Software Source Code Escrow Agreement

- You pay someone to develop a software program for you (*could even be a website, could even be something else*), but they keep the source code (*they often want to until the final payment clears their bank*) – the part of the program that generates the application program that you actually use. What if something happens to the programmer(s)? They die (*I know two who did!*), go to Afghanistan (*none have done that so far*), disappear (*does Mexico count?*)… and now you can't get any modifications or bug fixes to the software you've invested a lot of money in.

- The Software Source Code Escrow Agreement protects licensees of a software program by having the developer's source code placed in escrow, so that licensees may retrieve it if the developer goes out of business or otherwise becomes unable to provide software support.

- Per your development agreement, the developer places the source code and all of the documentation necessary to maintain that program, with a third party. This third party is known as an "escrow agent" and charges the developer a fee to keep the source code in escrow. Most banks provide this service and these are the need specific instructions they require.

- Designated licensee use are granted the right to retrieve the materials so that they can arrange for continued support. This right is customarily triggered by either the developer's bankruptcy or insolvency, a judgment that developer has failed to provide the required support, or if the developer ceases to provide maintenance.

- If a licensee exercises its right to retrieve the materials, this does not mean that the licensee owns the materials. The licensee's rights are still the same as those provided in the license agreement. Retrieving the materials does not enlarge those rights.

From JIAN

NOTICE:

We wish we could provide an agreement that was tailored *exactly* to your business. While this is not always possible, we feel that we've come very close and that this document provides you with the head-start that you need to get your deal moving. Nevertheless, we must make this disclaimer:

- ☯ **Do Not Use This Agreement 'As-Is.'**
- ☯ **This Agreement Is Not Legal Advice.**
- ☯ **Read it Thoroughly and Make All Appropriate Changes to Fit Your Requirements.**
- ☯ **You Should Have this Agreement Reviewed and Approved by a Qualified Attorney at Law Before Using It.**
- ☯ **JIAN Accepts No Liability for the Effectiveness of This Document For Your Purposes.**

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We're building a network of business experts who are eager to help you when you need it. They can review your work, make suggestions, handle unique situations and introduce you to influential people. On our website you can search by expertise and location, then e-mail or jump straight to their website. Although they are professionals and charge for their services, most offer an initial consultation free of charge. They're in your area and you can contact them directly.

- ▪ Please visit our website under **Expert Referral Network**.

Ongoing Update Service Keeps You Current

Things change, laws change, the world changes... new ideas come along all the time. When you register, you can access our website to get updates and changes... like new and improved spreadsheets and documents. They can be downloaded directly to your computer.

- ▪ Please visit our website under **Updates**.
- ▪ Remember to bookmark our website: **www.JIAN.com**

Editing Your Sample Contract

Since this entire agreement is formatted in Word, you can edit it like any other Word document. You can jump from variable to variable by clicking the above ←→ green arrows (JIAN Menu) which will take you forward / backward and highlight the entire sample text identified within the "[ ]" brackets – simply edit / type-over with your information.

To make sure your have filled in all the variables, use Word's 'FIND' function to locate any "[ ]" which may contain an unedited variable.

- ▪ Click the icon in the JIAN menu above to turn the expert comments on/off.
- ▪ Upon completion, delete any unnecessary blank lines that remain.
- ▪ You may format this document any way you like.
- ▪ Delete this page.

Software Source Code Escrow Agreement

◀ৗ This introductory paragraph lists the date and the parties to this Agreement. We formatted this agreement uniquely to make it easy on others (judge, arbitrator(s), etc. God forbid) to readily understand who is involved, when the agreement begins and some basic summary background information.

Effective Date	**[Date]**
between	**[Company Legal Name]**, ("[Company]")
a	[State] [Corporation/Partnership/Sole Proprietorship/Resident],
located at	[Address]
	[City], [State] [Zip Code]
and	**[Escrow Agent],** ("Escrow Agent")
a	[State] [Corporation/Partnership/Sole Proprietorship/Resident]
located at	[Escrow Agent Address].

Summary

Developer licenses the use of certain computer programs to certain users pursuant to license agreements. Continuous availability of such programs and maintenance thereof are critical to those users. Developer performs necessary maintenance and modification of its programs for its users without disclosing such documentation to them or other persons.

Developer wishes to protect the integrity of its programs from duplication, theft or other misappropriation by maintaining them in strict confidence as trade secrets, and wishes to insure that maintenance for Developer's software is available in the event Developer is unable or fails to fulfill its maintenance obligations or in the event Developer does not remain in business.

Escrow Agent is in the business of providing third-party software escrow protection by storing, retaining and allowing limited access to proprietary computer software, related media and materials.

NOW, THEREFORE, the parties agree as follows:

1. Purpose of Agreement

This Agreement establishes an arrangement under which:

A. Developer will store with Escrow Agent certain computer program source code for the program(s) identified in Exhibit A. attached hereto, along with duplication instructions, flow charts, manuals, development tools (if necessary) and other information necessary or appropriate for duplication, compilation and maintenance of said program(s) (the "Materials"); and

B. A "User" (as defined in this Agreement) will be able to secure from Escrow Agent access to the Materials enumerated in its agreement with Developer and stored under this Agreement, under the circumstance, and subject to the terms and conditions, specified below. For these purposes a "User" is any

licensee of one of Developer's computer software programs included with the Materials who: (i) is listed on Exhibit B attached to this Agreement, as it may be amended from time to time following notice from Developer, and (ii) has signed a "License Agreement" with Developer attached to this Agreement as Exhibit D, including the right of User to receive the Materials upon any of the following (an "Event of Default"):

(a)   Developer has filed a petition in bankruptcy, or has made a general assignment for the benefit of creditors or has had a receiver appointed for all or substantially all of its business, or has been liquidated, or dissolved.

(b)   The appointment of a trustee or receiver, voluntary or involuntary (or similar official) of all or a substantial part of the property of Developer under the Bankruptcy Code or any state court receivership proceedings, which appointment remains undismissed for at least 60 days.

(c)   An adjudication, judgment, order or binding arbitration award to the effect that Developer has failed to provide the maintenance or modification obligations required of it under the License Agreement.

(d)   Developer ceases its operations or business or discontinues licensing or maintenance of the Materials.

(e)   Developer is deceased or is otherwise unresponsive for a period of 60 days, evidenced by date-stamped email, postal mail or other bona fide delivery service attempted contact by the User and/or Escrow Agent.

C.   Each such License Agreement must also provide that User expressly acknowledge and agree that Escrow Agent will not be liable to such User for any harm that results from any act or omission of Escrow Agent in connection with serving as escrow agent.

2. Materials

A.   Escrow Agent acknowledges (i) that Developer claims that the Materials contain information that includes trade secrets of Developer or another person; and (ii) that the Materials are intended to constitute items useful to persons reasonably skilled in computer technology for providing maintenance and/or manufacturing documentation support for computer software products Developer licensed to its Users, in the event that any of these Users becomes entitled to receive them.

B.   From time to time, and certainly upon the release of any full version revision/upgrade (version 1.x → 2.x) and/or "point revision" (version 1.2 → 1.3) and/or annual update, during the escrow, Developer will furnish for User benefit then-current Materials to Escrow Agent that are either new Materials or in substitution for Materials in Escrow Agent's possession, and Developer shall identify the prior Materials that are superseded. Escrow Agent shall return to Developer such superseded Materials, provided they can be segregated conveniently. Escrow Agent is not responsible for enforcing or performing any obligation of Developer to Users to furnish then-current Materials.

C.   Developer acknowledges that Escrow Agent does not intend, and is not expected, to open any package represented to contain Materials, except in the circumstance identified in Section 4 below, and hence, is not responsible for determining whether the Materials are useful and has no obligation to enforce Developer's duties under this Agreement.

D.   Developer will retain copies of Materials left in Escrow Agent's possession and will furnish replacements of Materials to Escrow Agent promptly after each written request and without charge. However, if the reason for the request is that, through Escrow Agent's negligence or misconduct, any Materials were lost or damaged, Escrow Agent will reimburse Developer for the cost of the physical media so lost or damaged (but not for any costs incurred in re-recording or reconstructing the information recorded on such media).

3. Treatment of Material

A.   Escrow Agent will not furnish any Materials to any person other than Developer or a User so-entitled, except pursuant to a binding arbitration decision or final order of a court of competent jurisdiction, and will furnish Materials only pursuant to the provisions of this Agreement, or pursuant to such arbitration decision or court order. Escrow Agent shall not be required to incur any expense to challenge any arbitration decision or court order.

B.   Escrow Agent will protect the Materials from disclosure to unauthorized persons by the use of the same measures it uses to protect its own software and documents of equivalent sensitivity.

C.   Escrow Agent shall store the Materials in a climate controlled, secured storage area under the control of the Escrow Agent.

4. Release of Documentation

A.   Upon the occurrence of any Event of Default (as defined in Section 1) any User may notify Escrow Agent in writing as to such Event of Default (a "Notice"), and shall simultaneously provide a copy of any such Notice to Developer. Unless Developer shall have provided "Contrary Instructions" to Escrow Agent within ten (10) business days after Escrow Agent's receipt of such Notice, within five (5) business days following the end of such ten (10) day period, Escrow Agent shall deliver a copy of the Materials then in escrow to such User; provided however, that Escrow Agent shall be under no obligation to deliver a copy of such Materials until such User has first paid to Escrow Agent the cost and expenses of reproduction and delivery of the Materials. Delivery to User shall terminate all duties and obligations of Escrow Agent to that User, and to Developer with respect to that User and with respect to the copy of the Materials delivered to that User.

B.   "Contrary Instructions" for the purposes of this Escrow Agreement means a notarized affidavit executed by an officer of Developer stating that an Event or Events of Default specified in the User's Notice have not occurred, or have been cured.

C.   Upon timely receipt of such Contrary Instructions, Escrow Agent shall not release a copy of the Materials then in escrow, but shall continue to store the Materials until otherwise directed by the User and Developer jointly, or until resolution of the dispute by a court of competent jurisdiction or binding arbitration order.

D.   Developer shall be entitled to receive payment for costs, fees and expenses due it, prior to any release of a copy of the Materials.

E.   Developer represents and warrants that its agreements with Users shall provide Users rights and obligations consistent with the provisions of this Section 4.

5. Fees

A.   In consideration of performing its functions as Escrow Agent, Escrow shall be paid by Developer as set forth in Exhibit C. The fees set forth in Exhibit B will be billed periodically by Escrow Agent to Developer. Developer shall pay amounts due within thirty (30) days of receipt of Escrow Agent's invoice.

B.   The fees set forth in Exhibit C are for the ordinary services of Escrow Agent. In the event Escrow Agent is required to perform additional or extraordinary services not contemplated in this Agreement, including intervention in any litigation or proceeding, Developer shall pay Escrow Agent reasonable compensation for such services and reimburse Escrow Agent for reasonable costs incurred, including attorney's fees.

6. Discharge of Escrow Agent

A.   Escrow Agent will be deemed to be discharged in the event that Developer removes all the Material from Escrow Agent's premises. Except as otherwise provided herein, Developer may do this at any time, entirely in its discretion, by giving at least thirty (30) days' prior notice to Escrow Agent who, upon

receipt of Developer's notice, shall notify all Users.

B.   Escrow Agent may resign as such, at its discretion, by giving Developer and all Users at least thirty (30) days' prior notice. Promptly after that resignation becomes effective, Escrow Agent will furnish to Developer all Material in its possession.

C.   Whenever Escrow Agent ceases to hold the Materials in escrow, it will send a notice to that effect promptly to all Users.

7.   Bankruptcy

Developer acknowledges that this Agreement is an "agreement supplementary to" each License Agreement as provided in Section 365(n) of Title 11, United States Code (the "Bankruptcy Code") as amended. Developer acknowledges that if Developer as a debtor in possession or a trustee in bankruptcy in a case under the Bankruptcy Code rejects a License Agreement or this Agreement, each User may elect to treat its License Agreement and this Agreement as terminated or to retain its rights under the License Agreement and this Agreement as provided in Section 365(n) of the Bankruptcy Code. If a User elects to retain its rights under the License Agreement and this Agreement, then upon written request of the User to Developer or the bankruptcy trustee, Developer or such Bankruptcy Trustee shall not interfere with the rights of User as provided in the License Agreement and this Agreement, including the right to obtain the Materials from Escrow Agent.

8.   Indemnity & Liability of Escrow Agent

A.   Developer will indemnify Escrow Agent for, and hold it harmless against, any loss, cost, suit, damage, claim or expense incurred or suffered in connection with, or as a result of, serving as escrow agent, except any suffered as a result of Escrow Agent's negligent or intentional acts.

B.   Except for liability to Developer for a breach of this Agreement, Escrow Agent will not be liable to Developer, any User, or any other person for any harm that results from any act or omission of Escrow Agent in connection with its serving as Escrow Agent, except in the case of Escrow Agent's negligence.

9.   Effect of Waiver

The waiver or failure of either party to exercise in any respect any right provided for in this Agreement shall not be deemed a waiver of any further or future right under it.

10.   Applicable Law

This Agreement shall be governed construed and enforced according to the laws of [State].

11.   Notices

All notices required or given pursuant to this Agreement shall be sufficiently served by mailing the same by certified or registered mail, return receipt requested, to the parties at their respective address as follows:

If to Escrow Agent:

- [Escrow Agent]
- [Escrow Agent's Address]

If to Developer:

- [Developer]
- [Developer's Address]

Copy to the User
- [Company Legal Name]

- Attention: [Owner/Founder]
- [Address], [City], [State] [Zip Code]

12. Severability

In the event any of the provisions of this Escrow Agreement shall be held by a court of competent jurisdiction to be contrary to any state or federal law, the remaining provisions of this Escrow Agreement will remain in full force and effect.

13. Headings

The section headings in this Agreement are provided for convenience only and shall not be used to construe the meaning or intent of any term.

14. Final Agreement

This Agreement terminates and supersedes all prior understandings or agreements on the subject matter hereof. This Agreement may be modified only by a further writing that is duly executed by both parties.

Understood, Accepted & Agreed

IN WITNESS WHEREOF, the parties have executed this Escrow Agreement on the Effective Date first above written.

_____   _____

[Owner/Founder]   [Developer]

[Company]

Exhibit A

Software Programs

- [Software Title]
- xxx
- xxx

Exhibit B

Licensed Users

- [Company Legal Name]
- xxx
- xxx

Exhibit C

Escrow Fees

- xxx $00
- xxx $00
- xxx $00

EXHIBIT A

DEVELOPER'S PRODUCTS SUBJECT TO ESCROW

[List of Developer's Products]

EXHIBIT B

COMPENSATION OF ESCROW AGENT

A. Annual Escrow Fee. Developer will pay Escrow Agent an annual fee of [Escrow Fee] per Product.

B. Participating User Fee. Developer will pay Escrow Agent an annual fee of [First User Fee] for the first User and [Additional Users Fee] for each User thereafter, unless it is agreed that a given User will directly pay Escrow Agent.

C. Update Fee. Developer will pay Escrow Agent [Update Fee] for each update of the Materials.

D. Service Fees. User will pay [Request Fee] for each Materials release request.

SCHEDULE I

LIST OF DEVELOPER'S USERS

SOFTWARE SOURCE CODE ESCROW AGREEMENT DATED

[December 25, 2007]

The following are Users of Developer's Computer Software Programs who may acquire Materials pursuant to the Escrow Agreement.

[List of Users identified by Product]

[Signature]