRADES OR SUPPORT. PLEASE REVIEW YOUR SERVICE OR SUBSCRIPTION AGREEMENT(S) THAT YOU MAY HAVE WITH TIER1APP REGARDING SERVICES AND ASSOCIATED PAYMENTS.

EVALUATION LICENSE. If You are licensing the Software for evaluation purposes, Your use of the Software is only permitted in a non-production environment and for the period limited by the License Key. Notwithstanding any other provision in this EULA, an Evaluation License of the Software is provided "AS-IS" without indemnification, support or warranty of any kind, expressed or implied.

1. DEFINITIONS.

- 1.1. **"Affiliate"** means, with respect to a party at a given time, an entity that then is directly or indirectly controlled by, is under common control with, or controls that party, and here "control" means an ownership, voting or similar interest representing fifty percent (50%) or more of the total interests then outstanding of that entity.
- 1.2. **"Contractor"** means any third party employed by You to perform services on Your behalf.
- 1.3. **"Documentation"** means that documentation that is generally provided to customers by Tier1app with the Software, as revised by Tier1app from time to time, and which may include end user manuals, operation instructions, installation guides, release notes, and on-line help files regarding the use of the Software.
- 1.4. **"Intellectual Property Rights"** means all worldwide intellectual property rights, including without limitation, copyrights, trademarks, service marks, trade secrets, know how, inventions, patents, patent applications, moral rights and all other proprietary rights, whether registered or unregistered.
- 1.5. **"License"** means a license granted under Section 2.1 (General License Grant).
- 1.6. **"License Key"** means the license key or similar control mechanism to help ensure compliance with the use and time limitations with respect to Software products.
- 1.7. **"License Term"** shall mean the period of time during which You are licensed to use the Software (and/or the Subscription Services), as set forth in the quote, or Order, and the Software will be available for Your use and/or access only for the duration of such Term.
- 1.8. **"Licensed Products"** means the Software identified on an Order and licensed for a fee.
- 1.9. **"Order"** means a purchase order, enterprise license agreement or other ordering document issued by You to Tier1app or a Tier1app authorized reseller that is accepted by Tier1app as set forth in Section 5 (Order).
- 1.10. **"Open Source Software"** or **"OSS"** means software components that are licensed under a license approved by the Open Source Initiative or similar open source or freeware license and which are included in, embedded, utilized by, provided or distributed with the Software.
- 1.11. **"Party"** means You or Tier1app singularly. You and Tier1app are collectively referred to herein as the **"Parties."**
- 1.12. **"Software"** means the proprietary Tier1app software, including but not limited to GCEasy and FastThread, which You acquire a license under an Order for the particular License Term.
- 1.13. **"Support Services"** means the standard support and maintenance services (such as bug fixes, maintenance releases or error corrections) provided to You in connection with the Software as set forth in Section 2 (License Grant).
- 1.14. **"Third Party Agent"** means a third party delivering information technology services to You pursuant to a written contract with You.

2. LICENSE GRANT.

- 2.1. **General License Grant.** Subject to Your timely payment of the License Fee and the terms and conditions of this Agreement, Tier1app hereby grants You a limited, non-exclusive, non-transferable without rights to sublicense, to install, copy and use the Licensed Product internally during

the applicable License. You may allow Your Contractors and Affiliates to use the Software in accordance with this Agreement, provided, however, at all times You shall remain liable for the acts and omissions of Your Affiliates and Contractors.

- 2.2. **License Fee.** Payment of License Fee shall be made by You as set forth in the applicable Order.
- 2.3. **Third Party Agents.** Under the License granted to You in Section 2.1 (General License Grant) above, You may permit Your Third Party Agents to access, use and/or operate the Software on Your behalf for the sole purpose of delivering services to You, provided that You will be fully responsible for Your Third Party Agents' compliance with terms and conditions of this EULA and any breach of this EULA by a Third Party Agent shall be deemed to be a breach by You.
- 2.4. **Copying Permitted.** You may copy the Software and Documentation as necessary to install and run the quantity of copies licensed, but otherwise for archival purposes only.
- 2.5. **Reverse Engineering and Decompilation.** You acknowledge that the Software contains valuable trade secrets and confidential information of Tier1app. To the full extent permitted under applicable law, You agree not to reverse compile, reverse engineer, reverse assemble, or otherwise attempt, directly or indirectly, to obtain or create source code for the Software for any reason. Notwithstanding the foregoing, decompiling the Software is permitted to the extent the laws of the country in which You are using the Software give You the express right to do so to obtain information necessary to render the Software interoperable with other software; provided that You must first request such information from Tier1app (at legal@Tier1app.com), provide all reasonably requested information to allow Tier1app to assess Your claim, and Tier1app may, in its discretion, either provide such interoperability information to You, impose reasonable conditions, including a reasonable fee, on such use of the Software, or offer to provide alternatives to ensure that Tier1app's proprietary rights in the Software are protected and to reduce any adverse impact on Tier1app's proprietary rights.
- 2.6. **Books and Records; Audit Rights.** You shall create and keep accurate records regarding its compliance with the terms and conditions of this Agreement. Upon five (5) business days prior notice, Tier1app or its designee may audit Your records to verify Your compliance with this Agreement; provided, however that You may require a Tier1app designee to execute a confidentiality agreement reasonably satisfactory to You. Any such audit shall be performed at Your facilities during normal business hours and no more than one (1) time in any twelve (12) month period. In the event any such audit reveals that You have used or distributed the Software in violation of this Agreement, You shall promptly pay to Tier1app any amounts owed for such violation. In the event that the amounts owed for such violation(s) exceed by 15% the sum of all amounts owed to Tier1app by You during the prior twelve (12) month period, then: (i) You shall promptly reimburse Tier1app for all costs and expenses incurred for the audit; and (ii) Tier1app shall be entitled to conduct one (1) additional audit during the given twelve (12) month period.
- 2.7. **Suggestions/Enhancement Requests.** You hereby grant to Tier1app a royalty-free, worldwide, transferable, sublicense-able, irrevocable, perpetual license to use or incorporate into the Software and/or the Documentation (and/or any future version of either of them) any suggestions, enhancement requests, recommendations or other feedback related to the Software, Documentation and/or the Support Services provided by You to Tier1app. You shall execute such further documents and do any and all such further things as may be necessary to implement and carry out the intent of this provision.

3. SUPPORT SERVICES.

- 3.1. **Support Service Provider.** If you obtained your Software directly from Tier1app or its authorized reseller, then Tier1app will provide the Support Services in connection with the Software. If you obtained your Software directly from a value added reseller, then the value added reseller will provide your Support Services in connection with the Software. Your Order should specify whether you purchased the Software directly from Tier1app, its authorized reseller, or a value added reseller.
- 3.2. **Limited License.** The licenses granted herein are only for a single account for which You have paid the applicable fees and taxes for the Support Services and are granted solely for the purpose of allowing You to connect to and use the Support Services for Your personal or internal business use. Multiple accounts may be secured through a separate paid license for each account. You must have a license for each account used to access or use the Support Services.
- 3.3. **Delivery.** Tier1app, or if applicable Your value added reseller, shall provide You with an interface necessary to use the Services ("Interface"). You agree to access the Services only through the interface and will not create any derivative works of the interface or the Support Services. You agree not to circumvent any limitations to the Support Services or Interface as implemented by Tier1app, or if applicable your value added reseller.

4. RESTRICTIONS; OWNERSHIP.

- 4.1. **License Restrictions.** Without Tier1app's prior written consent, You must not, and must not allow any third party to: (a) use Software in an application services provider, service bureau, or similar capacity for third parties, except that You may use the Software to deliver hosted services to Your Affiliates; (b) make the Software available in any form to anyone other than Your employees or contractors who require access to use Software on Your behalf in a matter permitted by this EULA, or third party agents except as specified in Section 2.3 (Third Party Agents); (c) transfer or sublicense Software or Documentation to an Affiliate or any third party, except as expressly permitted in Section 13.1 (Transfers; Assignment); (d) use Software in conflict with the terms and restrictions of the Software's licensing model and other requirements specified in Tier1app quote or Order on in this EULA; (e) except to the extent permitted by applicable mandatory law, modify, translate, enhance, or create

derivative works from the Software, or reverse engineer, decompile, or otherwise attempt to derive source code from the Software, except as specified in Section 2.5 (Reverse Engineering and Decompilation); (f) remove any copyright or other proprietary notices on or in any copies of Software; or (g) violate or circumvent any technological restrictions within the Software or specified in this EULA.

- 4.2. **Restricted Activities.** You shall not, and shall not encourage any third party to: (a) modify, adapt, alter, translate, or create derivative works of the Licensed Products; (b) reverse-engineer, decompile, disassemble, or attempt to derive the source code for the Licensed Products, in whole or in part, except to the extent that such activities are permitted under applicable law; (c) distribute, license, sublicense, lease, rent, loan, or otherwise transfer the Licensed Products to any third party; (d) remove, alter, or obscure in any way the proprietary rights notices (including copyright, patent, and trademark notices and symbols) of Tier1app or its suppliers contained on or within any copies of the Licensed Products; (e) use the Licensed Products with any unsupported software or hardware (as described in the applicable documentation provided by Tier1app); (f) use the Licensed Products for any time-sharing, outsourcing, service bureau, hosting, application service provider or like purposes; (g) use the Licensed Products for the purpose of third party training; (h) disclose the results of any benchmark tests on the Licensed Products without Tier1app's prior written consent; or (i) use the Licensed Products other than as described in the documentation provided therewith, or for any unlawful purpose.
- 4.3. **Ownership of Licensed Product.** The Software and Documentation, all copies and portions thereof, and all improvements, enhancements, modifications and derivative works thereof, and all Intellectual Property Rights therein, are and shall remain the sole and exclusive property of Tier1app and its licensors. Your rights to use the Software and Documentation shall be limited to those expressly granted in this EULA and any applicable Order. No other rights with respect to the Software or any related Intellectual Property Rights are implied. You are not authorized to use (and shall not permit any third party to use) the Software, Documentation or any portion thereof except as expressly authorized by this EULA or the applicable Order. Tier1app reserves all rights not expressly granted to You. Tier1app does not transfer any ownership rights in any Software. All the copies of the Licensed Products provided or made available hereunder are licensed, not sold.
5. **ORDER.** Your Order is subject to this EULA. No Orders are binding on Tier1app until accepted by Tier1app. Orders for Software are deemed to be accepted upon Tier1app's delivery of the Software and License Key included in such Order. Orders issued to Tier1app do not have to be signed to be valid and enforceable.
6. **SUPPORT SERVICES AND SUBSCRIPTION SERVICES.** In the event You have purchased Tier1app's Support or Subscription Services You will be entitled to any updates, upgrades, binaries and patches or extensions or enhancements to the Software. Subscription Services includes Support Services and enables You to obtain unspecified upgrades and major releases of the Software product purchased under such Subscription Service during the Subscription Term.
7. **SOFTWARE WARRANTY DISCLAIMER AND LIMITATIONS.**
 - 7.1. **Software Performance Warranty and Remedy.** Tier1app makes no warranty to You other than that, during the License Term, the Software will perform in all material respects in accordance with its Documentation. The exclusive remedy and Tier1app's sole obligation for any failure of the Software to perform in all material respects in accordance with its Documentation will be for Tier1app to use its commercially reasonable efforts to correct such non-conformance. Such warranties do not apply to any defect resulting from misuse, casualty loss, use or combination of the Software with any products, goods, services or other items furnished by anyone other than Tier1app (unless recommended by Tier1app in writing), any modification not made by or for Tier1app, or any use of the Software by You in contradiction of the terms of this Agreement.
 - 7.2. **Warranty Disclaimer and Limitations.** EXCEPT AS SET FORTH IN SECTION 7.1, ALL PRODUCTS AND SERVICES PROVIDED PURSUANT TO THIS AGREEMENT, INCLUDING WITHOUT LIMITATION THE SUPPORT SERVICES, TRAINING SERVICES AND THE SOFTWARE ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, AND TIER1APP MAKES NO WARRANTIES WHETHER EXPRESSED, IMPLIED OR STATUTORY REGARDING OR RELATING THERETO. TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAW, TIER1APP SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT WITH RESPECT TO THE PRODUCTS AND SERVICES PROVIDED PURSUANT TO THIS AGREEMENT, INCLUDING WITHOUT LIMITATION THE SOFTWARE, DOCUMENTATION, SUPPORT SERVICES AND TRAINING SERVICES PROVIDED BY TIER1APP HEREUNDER, AND WITH RESPECT TO THE USE OF THE FOREGOING. FURTHER, TIER1APP DOES NOT WARRANT RESULTS OF USE OR THAT THE SOFTWARE WILL BE ERROR FREE OR THAT THE YOUR USE OF THE SOFTWARE WILL BE UNINTERRUPTED. IN THE EVENT THAT APPLICABLE LAW DOES NOT PERMIT SOME OR ALL OF THE DISCLAIMER SET FORTH HEREIN, ANY LIABILITY WILL BE SUBJECT TO THE LIMITATION OF LIABILITY IN SECTION 10.
8. **INDEMNIFICATION.**
 - 8.1. **Mutual.** Each Party ("Indemnitor") shall indemnify, defend and hold the other Party and its directors, officers, employees, agents and independent contractors ("Indemnitee") harmless from and against, any and all suits, actions and proceedings, claims, liabilities, losses, damages, expenses (including attorneys' fees) and costs (collectively, "Claims"), made against an Indemnitee by a third party for personal injury or tangible property damage, but only to the extent arising solely from: (i) any gross negligence or reckless act, or any intentional misconduct of the Indemnitor, or its directors, officers, employees, agents or independent contractors in the performance of this Agreement; or (ii) any violation of any laws, statues or governmental regulations. Notwithstanding the foregoing, Tier1app's indemnity obligations are subject to the Limitation of Liability provisions of Section 10.

8.2. **Conditions.** The indemnification obligations of the Parties in this Section 8 are contingent upon: (i) the Indemnitee promptly notifying the Indemnitor in writing of any claim which may give rise to a Claim indemnification hereunder; (ii) the Indemnitor being allowed to control the defense and settlement of such Claim; and (iii) the Indemnitee cooperating with all reasonable requests of the Indemnitor (at Indemnitor's expense) in defending or settling a Claim. The Indemnitee shall have the right, at its option and expense, to participate in the defense of any suit or proceeding through a counsel of its own choosing.

8.3. **Waiver.** The Parties waive any and all other rights to indemnity.

9. INTELLECTUAL PROPERTY INDEMNIFICATION.

9.1. **Obligation.** Subject to the damages cap set forth in Section 10.2 and the terms set forth herein, Tier1app will, at its expense defend a claim brought against You by a third party during the Term alleging that the Software infringes a patent registered in the United States, or any copyright or trademark registered in the territory of Your use of the Software ("Infringement Claim").

9.2. **Remedies.** If the alleged infringing Software becomes, or in Tier1app's opinion be likely to become, the subject of an Infringement Claim, Tier1app will, at Tier1app's option and expense, do one of the following: (a) procure the rights necessary for You to make continued use of the affected Software; (b) replace or modify the affected Software to make it non-infringing; or (c) terminate the License to the affected Software and discontinue the related Support Services, and, upon Your certified deletion of the affected Software, refund: (i) the fees paid by You for the License to the affected Software, less straight-line depreciation over a three (3) year useful life beginning on the date such Software was delivered; and (ii) any pre-paid service fee attributable to related Support Services to be delivered after the date such service is stopped. Nothing in this Section 9.2 (Remedies) shall limit Tier1app's obligation under Section 9.1 (Defense and Indemnification) to defend and indemnify You, provided that You replace the allegedly infringing Software upon Tier1app's making alternate Software available to You and/or You discontinue using the allegedly infringing Software upon receiving Tier1app's notice terminating the affected License.

9.3. **Exclusions.** Notwithstanding the foregoing, Tier1app will have no obligation under this Section 9 (Intellectual Property Indemnification) or otherwise with respect to any claim based on: (a) a combination of Software with non-Tier1app products (other than non-Tier1app products that are listed on the Order and used in an unmodified form); (b) use for a purpose or in a manner for which the Software was not designed; (c) use of any older version of the Software when use of a newer Tier1app version would have avoided the infringement; (d) any modification to the Software made without Tier1app's express written approval; (e) any claim that relates to open source software or freeware technology or any derivatives or other adaptations thereof that is not embedded by Tier1app into Software listed on Tier1app's price list; (f) results from use of the Software after Your license was terminated; (g) results from the combination, operation, or use of the Software with any other products or equipment; (h) use of any version of the Tier1app Software not made available directly from Tier1app; (i) the failure to use an Update made available by Tier1app that would have avoided such infringement; (j) a modification of the Tier1app Software that is not performed by Tier1app if liability would have been avoided in the absence of such modification; (k) the combination, operation, or use of the Tier1app Software with any other products or equipment, if liability would have been avoided in the absence of such combination, operation, or use; or (l) damages attributable to the use of a non-Tier1app product or service, or (m) any Software provided on a no charge, beta or evaluation basis. THIS SECTION 9 (INTELLECTUAL PROPERTY INDEMNIFICATION) STATES YOUR SOLE AND EXCLUSIVE REMEDY AND TIER1APP'S ENTIRE LIABILITY FOR ANY INFRINGEMENT CLAIMS OR ACTIONS.

9.4. **Conditions.** To be eligible for the protections under this Section 9, You must notify Tier1app within seven (7) days of its receipt of any notification of the existence of any threatened or pending Claim by a third person and give Tier1app reasonable assistance and information in the defense or settlement of the Claim. Tier1app will have sole control over the defense and settlement of the Claim. Your counsel will have the right to participate in the defense of the Claim, at Your own expense. You will not, without the prior written consent of Tier1app, settle, compromise or consent to the entry of any judgment with respect to the pending or threatened Claim.

10. LIMITATION OF LIABILITY.

10.1. **Limitation of Liability.** TO THE MAXIMUM EXTENT MANDATED BY LAW, IN NO EVENT WILL TIER1APP AND ITS LICENSORS BE LIABLE FOR ANY LOST PROFITS OR BUSINESS OPPORTUNITIES, LOSS OF USE, LOSS OF REVENUE, LOSS OF GOODWILL, BUSINESS INTERRUPTION, LOSS OF DATA, OR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES UNDER ANY THEORY OF LIABILITY, WHETHER BASED IN CONTRACT, TORT, NEGLIGENCE, PRODUCT LIABILITY, OR OTHERWISE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO YOU. THE FOREGOING LIMITATIONS SHALL APPLY REGARDLESS OF WHETHER TIER1APP, ITS AUTHORIZED RESELLERS, ITS VALUE ADDED RESELLERS AND/OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE.

10.2. **Damages Cap.** IN NO EVENT SHALL TIER1APP'S AGGREGATE, CUMULATIVE LIABILITY TO YOU AND ANY RESELLER THROUGH WHICH YOU PURCHASED THE SOFTWARE UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO POTENTIAL LIABILITY, INDEMNITY OBLIGATIONS AND ATTORNEYS' FEES PURSUANT TO SECTIONS 8, 9 AND 13.1, EXCEED THE LESSER OF (A) AMOUNTS PAID TO TIER1APP UNDER THIS AGREEMENT FOR THE SOFTWARE, THE SUPPORT SERVICES OR THE TRAINING SERVICES GIVING RISE TO SUCH LIABILITY, IN THE TWELVE (12) MONTHS IMMEDIATELY PRIOR TO THE EVENT GIVING RISE TO LIABILITY AND (B) TEN THOUSAND DOLLARS (\$10,000).

- 10.3. **Further Limitations.** Tier1app's licensors, authorized resellers and value added resellers shall have no liability of any kind under this EULA. You may not bring a claim under this EULA more than eighteen (18) months after the cause of action arises.
- 10.4. **Disclaimer of Certain Damages.** **IN NO EVENT SHALL TIER1APP BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING OUT OF OR RELATED TO ANY SOFTWARE COMPONENTS THAT ARE LICENSED UNDER A LICENSE APPROVED BY THE OPEN SOURCE INITIATIVE OR SIMILAR OPEN SOURCE OR FREWARE LICENSE AND WHICH ARE INCLUDED IN, EMBEDDED, UTILIZED BY, PROVIDED OR DISTRIBUTED WITH THE SOFTWARE.** IN NO EVENT SHALL YOU OR TIER1APP BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF USE, BUSINESS INTERRUPTION, LOSS OF DATA, COST OF SUBSTITUTE GOODS OR SERVICES, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND IN CONNECTION WITH OR ARISING OUT OF THE USE OR INABILITY TO USE THE SOFTWARE, OR THE PERFORMANCE OF OR FAILURE TO PERFORM THIS AGREEMENT, WHETHER ALLEGED AS A BREACH OF CONTRACT OR TORTIOUS CONDUCT, INCLUDING NEGLIGENCE, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ADDITION, TIER1APP SHALL NOT BE LIABLE FOR ANY DAMAGES CAUSED BY DELAY IN THE DELIVERY OR FURNISHING OF THE SOFTWARE, DOCUMENTATION, THE SUPPORT SERVICES OR THE TRAINING SERVICES. THE LIMITATIONS OF LIABILITY SET FORTH IN THIS SECTION 10.1 SHALL NOT APPLY TO A BREACH BY YOU OF THE SCOPE OF THE LICENSE GRANTED IN SECTION 2 OF THIS AGREEMENT.
- 10.5. YOU AGREE THAT THE FOREGOING LIMITATIONS, EXCLUSIONS AND DISCLAIMERS ARE A BARGAINED FOR REASONABLE ALLOCATION OF THE RISK BETWEEN THE PARTIES AND WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EVEN IF ANY REMEDY FAILS IN ITS ESSENTIAL PURPOSE.

11. TERMINATION.

- 11.1. **EULA Term.** The term of this EULA begins on the notice of availability for electronic download or delivery of the Software and continues until this EULA is terminated in accordance with this Section 11.
- 11.2. **Termination for Breach.** Tier1app may terminate this EULA effective immediately upon written notice to You if: (a) You fail to pay any portion of the fees under an applicable Order within ten (10) days after receiving written notice from Tier1app or its authorized reseller that payment is past due; or (b) You breach any other provision of this EULA and fail to cure within thirty (30) days after receipt of written notice thereof.
- 11.3. **Termination for Insolvency.** Tier1app may terminate this EULA effective immediately upon written notice to You if You: (a) terminate or suspend Your business; (b) become insolvent, admit in writing Your inability to pay Your debts as they mature, make an assignment for the benefit of creditors; or become subject to control of a trustee, receiver or similar authority; or (c) become subject to any bankruptcy or insolvency proceeding.
- 11.4. **Effect of Termination.** Upon Tier1app's termination of this EULA: (a) all Licensed rights to all Software granted to You under this EULA will immediately cease; and (b) You must cease all use of all Software, and return or certify destruction of all Software and License Keys (including copies) to Tier1app, and return, or if requested by Tier1app, destroy, any related Tier1app Confidential Information in Your possession or control and certify in writing to Tier1app that You have fully complied with these requirements. Any provision will survive any termination or expiration if by its nature and context it is intended to survive, including Sections 1 (Definitions), 2.7 (Open Source Software), 2.8 (Records and Audit), 4 (Restrictions; Ownership), 7 (Software Warranty Disclaimer and Limitations), 10 (Limitation of Liability), 11 (Termination), 12 (Confidential Information) and 13 (General).
- 11.5. **No Liability for Expiration or Lawful Termination.** Neither Party shall have the right to recover damages or to indemnification of any nature, whether for goodwill or otherwise, made in connection with the business contemplated by this Agreement due to the expiration or lawful termination of this Agreement. EACH PARTY WAIVES AND RELEASES THE OTHER PARTY FROM ANY CLAIM TO COMPENSATION OR INDEMNITY FOR TERMINATION UNLESS TERMINATION IS IN MATERIAL BREACH OF THIS AGREEMENT.

12. CONFIDENTIAL INFORMATION.

- 12.1. **Definition.** "Confidential Information" means information or materials provided by one party ("Discloser") to the other party ("Recipient") which are in tangible form and labeled "confidential" or the like, or, information which a reasonable person knew or should have known to be confidential. The following information shall be considered Confidential Information whether or not marked or identified as such: (a) License Keys; (b) information regarding Tier1app's pricing, product roadmaps or strategic marketing plans; and (c) non-public materials relating to the Software, including without limitation, computer programs, technical drawings, algorithms, know-how, formulas, processes, ideas, inventions (whether or not patentable), schematics and other technical plans.
- 12.2. **Protection.** Recipient may use Confidential Information of Discloser; (a) to exercise its rights and perform its obligations under this EULA; or (b) in connection with the parties' ongoing business relationship. Recipient will not use any Confidential Information of Discloser for any purpose not expressly permitted by this EULA, and will disclose the Confidential Information of Discloser only to the employees or contractors of Recipient who have a need to know such Confidential Information for purposes of this EULA and who are under a duty of confidentiality no less restrictive than Recipient's duty hereunder. Recipient will protect Confidential Information from unauthorized use, access, or disclosure in the same manner as Recipient protects its own confidential or proprietary information of a similar nature but with no less than reasonable care.
- 12.3. **Exceptions.** Recipient's obligations under Section 12.2 (Protection) with respect to any Confidential Information will terminate if Recipient can

show by written records that such information: (a) was already known to Recipient at the time of disclosure by Discloser; (b) was disclosed to Recipient by a third party who had the right to make such disclosure without any confidentiality restrictions; (c) is, or through no fault of Recipient has become, generally available to the public; or (d) was independently developed by Recipient without access to, or use of, Discloser's Information. In addition, Recipient will be allowed to disclose Confidential Information to the extent that such disclosure is required by law or by the order of a court of similar judicial or administrative body, provided that Recipient notifies Discloser of such required disclosure promptly and in writing and cooperates with Discloser, at Discloser's request and expense, in any lawful action to contest or limit the scope of such required disclosure.

- 12.4. **Information About Your Use of Software.** You agree that Tier1app may process technical and related information about Your use of the Software which may include internet protocol address, hardware identification, operating system, application software, peripheral hardware, and non-personally identifiable Software usage statistics to facilitate the provisioning of updates, support, invoicing or online services and may transfer such information to other companies in the Tier1app worldwide group of companies from time to time.

13. GENERAL.

- 13.1. **Transfers; Assignment.** You will not assign this EULA, any Order, or any right or obligation herein or delegate any performance without Tier1app's prior written consent, which consent will not be unreasonably withheld. Any other attempted assignment or transfer by You will be void. Tier1app may use its Affiliates or other sufficiently qualified subcontractors to provide services to You, provided that Tier1app remains responsible to You for the performance of the services.
- 13.2. **Assignment.** You may not assign this EULA, in whole or in part, without the prior written consent of Tier1app. Any assignment in violation of this Section shall be void, ab initio, and of no effect. Subject to the foregoing, this EULA is binding upon, inures to the benefit of and is enforceable by the Parties and their respective successors and assigns.
- 13.3. **Notices.** Any notice delivered by Tier1app to You under this EULA will be delivered via mail, email or fax.
- 13.4. **Waiver.** Failure to enforce a provision of this EULA will not constitute a waiver.
- 13.5. **Severability.** If any part of this EULA is held unenforceable, the validity of all remaining parts will not be affected.
- 13.6. **Compliance with Laws; Export Control; Government Regulations.** Each party shall comply with all laws applicable to the actions contemplated by this EULA. You acknowledge that the Software is of United States origin, is provided subject to the U.S. Export Administration Regulations, may be subject to the export control laws of the applicable territory, and that diversion contrary to applicable export control laws is prohibited. You represent that (1) You are not, and are not acting on behalf of, (a) any person who is a citizen, national, or resident of, or who is controlled by the government of any country to which the United States has prohibited export transactions; or (b) any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons, or the U.S. Commerce Department Denied Persons List or Entity List; and (2) You will not permit the Software to be used for, any purposes prohibited by law, including, any prohibited development, design, manufacture or production of missiles or nuclear, chemical or biological weapons. The Software and accompanying documentation are deemed to be "computer software" and "computer software documentation", respectively, pursuant to DFARS Section 227.7202 and FAR Section 12.212(b), as applicable. Any use, modification, reproduction, release, performing, displaying or disclosing of the Software and documentation by or for the U.S. Government shall be governed solely by the terms and conditions of this EULA.
- 13.7. **Government Rights.** The Software licensed under this Agreement is "commercial computer Products" as that term is described in DFAR 252.227-7014(a)(1). If acquired by or on behalf of a civilian agency, the U.S. Government acquires this commercial computer Product and/or commercial computer Products documentation subject to the terms and conditions of this Agreement as specified in 48 C.F.R. 12.212 (Computer Products) and 12.11 (Technical Data) of the Federal Acquisition Regulations ("FAR") and its successors. If acquired by or on behalf of any agency within the Department of Defense ("DOD"), the U.S. Government acquires this commercial computer Products and/or commercial computer Products documentation subject to the terms and conditions of this Agreement as specified in 48 C.F.R. 227.7202 of the DOD FAR Supplement and its successors. You will not export the commercial computer Products in violation of the export laws of the United States or of any other country.
- 13.8. **Export Control.** You acknowledge that the goods, software and technology acquired from Tier1app are subject to U.S. export control laws and regulations, including but not limited to the International Traffic In Arms Regulations ("ITAR") (22 C.F.R. Parts 120-130 (2010)); the Export Administration Regulations ("EAR") (15 C.F.R. Parts 730-774 (2010)); the U.S. antiboycott regulations in the EAR and U.S. Department of the Treasury regulations; the economic sanctions regulations and guidelines of the U.S. Department of the Treasury, Office of Foreign Assets Control, and the USA Patriot Act (Title III of Pub. L. 107-56, signed into law October 26, 2001), as amended. You are now and will remain in the future compliant with all such export control laws and regulations, and will not export, re-export, otherwise transfer any Tier1app goods, software or technology or disclose any software or technology to any person contrary to such laws or regulations. You acknowledge that remote access to the Software may in certain circumstances be considered a re-export of the Software, and accordingly, may not be granted in contravention of U.S. export control laws and regulations.
- 13.9. **Construction.** The headings of sections of this EULA are for convenience and are not to be used in interpreting this EULA. As used in this EULA, the word "including" means "including but not limited to".

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- 13.10. **Governing Law.** This EULA will be governed by the laws of the State of California, without regard to its conflict of laws principles. This EULA shall not be governed by the 1980 UN Convention on Contracts for the International Sale of Goods. All suits hereunder will be brought solely in Federal Court for the Central District of California, or if that court lacks subject matter jurisdiction, in any California State Court located in Los Angeles County. The Parties hereby irrevocably waive any and all claims and defenses either might otherwise have in any such action or proceeding in any of such courts based upon any alleged lack of personal jurisdiction, improper venue, forum non convenient or any similar claim or defense. A breach by either Party of Section 12 would cause irreparable harm for which the non-breaching Party shall be entitled to seek injunctive relief.
- 13.11. **Attorneys' Fees.** In any judicial proceeding between You and Tier1app arising out of or relating to this EULA, the prevailing Party shall be entitled to recover reasonable attorneys' fees.
- 13.12. **Force Majeure.** Neither Party will be liable for, or be considered to be in breach of or default under this EULA, other than monetary obligations, as a result of any cause or condition beyond such Party's reasonable control including but not limited to acts of God, war, riot, embargoes, acts of civil or military authorities, denial of or delays in processing of export license applications, fire, floods, earthquakes, accidents, strikes or fuel crises, provided that such Party gives prompt written notice thereof to the other Party. The time for performance will be extended for a period equal to the duration of the Force Majeure, but in no event longer than sixty days.
- 13.13. **Third Party Rights.** Other than as expressly set out in this EULA, this EULA does not create any rights for any person who is not a party to it, and no person who is not a party to this EULA may enforce any of its terms or rely on any exclusion or limitation contained in it.
- 13.14. **No Third Party Modifications.** No authorized reseller, value added reseller or agent has any authority to modify or alter the terms of this EULA in any manner. Any such representations are invalid and of no force or effect. If You believe that an authorized reseller, value added reseller or agent has offered You terms that are inconsistent with this EULA, then you must not use the Tier1app Software.
- 13.15. **Entire Agreement.** This EULA, including accepted Orders and any amendments hereto, together with the Support Service Policy, represents the entire agreement of the Parties with respect to the subject matter of this EULA and supersede all previous or contemporaneous communications, representations, proposals, commitments, understandings and agreements, whether written or oral, between the parties regarding the subject matter hereof. This EULA may be amended only in writing signed by authorized representatives of both parties.
- 13.16. **Contact Information.** Please direct legal notices or other correspondence to Tier1app Corporation at email address: Legal@Tier1app.com, Attention: Legal Department.