

Appendix C: Escrow Agreement

**SAMPLE ESCROW AGREEMENT
APPLICATION SOFTWARE SOURCES CODE**

This AGREEMENT between _____ (hereinafter “ ”) located at _____, _____ (hereinafter “**Escrow Agent**”) whose main office is located at _____, _____ and _____, _____, (hereinafter “**Contractor**”) for the benefit of the Cleveland Metropolitan Schools acting by and through the Cleveland Metropolitan Schools (“**CMSD**”), whose principal office is located at 1111 Superior Avenue, Cleveland, Ohio 44114 (hereinafter “**End-User**”).

WHEREAS, _____ and the **End-User** have entered into an Agreement(s) for the acquisition of computer hardware and/or licensing of _____ produced Application Software Packages, and WHEREAS, the **End-User** wants to secure the availability of such Software Source Codes, and

WHEREAS, the **Escrow Agent** desires to serve as **Escrow Agent** for such Software Source Codes;

NOW THEREFORE, in consideration of the terms hereinafter mentioned, the parties do hereby agree as follows:

1. _____ will procure an escrow agent located in the city of Cleveland and the state of Ohio and deliver to the **Escrow Agent**, the Software Source Codes and subsequent versions thereof (hereinafter referred to as “Sources”) and the documentation and diagrams used to develop the Sources to include, but not limited to, data flow diagrams, entity relationship diagrams, work flow diagrams, window layouts, report layouts, process flows, interface designs, logical and physical database design diagrams, technical and user manuals, and data dictionary (hereinafter referred to as "Sources' Documentation") for -produced application Software Package (hereinafter referred to as “Packages”) as installed on the **End-User’s** computer. The Packages installed are as follows:

List Packages installed

If the **Escrow Agent** relocates outside of the city of Cleveland, this Application Software Sources' Escrow Agreement shall be void and _____, after consultation with and approval of the **End-User**, shall procure an escrow agent within the city of Cleveland area of Ohio.

2. The Sources deliverable and Sources' Documentation deliverable to the **Escrow Agent** shall correspond to each version of the Packages which have been installed after acceptance test procedures have been completed and signed-off by a duly authorized representative of the **End-User**.

3. The Sources shall be stored on CDs or other media compatible with **End-User** hardware capabilities as designated by the **End-User** (the “Storage Media”). If Sources' Documentation is available in digital format than it should be stored on CDs or other media designated by **End-User**. If Sources

Documentation is not available in digital format, a hardcopy of all documentation should be supplied. The **End-User** shall be provided with software required to view the Sources and Sources' Documentation.

4. The Sources and Sources' Documentation will be at all times submitted to the **Escrow Agent** in a sealed package which will bear identification as to the **End-User's** name and address, the date and version of the Sources and Package names. The Sources and Sources' Documentation will be stored by the **Escrow Agent** in a fireproof vault or safe. The Sources and Sources' Documentation shall not be exposed intentionally to x-ray, magnetic force, direct sunlight or extreme heat or humidity.

5. The **Escrow Agent** shall inform the **End-User** and _____ in writing within thirty (30) days after receipt of any Sources or Sources' Documentation that have been deposited in escrow along with the location of the place of escrow in sufficient detail as will allow the **End-User** or _____ to locate such place and the identification information on the sealed package containing the Sources and Sources' Documentation.

6. Should the **Escrow Agent** change the location of the escrow, it will notify the **End-User** and _____ of the new location (providing sufficient detail as will allow the **End-User** or _____ to locate such new place) within thirty (30) days of the date the Sources and Sources' Documentation were moved to their new place of escrow

7. The **Escrow Agent** shall have the right to inspect the Sources and Sources' Documentation delivered. If this right is exercised, the purpose of this inspection shall be to determine the physical condition of the Storage Media. If the **Escrow Agent** notices any damages, or if the **Escrow Agent** is doubtful as to whether damage exists, the **Escrow Agent** shall have the right to request another copy of the Storage Media containing the same Sources and Sources' Documentation. The **Escrow Agent**, once in possession of the Sources and Sources' Documentation, shall be liable for the loss of the Sources and Sources' Documentation or damage to it (them) caused by any acts of negligence. However, the **Escrow Agent** shall not be held liable for any damage to the Sources and Sources' Documentation caused by any acts of God, including corruption of the storage environment due to losses of electrical power beyond the **Escrow Agent's** control.

8. If the **End-User** is to receive the Sources and Sources' Documentation held in escrow per the terms of this Agreement, the **End-User** must collect all such Sources and Sources' Documentation held by the **Escrow Agent** in person. Upon receipt, the **End-User** must sign a release indicating the condition of the Sources and Sources' Documentation (whether damaged or undamaged).

9. The **Escrow Agent** shall not be liable for the contents of any Sources and Sources' Documentation indicated in a release (per Section 8) signed by the End-User as not damaged.

10. Every six (6) months, _____ will deliver in a sealed package to the **Escrow Agent** the new Sources and Sources' Documentation, if applicable, containing subsequent versions of the Package(s) as developed by _____ inclusive of any **End-User** modifications or enhancements thereto. At the option of the **End-User**, delivery to the **Escrow Agent** of any such new or replacement Sources and

Sources' Documentation shall be subject to prior inspection and sealing by the **End-User**. Such inspection and sealing shall take place at _____ place of business and shall be limited to **End-User's** verification of Package(s) contents. **End-User** shall bear all costs associated with its right to inspect Sources and Sources' Documentation. _____ agrees to notify the **End-User** of its intent to generate Sources and Sources' Documentation deposits in less than ten (10) working days prior to such action. **End-User's** failure to be present on the stipulated date shall constitute its waiver of rights of inspection hereunder for the version(s) of the Package(s) being escrowed at that time. Should there be no modifications to, or new versions of the Package(s) within any given six (6) month period, _____ will then deliver to the **Escrow Agent** and to the **End-User** a notification that no software updates were made during said six (6) month period.

11. In the event that _____ has performed modifications or enhancements to the Package(s) for the specific use and at the specific request of the **End-User** or _____ has released a new version of its packages, _____ will deliver to the **Escrow Agent** new Sources and Sources' Documentation within sixty (60) days after any modifications or enhancement has been completed. The **Escrow Agent** will deliver notice in accordance with Section 5.

12. Within 30 days of delivery to the **Escrow Agent** of new Sources and Sources' Documentation pursuant to Sections 10 or 11, the **Escrow Agent** agrees to return to _____ any and all storage media of previous date and issue that correspond to the new Sources and Sources' Documentation being deposited in escrow. **Escrow Agent** shall use the outside identifying marks in determining this duplication of Sources and Sources' Documentation. **Escrow Agent** agrees to ship said older versions of the Sources and Sources' Documentation to _____, in its original cartons, personally or by any carrier service where **Escrow Agent** and _____ may be able to trace said shipment in the event of loss or delay, unless otherwise specified in writing by _____ as to specific shipping instructions. _____ will reimburse **Escrow Agent** for the cost of shipping.

13. Once every calendar year and on a date previously agreed to by _____ and the **Escrow Agent**, duly authorized representatives of _____ and the **Escrow Agent** shall be present together at said vault for the purpose of making a physical inventory of the Sources and Sources' Documentation. The **Escrow Agent** shall report to the **End-User** within thirty (30) days the results of each inventory. _____ further agrees to provide the **End-User** with a legal opinion, once a year, stating _____ status as to filing for voluntary or involuntary bankruptcy, involuntary reorganization, receivership or voluntary liquidation in the county in which _____ is incorporated, or acquisition or merger with another corporation.

14. In addition to the inspection by the **Escrow Agent** described in Section 13 above, the **End-User** shall have the right to make a physical inventory of the Sources and Sources' Documentation at any time, when convenient to and as agreed upon by the **End-User**, the **Escrow Agent**, and _____ .

15. The Escrow Agent will be authorized to release the Sources and Sources' Documentation to the End-User only if:

(a) _____ fails to provide an Application Software Maintenance Agreement to the **End-User** containing, at a minimum, the same terms and conditions of the most recent Application Software Maintenance Agreement in effect between the parties, upon the **End-User's** written request; or _____ fails to honor any existing Application Software Maintenance Agreement. In order for the **End-User** to make a claim for the Sources and/or Sources' Documentation due to this failure, the **End-User** must send to the **Escrow Agent** a copy of the Application Software Maintenance Agreement then in effect and signed by, _____ and/or a copy of the **End-User's** written request for maintenance sent to _____. The **Escrow Agent** shall notify _____ of the receipt of such documents. If _____ does not provide the **Escrow Agent**, within thirty (30) business days of _____' receipt of such notification, with a letter signed by the **End-User**, stating a new Application Software Maintenance Agreement has been received or the terms of the existing Application Software Maintenance Agreement have been honored, _____ will have been deemed to have failed to provide an Application Software Maintenance Agreement and the **Escrow Agent** is authorized to release the Sources and Sources' Documentation for the applicable Package(s) to the **End-User**.

(b) _____ ceases to exist due to an acquisition or merger with another corporation or voluntary liquidation of the corporation and the **End-User** provides the **Escrow Agent** with a copy of the legal opinion provided in Section 13 verifying such a claim, or such other evidence of the application of this section of the Agreement as may be acceptable in a Court of Law.

(c) _____ shall file a petition for relief under Title 11 of the United States Code; there shall be entered an order for relief with respect to any petition filed against _____ under Title II of the United States Code, or decree or order by a court having competent jurisdiction with respect to any petition filed or action taken against looking to reorganize under any other present or future federal or state statute, law or regulation, resulting in the appointment of a receiver of or any substantial part of its property, all without the consent or acquiescence of _____, and the continuance of any such order or decree, unstated and in effect, for a period of sixty (60) consecutive days; the failure by _____ within sixty (60) days to lift any execution, garnishment or attachment of such consequence as will impair its ability to carry on its operations; the assignment of assets by _____ for the benefit of its creditors; the entry by _____ into an agreement of composition with its creditors; or the appointment by order, judgment or decree of a court of competent jurisdiction of a receiver of the whole or a substantial portion of property of _____ (unless such order, judgment or decree is stayed within a period of sixty (60) days after the effective date of such order, judgment or decree or unless such receiver is removed or discharged within sixty (60) days of the date of his qualification)

and the **End-User** provides the **Escrow Agent** with a copy of legal opinion provided in Section 13 verifying such a claim.

16. In the event of any occurrences described in Section 15 (a), (b) or (c) above, unless otherwise instructed by a court of competent jurisdiction, and unless **End-User** makes claim for the Sources and Sources' Documentation as specified hereunder, the **Escrow Agent** shall maintain the Sources and Sources' Documentation in escrow for a maximum period of twelve (12) months after which all obligations hereunder and the entire Agreement will terminate. The **Escrow Agent** thereafter shall freely dispose of said Sources and Sources' Documentation by destroying them.

17. In the event the **Escrow Agent** can not determine that conditions exist supporting the disbursement or retention of the Sources and Sources' Documentation, the **Escrow Agent** is authorized to submit the dispute to the American Arbitration Association in the County where the **Escrow Agent** resides. Any decision forthcoming shall be binding upon _____ and the **End-User** with the cost of such arbitration to be paid by the losing party.

18. This Agreement constitutes the entire Agreement between the parties hereto, and shall remain in effect until rescinded, modified or altered in writing and agreed to by all parties.

19. The **Escrow Agent** may not assign any of its rights or duties hereunder without the prior written consent of _____ .

20. No person, firm, corporation or other entity will be recognized by the **Escrow Agent** as a successor, heir or personal representative of any party to this Agreement until there shall be presented to the **Escrow Agent** evidence satisfactory to it of such succession.

21. The **Escrow Agent** shall have no duties or responsibilities except as expressly provided in this Agreement and shall neither be obligated to recognize nor have any liability or responsibility arising under any other Agreement to which the **Escrow Agent** is not a party, even though reference thereto may be herein or a copy thereof attached hereto.

22. The **Escrow Agent** shall not be responsible for the identity, authority or rights of any person, firm, corporation or other entity, executive or delivering or purporting to execute or deliver this Agreement or any Sources and Sources' Documentation deposited hereunder or any endorsement thereof or assignment thereof.

23. The **Escrow Agent** shall not be responsible for the sufficiency, genuineness or validity of or title to any Sources and Sources' Documentation deposited or to be deposited with it pursuant to any provisions of this Agreement or of any endorsement or assignment thereof.

24. The **Escrow Agent** may rely upon any instrument of writing believed by it to be genuine and sufficient and properly presented, and shall not be liable or responsible for any action taken or omitted in accordance with the provisions thereof.

25. If the Sources and Sources' Documentation held by the **Escrow Agent** hereunder shall be attached, garnished or levied upon any order of court, or the delivery thereof shall be stayed or enjoined by any order of court, or any other order, judgment or decree shall be made or entered by any court affecting such property, or any part thereof, or any act of the **Escrow Agent**, the **Escrow Agent** is hereby expressly authorized in its sole discretion to obey and comply with all writs, orders, judgments or decree so entered or issued, whether with or without jurisdiction, and in case the **Escrow Agent** obeys and complies with any such writ, order, judgment or decree it shall not be liable to any of the parties hereto, their successors, heirs or personal representatives or to any other person, firm or corporation, by reason of such compliance notwithstanding that such writ, order, judgment or decree be subsequently reversed, modified, annulled, set aside or vacated.

26. Whenever it is provided in this Agreement that notice or other communication is to be given or directed to any party hereto, the same shall be given or directed to the respective party at its address as specified at the beginning of the Agreement or at such other addresses as each party may from time to time designate by written notice to the others. Notice shall be addressed as set forth above and delivered by hand or by certified or registered mail, first-class postage repaid, return receipt requested.

27. The **Escrow Agent** shall be entitled to reasonable compensation for the services performed herein. The cost of maintaining this Agreement shall be borne by _____ and set up between _____ and **Escrow Agent** in a separate instrument.

28. The **Escrow Agent** agrees to act as **Escrow Agent** for a term of five (5) years from the date this Agreement takes effect. The **Escrow Agent** may resign after giving sixty (60) days written notice prior to the expiration of the Agreement or any subsequent anniversary. Upon such resignation all fees paid will be returned to _____ on a prorated basis. This Agreement shall automatically renew upon the fifth anniversary of its execution provided the **Escrow Agent** has not resigned.

29. The **Escrow Agent** may employ agents and attorneys for the reasonable protection of the Sources and Sources' Documentation held hereunder and of itself and shall have a lien on the Sources and Sources' Documentation for its compensation and for any and all costs, expenses and attorneys' fees reasonably incurred by it. If the **End-User** attempts to collect the Sources and Sources' Documentation held in escrow pursuant to this Agreement and _____ is delinquent in payment of the **Escrow Agent's** compensation, the **Escrow Agent** may hold all Sources and Sources' Documentation held in Escrow until such time as all delinquent compensation is paid. If the **End-User** pays such delinquent compensation in order to obtain the Sources and Sources' Documentation, the **End-User** may only recover such amounts from _____.

31. This Agreement shall be construed and enforced according to the Laws of The State of Ohio.

32. This Agreement may be executed in several counterparts, each of which, when properly executed by all parties hereto, shall constitute an original instrument.

33. This Agreement shall take effect upon the last date of execution of any party hereto.

34. This Agreement constitutes the entire agreement between the parties and supersedes all other oral or prior written agreements or covenants. This instrument may not be assigned or transferred and may not be modified or amended except by written agreement properly executed by all parties hereto.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective duly authorized officers as of the dates specified below.

END-User

Contractor Escrow Agent

Signature Signature Signature _____

Name & Title Name & Title Name & Title

Date Date Date