



**BINARY TREE™**

Powering Enterprise Transformations™

# Software as a Service (SaaS) Agreement

Power365®



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**THIS SOFTWARE AS A SERVICE AGREEMENT** (this “**Agreement**”) is entered into by and between the Client identified on the Order Form and BinaryTree.com Inc., a Delaware, U.S.A. corporation (“**BT**”), with offices at 3088 Route 27 – Suite 1-2, Kendall Park, NJ 28824. Client and BT are referred to herein collectively as the “**Parties**” and individually as a “**Party**.” This Agreement becomes effective on the Order Start Date specified on the Order Form (“**Order Start Date**”). If Client is an affiliate of a BT customer that has a signed, effective Master Services Agreement with BT, Client hereby agrees to be bound to all terms and conditions of such Master Services Agreement as part of this Agreement and shall be the governing document. By signing the Order Form, each party agrees as follows

## 1. Services and Responsibilities

**Services.** “**Services**” means the online, Web-based Power365® application provided by BT that is ordered by Client under an Order Form.

**Order Forms.** “**Order Forms**” means the ordering documents for purchases hereunder, including addenda thereto, that are signed or electronically accepted by BT and Client from time to time. Each mutually-signed Order Form shall be deemed incorporated herein by reference.

**Specifications.** “**Specification**” means the documentation and/or (online or offline) user guide for the Services, available as set forth on an Order Form, as updated from time to time.

**Provision of Services.** BT shall make the Services available to Client pursuant to this Agreement and the applicable Order Forms during each subscription term.

**Client Data.** “**Client Data**” means all electronic data or information submitted by Client to the Services.

**Users.** “**Users**” means individuals who are authorized by Client to use the Services, for whom subscriptions to a Service have been purchased, and who have been supplied user identifications and passwords by Client (or by BT at Client’s request). Users include employees, consultants, contractors and agents of Client.

**User Subscriptions.** Unless otherwise specified in the applicable Order Form, (i) Services are purchased as User subscriptions and may be accessed by no more than the specified number of Users, (ii) additional User subscriptions may be added during the subscription term at the same pricing and will be for the same term in each case of the subscription term in effect at the time the additional User subscriptions are added, User subscriptions are for designated Users and cannot be shared or used by more than one User, but may be reassigned to new Users replacing former Users who no longer require ongoing use of the Services.

**BT Responsibilities.** BT shall provide the Services in accordance with applicable laws and government regulations. The BT Designated Privacy Protection Officer shall act as the primary point of contact in contracts for cloud service customers regarding the processing of PII under the contract.

In the case of a Personal Data Breach, the Processor will notify the customer without undue delay after becoming aware of a Personal Data Breach.

**Client Responsibilities.** Client shall (i) be responsible for Users’ compliance with this Agreement, (ii) be solely responsible for the accuracy, quality, integrity and legality of Client Data and of the means by which it acquired Client Data, (iii) use commercially reasonable efforts to prevent unauthorized access to or use of the Services, and notify BT promptly of any such unauthorized access or use, and (iv) use the Services only in accordance with the User Guide and applicable laws and government regulations. Client shall not (a) make the Services available to any third party other than Users, (b) sell, resell, rent or lease the Services, (c) use the Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use the Services to store or transmit Malicious Code, (e) interfere with or disrupt the integrity or performance of the Services or third-party data contained therein, or (f) attempt to gain unauthorized access to the Services or their related systems or networks.

## 2. Term and Termination

**Term of Agreement.** This Agreement shall become effective starting on Order Form Start Date and shall continue until all subscriptions hereunder have expired or have been terminated in accordance with the terms set forth herein.

**Term of User Subscriptions.** User subscriptions commence on the start date specified in the applicable Order Form and continue for the subscription term specified therein.

**Termination for Cause.** A party may terminate this Agreement for cause (i) upon 30 days written notice to the other party of a material breach if such breach remains uncured at the expiration of such period, or (ii) if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors. Upon the expiration or termination of this Agreement for any reason, Client shall immediately cease all use of the Services.

**Refund or Payment upon Termination.** Upon any termination, Supplier shall refund Customer any prepaid fees covering the remainder of the term of all subscriptions after the effective date of termination.

**Return of Client Data.** Promptly upon request by Client made within 90 days after the effective date of termination, BT will make available to Client for download a file of Client Data stored in the Services in comma separated value (.csv) format along with attachments in their native format. After such 90-day period, BT shall, unless legally prohibited, delete all Client Data in systems or otherwise in its possession or under its control and certify destruction of the same in writing.

## 3. Proprietary Rights, Restrictions and Exclusions

**Reservation of Rights.** Subject to the limited rights expressly granted hereunder, BT reserves all rights, title and interest in and to the Services, including all related intellectual property rights. No rights are granted to Client hereunder other than as expressly set forth herein.

**Restrictions.** Client shall not (i) permit any third party to access the Services except as permitted herein or in an Order Form, (ii) create derivative works based on the Services, (iii) copy, frame or mirror any part or content of the Services, other than copying or framing on Client's own intranets or otherwise for its own internal business purposes, (iv) reverse engineer the Services, or (v) access the Services in order to (a) build a competitive product or service, or (b) copy any features, functions or graphics of the Services.

**Ownership of Client Data.** As between BT and Client, Client exclusively owns all rights, title and interest in and to all Client Data.

## 4. Enhancement Requests

BT may, but shall have no obligation to, consider Client's suggestions or requests regarding new functionality or features of the Services ("**Enhancement Requests**"). All modifications proposed or requested in an Enhancement Request shall be the sole and exclusive property of BT. BT may, in its sole discretion include such modifications in a future version of the Services, but BT's acceptance and consideration of an Enhancement Request shall not obligate BT to include in any version of the Service any modifications proposed or requested in such Enhancement Request.

## 5. Support Services

**Support.** BT will use commercially reasonable efforts to make available to Clients who have purchased a subscription complimentary Support including the basic functionality of the software 24 hours a day, 7 days a week, 365 days a year. For In-depth product questions, issues, and assistance, cases may be escalated to a solution expert for remediation. Support can be accessed by submitting a standard support request via email, online request form or phone. BT's solution support team is available Monday through Friday 3:00 a.m. - 8:00 p.m. (US Eastern Time).

## 6. Fees and Payment

**User Fees.** Client shall pay only those fees specified in all Order Forms hereunder. Except as otherwise specified herein or in an Order Form, (i) fees are quoted and payable in United States dollars and (ii) fees are based on Services purchased and not actual usage. User subscription fees are based on periods that begin on the subscription start date and each specified anniversary thereof; therefore, fees for User subscriptions added in the middle of a subscription period will be charged for the next full period and the periods remaining in the subscription term.

**Invoicing and Payment.** Fees will be invoiced in advance and otherwise in accordance with the relevant Order Form. Unless otherwise stated in the Order Form, fees are due 30 days from receipt of the invoice.

**Taxes.** Unless otherwise stated, BT's fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to value-added, sales and use, or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "Taxes"). Client is responsible for paying all Taxes associated with its purchases hereunder. If BT has the legal obligation to pay or collect Taxes for which Client is responsible under this paragraph, the appropriate amount shall be invoiced to and paid by Client, unless Client provides BT with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, BT is solely responsible for taxes assessable against it based on its income, property and employees.

## 7. Limited Warranty

Supplier warrants that (i) the Services shall perform materially in accordance with the Specifications, and (ii) the functionality of the Services will not be materially decreased during the term of this Agreement. For any breach of either such warranty, Customer's exclusive remedy shall be as provided in the "Termination for Cause" and "Refund or Payment upon Termination" paragraphs in Section 2 above.

## 8. Disclaimer of Warranties; Exclusions

**THE WARRANTIES SET FORTH IN SECTION 8 ABOVE ARE THE SOLE AND EXCLUSIVE WARRANTIES REGARDING THE SERVICES. BT EXPRESSLY DISCLAIMS TO THE FULLEST EXTENT PERMITTED BY LAW ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.** BT shall have no obligation or other liability with regard to any error or non-compliance with a warranty that is caused by Client's breach of this Agreement.

## 9. Indemnification

BT shall indemnify, defend and hold harmless Client from and against all losses, liabilities, claims, costs, damages and expenses (including, without limitation, reasonable attorneys' fees and expenses) paid or incurred in connection with any third party claims alleging that the Services infringe a third party's U.S. patent, copyright, trademark or trade secret, provided that Client: (i) promptly notifies BT of any such claim, (ii) permits BT to control the defense or settlement of such claim, at BT's expense, and (iii) provides BT with all reasonable authority, assistance, and cooperation necessary for the defense or settlement of such claim. If Client is enjoined, or in BT's opinion, likely to be enjoined, from using the Services due to a third party infringement claim, BT shall, in its sole discretion: (i) replace or modify the infringing Services, at no additional charge, so that it is non-infringing; (ii) obtain, at BT's expense, a license for Client to use the Services; or (iii) terminate Client's right to use the infringing Services and refund a prorated portion of the Fees paid by Client for the unused portion of the then current term

of the infringing Services. BT shall have no liability to indemnify or defend Client to the extent the alleged infringement is based on: (a) use of the Services other than in accordance with the terms and conditions of this Agreement or (b) Client Data. This Section 10 sets forth the sole and exclusive obligation of BT with regard to third party claims related to the Services.

This Section 10 (Indemnification) states BT's sole liability to Client, and Client's exclusive remedy against BT, for any type of claim described in this Section.

## 10. Limitation of Liability

**EXCEPT FOR LICENSEE'S BREACH OR INFRINGEMENT OF ANY INTELLECTUAL PROPERTY OR OTHER PROPRIETARY RIGHTS OF BT, TO THE FULLEST EXTENT PERMITTED BY LAW, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS OR REVENUES, LOSS OF PRODUCTION OR USE, DOWN-TIME, OR LOSS OF SAVINGS OR DATA, REGARDLESS OF THE NATURE OF THE CLAIM GIVING RISE TO SUCH DAMAGES, WHETHER IN CONTRACT OR TORT (INCLUDING NEGLIGENCE), AND EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.** BT's aggregate and cumulative liability for damages hereunder shall in no event exceed one hundred thousand U.S. dollars (\$100,000) or the amount of the Fees paid by Client under the applicable Order Form, whichever is less, for the current term for the Services giving rise to the claim.

## 11. Trademarks

Client acknowledges and agrees that this Agreement does not convey to Client any right, title or interest in or to any trademarks or trade names of BT or its affiliates. Client shall not use or attempt to register any trademarks or trade names of BT or its affiliates, or any trademarks or trade names confusingly similar thereto.

## 12. Successors

This Agreement will be binding upon and will inure to the benefit and terms stated to the parties hereto and their respective representatives, permitted successors and assigns except as otherwise provided herein.

## 13. U.S. Government

**Federal Government End Use Provisions.** BT provides the Services, including related software and technology, for ultimate federal government end use solely in accordance with the following: Government technical data and software rights related to the Services include only those rights customarily provided to the public as defined in this Agreement. This customary commercial license is provided in accordance with FAR 12.211 (Technical Data) and FAR 12.212 (Software) and, for Department of Defense transactions, DFAR 252.227-7015 (Technical Data – Commercial Items) and DFAR 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation). If a government agency has a need for rights not conveyed under these terms, it must negotiate with BT to determine if there are acceptable terms for transferring such rights, and a mutually acceptable written addendum specifically conveying such rights must be included in any applicable contract or agreement.

## 14. Compliance with Laws

Client agrees to comply fully with all applicable export laws and regulations of the United States. Without limiting the generality of the preceding sentence, Client shall not export the Services, directly or indirectly, in violation of such export laws and regulations or use the Services for any purposes prohibited by such laws and regulations.

## 15. General

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to choice of law principles. The parties agree that venue for all litigation or other proceedings arising under or related to this Agreement shall be in the federal or state courts located in Delaware. Except for actions for non-payment of the Fees, no action, regardless of form, arising out of or relating to this Agreement may be brought by either party more than one (1) year after the cause of action occurred. Except for Client's obligation to pay the

Fees, neither party shall be liable for any failure to perform due to causes beyond its reasonable control. If any provision of this Agreement is held to be unenforceable, such term or provision shall not affect the other provisions of this Agreement, and such provision shall be deemed modified to the extent necessary to render it enforceable. The failure by a party to exercise any right under this Agreement shall not operate as a waiver of such party's right to exercise such right or any other right in the future. The section headings herein are provided for convenience only and shall have no substantive effect on the construction of this Agreement. No provision of this Agreement shall be construed in favor of or against a party solely for the reason that such party drafted the provision. This Agreement, along with the provisions of BT's website that relate to the fees set forth here, constitutes the entire agreement between the parties concerning the subject matter hereof, and it replaces and supersedes any prior verbal or written understandings, agreements, representations and other communications between the parties regarding such subject matter. No waiver, modification or amendment of any provision of this Agreement shall be valid or of enforceable unless it is set forth in writing signed by the duly authorized representatives of both parties. In the event of a conflict between this Agreement and any other agreement between BT and Client, the terms and conditions of this Agreement shall take precedence with regard to the parties' respective rights and obligations with respect to the Services. Client shall not assign any of its rights or delegate any of its duties under this Agreement to any third party without the prior written consent of BT. All notices required to be sent under this Agreement shall be in writing and sent to BT at 3088 Route 27 Kendall Park, New Jersey 08824 or to Client at its address provided to BT in connection with this Agreement. Either party may change its address to which notice should be given at any time and from time to time by giving notice to the other party (in the manner set forth herein) of such new address. Each party is an independent contractor and neither party has the authority to bind, represent or commit the other to any obligation. Nothing in this Agreement shall be deemed or construed to create a joint venture, partnership or agency relationship between the parties.

