

# Diagnostic Software, License, Maintenance and Support Program, and Additional Services Agreement

Last updated: August 26, 2025

This Diagnostic Software, License, Maintenance and Support Program, and Additional Services Agreement ("Agreement") is a legally binding agreement between Midmark Corporation, an Ohio corporation ("Midmark"), and the end-user entering into this Agreement with Midmark ("You" or "Your").

CAREFULLY READ THIS AGREEMENT. BY ACCESSING THE SOFTWARE, ALLOWING MIDMARK TO COMMENCE FURNISHING THE PRODUCTS OR SERVICES OFFERED HEREUNDER, OR MAKING ANY PAYMENT FOR THE PRODUCTS OR SERVICES OFFERED HEREUNDER, YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT AND REPRESENT THAT YOU ARE DULY AUTHORIZED TO ACCEPT THIS AGREEMENT ON BEHALF OF YOURSELF OR YOUR ORGANIZATION. IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, THEN DO NOT ACCESS THE SOFTWARE OR OTHERWISE ACCEPT THE PRODUCTS OR SERVICES.

Any additional, different, or conflicting terms and conditions set forth in any documents issued by You at any time, including without limitation any purchase orders, are hereby objected to by Midmark and shall not be binding in any way on Midmark.

WHEREAS, Midmark is the entity responsible for creating and developing the Software and/or providing the associated services;

WHEREAS, You desire to utilize the Software and/or services provided by Midmark;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained here, Midmark and You agree as follows:

- 1**     **Definitions.** Terms not otherwise defined herein shall have the following meanings:
- 1.1     "Authorized User" means an individual authorized by You to utilize the Software License on Your behalf, which may include, an employee, a temporary employee, and a contractor, but no other third party without Midmark's prior written consent.
  - 1.2     "Device" means a piece of Midmark diagnostic equipment that is capable of capturing and transmitting an individual's medical information. This Agreement does not govern the purchase, delivery, or extended service of a Device.
  - 1.3     "Documentation" means user manuals, online help files, technical manuals, and other materials published by Midmark that describe the Software and its uses, features, specifications, and/or technical requirements.
  - 1.4     "Malicious Code" means (i) any code, program, or sub-program the knowing or intended purpose or effect of which is to damage or maliciously interfere with the operation of a computer system containing the code, program, or sub-program, or to halt, disable, or interfere with the operation of the software, code, program, or sub-program, itself, or (ii) any device, method, or token that permits any person to circumvent without authorization the normal security of any software or system containing the code.
  - 1.5     "Order Form" means the quote or order form (whether in paper or electronic form, and whether derived via a Midmark representative or Midmark's e-commerce website) that sets forth the specific Licenses, services, and/or renewals that You are purchasing, together with all other pertinent details of the transaction.
  - 1.6     "Software" means all programs, files, content, data, scripts, code, and documentation, regardless of form, provided by Midmark to You under the terms of this Agreement. Software includes Updates. Software does not include any software embedded in a Device.
  - 1.7     "Update" means the release by Midmark, in its sole discretion, of minor feature changes, bug fixes, servicing updates, patches, error corrections, workarounds, and/or modifications to the Software. Updates may have breaking changes that could require separately purchased implementation services and/or modify or delete in their entirety certain features and functionality of the Software. Updates shall be considered Software governed by this Agreement. Updates exclude major enhancements and/or new features to the Software expected to have breaking changes and/or that require additional license types for which Midmark charges separate Software and/or implementation fee(s).
  - 1.8     "Utilized" means the License pool You are actively accessing. Upon Your request, and in Midmark's sole discretion, Your License pool may be right-sized. If so, then (i) all Utilized Licenses are subject to

currency, and (ii) any non-Utilized Licenses shall be closed. Midmark will not refund any M+S Program fees during the right-sizing process; any previously closed Licenses that are subsequently re-opened will be subject to additional fees. By way of example, if You purchased ten Licenses in May 2021, but in October 2023 are only actively accessing and needing a License pool size of six, then upon Your request and at the discretion of Midmark, Your pool may be right-sized to six and Your remaining four Licenses would be closed; You would not get any refund on the four Licenses or unused six months of the M+S Program on the four Licenses, and would be due for six License's worth of M+S Program fees in May 2024 to remain current.

## 2 **Software.**

- 2.1 **Functionality; Your obligations.** Midmark Software is tested for proper function with the operating systems ("OS") and minimum system requirements ("System Requirements") identified [HERE](#).
  - 2.1.1 You shall not operate the Software with an OS other than those specified.
    - 2.1.1.1. YOU ARE RESPONSIBLE FOR ANY USE OF THE SOFTWARE THAT OCCURS ON OR THROUGH YOUR OS, AND YOU ASSUME ALL RISK OF RUNNING THE SOFTWARE WITH AN OS NOT SPECIFIED.
  - 2.1.2 It is Your responsibility to verify and You must maintain a network environment that meets System Requirements, which are subject to change by Midmark in its sole discretion.
  - 2.1.3 Your obligations set forth in this Section 2.1 shall survive termination of this Agreement for as long as You continue to access the Software.
- 2.2 **Delivery.** Upon receipt of full payment per the Order Form, Midmark will provide the Software associated with any License You purchased.
  - 2.2.1 The Software is included in the License price.
  - 2.2.2 You may download the Software an unlimited number of times.
- 2.3 **Trial basis.** Midmark, in its sole discretion, may provide the Software to You on a temporary, emergency, or trial basis. In that event, You shall be bound by the Terms of this Agreement.

## 3 **License.**

- 3.1 **License grant.** Midmark hereby grants to You and Your Authorized Users, a limited, non-exclusive, non-transferable, non-sublicensable, and perpetual right to access and use the Software for internal business purposes in connection with a Midmark Device, subject to the terms of this Agreement, Your Order Form, and the Documentation ("License"). Your rights set forth in this Section 3.1 shall survive termination of this Agreement for as long as You continue to access the Software. No license is granted to You in the source code of the Software. All rights not expressly granted to You are reserved to Midmark indefinitely.
- 3.2 **Key; seat.** Upon receipt of full License payment per the Order Form, Midmark will provide the License key to You.
  - 3.2.1 Each Utilized License authorizes one user to access the Software at any one time.
- 3.3 **Usage restrictions.** In addition to any other limitations set forth herein or in the Order Form, You agree (i) not to copy, download, modify, or translate the Software in any manner not authorized by this Agreement; (ii) not to modify, correct, adapt, translate, enhance, or otherwise prepare derivative works of or improvements of the Software; (iii) not to rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer, or otherwise provide access to or use of the Software to any person or entity other than Your Authorized Users; (iv) not to reverse engineer, decompile, or disassemble the Software, or otherwise attempt to discover the underlying source code of the Software; (v) not to use the Software or Documentation for purposes of competitive analysis, the development of a competing software product or service, or any purpose that is detrimental to Midmark or to its commercial disadvantage; and (vi) not to use the Software or Documentation in violation of any applicable local laws and regulations, whether inside or outside the United States. Your obligations set forth in this Section 3.3 shall survive termination of this Agreement for as long as You continue to access the Software.

## 4 **Maintenance and Support Program.**

- 4.1 **Program; fee; enrollment; renewal; proration.** The Maintenance and Support Program ("M+S Program") is an annual subscription offered by Midmark for Updates and certain support services for the Software.
  - 4.1.1 Fee. The M+S Program fee is an annual fee calculated at 15% the individual Utilized License cost.
    - 4.1.1.1. Each year, Midmark reserves the right to adjust its fees for no more than the greater of (i) five percent; or (ii) the yearly percentage increase in the most recently published Consumer Price Index. Midmark will notify You of any such increase in fees at least 30 days in advance of when such fee adjustment is to take effect.
  - 4.1.2 Enrollment. Upon purchasing a License within the Order Form, You will automatically be enrolled in the M+S Program for one year for that License, beginning on the date You sign the Order Form, under the terms of this Agreement.

- 4.1.3 Renewal. This Agreement and Your M+S Program enrollment will automatically renew one year from the date of Your initial License purchase and will continue to automatically renew each subsequent year thereafter until You cancel.
  - 4.1.3.1. Subsequent years' M+S Program fees will be invoiced to You annually. In the absence of You electing to cancel Your enrollment in the M+S Program, at each subsequent annual anniversary of the date of Your initial purchase You agree to pay Midmark the then-current M+S Program fee in exchange for one year of the M+S Program enrollment.
  - 4.1.3.2. You may cancel Your M+S Program enrollment at any time by contacting Midmark Customer Experience by telephone at 844.856.1233 or email at [cx-torrance@midmark.com](mailto:cx-torrance@midmark.com). If You cancel Your M+S Program enrollment after paying the M+S Program fee but prior to the renewal date, then this Agreement will continue in force until the next renewal date at which point the Agreement will terminate. Under no circumstance will You be entitled to a refund of any applicable M+S Program fee upon termination of this Agreement.
- 4.1.4 Currency. If the M+S Program is cancelled or otherwise lapses such that a particular Utilized License is not current on M+S Program fees, then Midmark will only allow re-enrollment in the M+S Program upon You coming current on all outstanding M+S Program fees incurred during the period of cancellation or lapse on each such Utilized License.
- 4.1.5 Proration. If in any calendar year You have more than one M+S Program renewing, then Midmark may, in its sole discretion and with Your advance written approval, require You to pay a pro-rata amount on other M+S Programs subject to renewal in that same calendar year. Upon Your payment of any pro-rata amount(s), Midmark will adjust all affected M+S Program terms and renewal dates accordingly. (By way of example, You purchase License #1 with included M+S Program on January 1, 2023, and License #2 with included M+S Program on July 1, 2023; when the renewal for License #1's M+S Program occurs on January 1, 2024, Midmark may elect that You also pay one-half of License #2's M+S Program fees at that time; upon Your payment of License #1's M+S Program fee in full and #2's M+S Program on a pro rata basis, the renewal term for both Licenses #1 and #2 will be January 1, 2025.)
- 4.2 **Use and functionality support.** If You are current on Your M+S Program fee for the Utilized License at issue, then Midmark will provide telephone, email, and/or remote support to You and/or Your Authorized Users with respect to use and functionality of the Software during Midmark's regular business hours at no additional charge.
  - 4.2.1 Midmark Technical Support can be contacted by telephone at 844.856.1230, or email at [techsupport@midmark.com](mailto:techsupport@midmark.com).
  - 4.2.2 Midmark performs remote support via LogMeInRescue, Microsoft Teams, Cisco WebEx, or a mutually agreed upon remote support and screensharing solution.
  - 4.2.3 Midmark's regular business hours are Monday through Friday from 6:00 am to 4:00 pm PT, excluding observed holidays.
  - 4.2.4 Exclusions: The M+S Program does not include support required due to any accident or cause external to the Software, including, but not limited to, problems or malfunctions related to Your hardware, network, database(s), third-party software product(s), electrical power source(s) (or failure or interruption thereto), operator error, negligence, or willful misconduct.
- 4.3 **Updates.** If You are current on Your M+S Program fee(s) for all Utilized Licenses, then Midmark will provide Updates to You for those Utilized Licenses at no additional charge.
  - 4.3.1 Midmark, in its discretion, will provide Updates to those current on M+S Program fees via an (i) alert within the Software prompting download and installation, or (ii) email message containing a link for download and installation.
    - 4.3.1.1. Any Updates provided via email will be sent to the email address You provide on the Order Form. It is Your responsibility to keep this address current.
  - 4.3.2 You shall promptly download and install all Updates provided to You by Midmark, and You acknowledge and agree that the Software or portions thereof may not properly operate should You fail to do so.
  - 4.3.3 Update installation support is not included; such can be purchased for an additional charge.

**Additional Services.**

- 5.1 **Implementation services.** By default, Order Forms with Software purchases also include implementation services to integrate the Software into Your environment. Implementation services are not included within the M+S Program, are primarily offered at a flat fee, and cover installation, configuration, validation, and troubleshooting support for Software installations, whether for initial setups or Updates.
- 5.1.1 If You choose to decline implementation services, then You shall assume full responsibility for the Software's installation, including any necessary configuration and troubleshooting efforts; Midmark shall not be responsible or liable for any subsequent issues arising from installations not performed by Midmark. If implementation assistance is thereafter requested from Midmark, then it shall be at a fee.
- 5.2 **Professional services.** Professional services are expanded support, not included in either the M+S program or implementation services, that can be tailored, in Midmark's sole discretion, to meet specific needs and include, but are not limited to, data conversion and migration services and after-hours support.
- 5.2.1.1. After-hours support is available upon request and is billed in blocks of four hours; this billing structure applies regardless of whether the actual support time used is less than the billed block. Requests for after-hours support must be made at least 72 hours in advance and should be made via email to techsupport@midmark.com.
- 5.3 **Your responsibilities; advance payment; Statement of Work.** If any of the aforementioned additional services are purchased, then You must provide all necessary resources, including but not limited to any necessary hardware, third party licenses, and support staff, and also facilitate remote support access via LogMeInRescue, Microsoft Teams, Cisco WebEx, or a mutually agreed upon remote support and screensharing solution. An Order Form, advance payment in full, and a fully executed Statement of Work describing objectives, Your prerequisites and responsibilities, and Midmark deliverables, if applicable, are required prior to any additional services being performed.

**Fees and Payment.**

- 6.1 **Payment.** Unless otherwise agreed in writing by Midmark, all amounts due under this Agreement shall be payable in full in accordance with the payment terms stated on the applicable invoice, which may include cash in advance, Net 10, Net 30, or other terms as determined by Midmark in its sole discretion. Midmark reserves the right to modify or revoke credit terms, or require advance payment, upon notice to You.
- 6.2 **Collection.** Any amounts not paid by You when due to Midmark shall be subject to interest charges, from the date due until paid, at the rate of one and one-half percent per month, or the highest interest rate allowable by law, whichever is less, compounded and payable monthly. You shall pay all collection expenses, including but not limited to attorneys' fees, incurred by Midmark in the collection of amounts owed by You.
- 6.3 **Return; cancellation.** Upon Order Form execution and/or payment, (i) Licenses are not eligible for return or refund; (ii) in the event You cancel Your M+S Program enrollment midterm, all M+S Program fees are forfeited; and (iii) in the event You cancel any services as set forth in Section 5 of this Agreement, fair compensation shall be made to Midmark, which shall take into account expenses incurred and profit reasonably anticipated by Midmark.
- 6.4 **Taxes.** You shall pay the amount of any present or future sales, use, excise, or other tax applicable to the sale or use of the products and services sold hereunder, or in lieu thereof, You shall provide Midmark with a tax-exemption certificate acceptable to the taxing authorities. You shall indemnify, defend, and hold Midmark harmless from all such taxes.

**Term and Termination.**

- 7.1 **Term.** The term of this Agreement commences on the date You sign the Order Form or otherwise utilize Midmark's services in relation to this Agreement.
- 7.2 **Termination.** This Agreement will continue in effect until the earliest of (a) Your untimeliness in paying any fee due to Midmark, (b) the end of an M+S Program initial or renewal term after which You have elected to cancel the M+S Program, (c) the completion of any services Midmark provided to You as set forth in Section 5 of this Agreement and You not otherwise having active enrollment in the M+S Program, or (d) termination by You or Midmark as set forth herein. You may terminate this Agreement for a material breach by Midmark that remains uncured after the giving by You of not less than 30 days prior written notice of the breach to Midmark. Midmark may, at its option, terminate this Agreement if (y) You breach any obligation relating to Midmark's (or its suppliers') intellectual property rights, or (z) You materially fail to comply with any other provision of this Agreement and do not remedy that failure within 15 calendar days of Midmark's notice to You describing the failure in reasonable detail.
- 7.3 **Effect of termination; survival.** Following the term of this Agreement, any and all provisions set forth herein which, by their very nature, are intended to survive any expiration or termination hereof, shall so survive indefinitely, including without limitation, the provisions respecting (i) Your use of the

Software in accordance with the OS and System Requirements as discussed in Section 2.1 of this Agreement, (ii) Your License grant as discussed in Section 3.1 of this Agreement, (iii) Your License usage restrictions as discussed in Section 3.3 of this Agreement, (iv) intellectual property as discussed in Section 9 of this Agreement, (v) warranties and disclaimers as discussed in Section 11 of this Agreement, (vi) limitations on liability as discussed in Section 12 of this Agreement, and (vii) indemnifications as discussed in Section 13 of this Agreement. Termination of this Agreement will not relieve You from any accrued payment obligations. Termination or expiration of this Agreement shall be without prejudice to any other right or remedy to which Midmark may be entitled under this Agreement or applicable law. Midmark will not be liable to You for any claims or damages of any kind arising out of termination of this Agreement in accordance with this Section 7.

7.3.1 In the event that Midmark is required to, or reasonably believes it has cause to, discontinue offering the Software in response to allegations made by a third party that the Software infringes that third party's or another third party's intellectual property rights, then Midmark may, in its sole discretion: (a) obtain for You the right to continue using the Software on a non-infringing basis; (b) modify the Software so it is no longer infringing but of equivalent functionality, performance, and interoperability; or (c) terminate this Agreement and discontinue the provisioning of the Software, provided that it will issue You a pro-rata refund or credit for any prepaid fees with regard to periods after termination.

## 8 **Privacy; Communications; Data; and Feedback**

8.1 **Privacy.** You agree that any personally identifying information provided by You to Midmark shall be collected and used in accordance with the Midmark Privacy Policy, which is accessible at <https://www.midmark.com/about-us/legal>. You represent to Midmark that You have the full authority to provide any such personally identifying information to Midmark.

8.2 **Communications.** You hereby agree that Midmark may contact You via (i) any Software features designed to notify and contact You, and/or (ii) email, using any personally identifiable information that You have provided to Midmark. Such communications may relate, but are not limited, to Updates, marketing release notes, and technical advisories.

8.3 **Data collection, usage, and security.** You acknowledge that Midmark may gather, view, and/or record certain data regarding Your use of and/or transferred or stored by Your Device, Software, OS and hardware environment, and electronic medical record system, including but not limited to feature usage, workflow sequencing, errors, and License accessing (collectively, the "Data") to provide services to You and/or assess, advance, or validate Midmark products. In consideration for Your use of the Software, and to the extent that You have rights in the Data, You hereby grant to Midmark a non-exclusive, worldwide, transferable, sublicensable, perpetual license to use, reproduce, make derivative works of, distribute, and display the Data. By submitting or transmitting Data, You represent and warrant that You are the owner of and/or have all necessary right and consents to permit Midmark to use the same in accordance with this Agreement without violating the rights of any third party.

8.3.1 Nothing herein is intended to grant or allow Midmark access to any personal health information ("PHI") subject to applicable regulatory laws and regulations, and You shall use Your best efforts to not allow Midmark access to PHI.

8.3.2 Midmark shall implement and maintain appropriate technical physical, and organizational controls to protect the security, confidentiality, and integrity of the Data in accordance with all applicable laws and regulations relating to Data privacy, confidentiality, security, and protection.

8.4 **Feedback.** To the extent You provide Midmark with any feedback, ideas, or technical improvement suggestions about the Software ("Feedback"), You acknowledge and agree that Midmark will be the owner of all such Feedback and may use the Feedback without compensation or attribution to You.

## 9 **Intellectual Property.**

9.1 **Ownership.** The Software is owned by Midmark (and its licensors) and is protected by applicable intellectual property laws and regulations. As between the parties hereto, Midmark retains all right, title, and interest in and to the Software and any derivative works that are created and/or developed based, in whole or in part, on access to or use of the Software. Nothing herein shall operate to transfer or convey to You any rights in any patent, copyright, trademark, or other intellectual property right of any kind of Midmark. Your only rights are as a licensee subject to the terms and conditions of this Agreement.

9.1.1 In the event You or any of Your Authorized Users make corrections, enhancements, or other modifications to the Software, whether in breach of this Agreement or as consented to by Midmark, all intellectual property and other ownership rights in such changes shall be exclusively owned by Midmark.

9.2 **Third-party application; open source software.** Portions of the Software may utilize or include third-party software, open-source software, and/or other copyrighted material. Use of third-party or

open-source software by You is governed exclusively by their respective terms and not by this Agreement.

## 10 **Confidentiality.**

- 10.1 Each party, as a recipient ("Recipient"), agrees to use the disclosing party's ("Discloser") Confidential Information solely for the purposes of performing its obligations or exercising its rights under this Agreement. Recipient will not disclose Discloser's Confidential Information to any third party other than its Authorized Recipients. As used herein, "Authorized Recipients" are a party's and its affiliates' officers, employees, agents, and consultants who require access to the Confidential Information for the purposes set forth in this Agreement and who are bound by confidentiality obligations at least as stringent as those set forth herein. Recipient shall use commercially reasonable standards to protect the Confidential Information from disclosure using equal measures as it uses to protect its own Confidential Information of a similar nature.
- 10.2 The obligations set forth in this Section 10 shall survive until two years from the termination or expiration of this Agreement except with regard to trade secret information, which shall be protected for the statutory period.
- 10.3 "Confidential Information" refers to any proprietary information, software, technical advice or knowledge, data, or know-how of the Discloser that is disclosed under this Agreement that a reasonable person would understand to be confidential based on the context of the disclosure or the nature of the information. For purposes of clarification, the Software and Documentation shall be Midmark's Confidential Information. All Confidential Information shall remain the property of the Discloser. Confidential Information does not include information that the Recipient is able to demonstrate through written evidence: (i) was already rightfully known to the Recipient prior to the time that it was disclosed by the Discloser; (ii) is or has entered the public domain through no breach of this Agreement by Recipient; (iii) has rightfully been received by Recipient from a third party without any breach of this Agreement; (iv) was approved for release by the written consent of the Discloser; (v) was independently developed by the Recipient without use of the Discloser's Confidential Information; or (vi) was required to be disclosed pursuant to the order of a court or governmental agency of competent jurisdiction, provided that the Discloser has, if permitted by law, been given reasonable notice of the order and the opportunity to contest the disclosure and any such disclosure is limited strictly to the Confidential Information that is the subject of such order.

## 11 **Representation and Warranties; Disclaimers.**

- 11.1 Midmark warrants to the original purchaser that: (a) for a period of one year from the date of purchase, the Software will substantially perform in accordance with applicable Documentation; (b) it will use commercially reasonable efforts, in accordance with industry standard practices, to provide Software that, at the time of installation, is free from Malicious Code; and (c) it will perform the support services in a professional and workmanlike manner in accordance with applicable industry standards, expiring 90 days from the date of service. You shall notify Midmark of any non-compliance with the foregoing warranties within 30 days after the event giving rise to the breach of warranty occurs. Upon receipt of a timely breach of warranty claim, as Your sole and exclusive remedy and Midmark's sole obligation for a breach of the warranties in this Section 11.1, Midmark, in its sole discretion, shall: (i) use commercially reasonable efforts to repair or replace any Software or reperform any support services that do not conform with the foregoing warranties, or (ii) if the above remedies are impracticable, then to refund the License fee or service fee paid by You for the License or service at issue.
- 11.1.1 If any modifications are made to the Software by You during the warranty period, or if You violate the terms of this Agreement, then this warranty shall immediately terminate and be void. This warranty shall not apply if the Software is used on or in conjunction with hardware or software other than the unmodified version of hardware and software which the Software is designed to be used as described in the Documentation.
- 11.2 EXCEPT FOR THE LIMITED WARRANTIES SET FORTH ABOVE, AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, MIDMARK DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, BUT NOT LIMITED TO ANY IMPLIED WARRANTIES, DUTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, RELIABILITY OR AVAILABILITY, ACCURACY OR COMPLETENESS, WORKMANLIKE EFFORT, LACK OF VIRUSES, AND LACK OF NEGLIGENCE. THE SOFTWARE IS PROVIDED "AS IS" AND "WITH ALL FAULTS." MIDMARK DOES NOT REPRESENT THAT: THE SOFTWARE WILL BE COMPLETELY SECURE; THE SOFTWARE WILL BE FREE FROM CORRUPTION OR LOSS; THE SOFTWARE WILL MEET YOUR REQUIREMENTS; THE SOFTWARE WILL BE COMPATIBLE WITH ALL INFORMATION SYSTEMS; THE OPERATION OF OR ACCESS TO THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE; ANY INFORMATION GENERATED, POSTED, MAINTAINED, OR ACCESSED BY THE SOFTWARE WILL BE ACCURATE, TIMELY, OR COMPLETE; OR THAT DEFECTS IN THE SOFTWARE WILL BE CORRECTED.

## 12 **Limited Liability.**

- 12.1 TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL MIDMARK BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, STATUTORY, EXEMPLARY, PUNITIVE, OR



OTHER DAMAGES, INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST BUSINESS, LOST DATA, INCONVENIENCE, OR DAMAGE TO GOOD WILL OR REPUTATION RELATING TO THE PROVISION OR FAILURE TO PROVIDE THE SOFTWARE OR SERVICES, WHETHER OR NOT DUE TO MIDMARK'S NEGLIGENCE. MIDMARK'S TOTAL, AGGREGATE LIABILITY FOR ANY DAMAGES OR CLAIMS ARISING UNDER THIS AGREEMENT OR RELATED TO THE SOFTWARE OR SERVICES SHALL IN NO EVENT EXCEED THE AMOUNT PAID BY YOU FOR THE APPLICABLE SOFTWARE, LICENSE, OR SERVICES UNDER THE APPLICABLE ORDER FORM IN THE 12 MONTH PERIOD BEFORE THE CLAIM AROSE. THE FOREGOING LIMITATIONS AND DISCLAIMERS APPLY TO DAMAGES HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY (WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE), EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES COULD HAVE BEEN REASONABLY FORESEEN.

- 12.2 ANY AND ALL CAUSES OF ACTION OR CLAIMS YOU MAY HAVE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR TO THE SOFTWARE, LICENSE, OR SERVICE MUST BE COMMENCED WITHIN ONE YEAR AFTER THE CAUSE OF ACTION ACCRUES; OTHERWISE, SUCH CAUSE OF ACTION OR CLAIM IS PERMANENTLY BARRED.

13 **Indemnification.** You shall indemnify, defend, and hold harmless Midmark and its affiliates, employees, agents, officers, directors, shareholders, representatives, successors, and assigns from and against any loss, liability, cause of action, cost, or expense (including reasonable attorneys' fees) brought by a third party and arising from, in connection with, or related to: (i) any breach of this Agreement by You, any employee or agent of You, or any Authorized User, (ii) the acts and omissions of You, Your employees and agents, or any Authorized User, in connection with Your, its, or their accessing or use of the Software, and (iii) the violation, infringement, or misappropriation by You, any employee or agent of You, or any Authorized User of the intellectual property rights of Midmark.

14 **Export Regulation.** You agree to abide by and to conform to any and all export regulations in force during the term that are applicable to You or the Software provided, including but not limited to any export rules and regulations of the United States of America. You understand that these regulations may prohibit the export or re-export of Documentation, and any information or technical data related to the Software. The Software and the underlying information and technology may not be accessed, downloaded, or otherwise exported or re-exported (i) into (or to a national or resident of) any country to which the US has embargoed goods; or (ii) to anyone on the US Treasury Department's list of Specially Designated Nationals or the US Commerce Department's Table of Deny Orders.

15 **Modifications.** Midmark reserves the right to change or modify the terms of this Agreement at any time upon written notice to You. All such changes will: (i) be effective immediately; (ii) be applied prospectively; and (iii) apply to all similarly situated users of the Software and/or services. Midmark will notify You of any changes or modifications by posting the modified Agreement on the midmark.com website and indicating the date on which the Agreement was last updated. If any changes to this Agreement are unacceptable to You, then You may terminate Your use of the Software or utilization of any services by providing ten days written notice of termination to Midmark, delivered at any time within 30 days of the effective date of the change. Continued Use of the Software and/or utilization of the services following the effective date of any changes constitutes Your acceptance of the changes but does not affect the foregoing right of termination.

16 **Miscellaneous.**

- 16.1 **Arbitration.** Midmark may, at its discretion, settle any claim or controversy arising out of or relating to any breach of non-performance of any provision hereof by arbitration in accordance with the Arbitration Rules of the American Arbitration Association in effect at the time such claim or controversy arises. The parties agree that any arbitration arising out of or related to this Agreement shall be administered and conducted in Dayton, Ohio.
- 16.2 **Assignment.** You may not assign this Agreement or the License granted hereunder without Midmark's prior written consent. Any assignment in violation of this clause shall be null and void.
- 16.3 **Class action waiver.** YOU AGREE THAT IF ANY DISPUTE SHOULD ARISE BETWEEN YOU AND MIDMARK, YOU WILL BRING YOUR CLAIM ON AN INDIVIDUAL BASIS AND YOU EXPRESSLY AND UNEQUIVOCALLY WAIVE YOUR RIGHT TO PURSUE ANY CLAIM IN A CLASS ACTION.
- 16.4 **Entire agreement.** The Order Form together with this Agreement and any other terms and conditions incorporated into this Agreement by reference constitute the complete agreement between Midmark and You relating to the subject matter of this Agreement, and supersede any and all previous agreements, either written or oral, between the parties or between Customer and a third party as it relates to the subject matter of this Agreement. Any additional, different, or conflicting terms and conditions are hereby objected to by Midmark, shall be inapplicable, and shall not be binding in any way on Midmark.
- 16.5 **Force majeure.** Midmark shall not be held responsible for delays or non-performance caused by activities or factors beyond its reasonable control, including without limitation, war, terrorism, epidemics, quarantines, strikes, lockouts, failures of suppliers of materials, delays in transportation, fires, weather, acts of God, or any other activities or factors beyond its control, whether similar or dissimilar to any of the foregoing.
- 16.6 **Governing law.** This Agreement shall be governed by the laws of the State of Ohio without reference to its conflicts of law principles. Each party hereby consents to the exclusive personal jurisdiction and venue of the federal and state courts located in Montgomery County, Ohio. The

parties expressly exclude the United Nations Convention on Contracts for the International Sale of Goods from application to this Agreement.

- 16.7 **Headings.** The headings used in this Agreement are for convenience only and are not binding.
- 16.8 **No authorization.** No person or entity is authorized to create or approve for Midmark any obligation or liability not discussed herein in connection with services performed hereunder.
- 16.9 **Notices.** Except as otherwise provided herein, notices under this Agreement will be deemed to be sufficiently given, effective (i) on the date received when delivered by overnight courier (signature required), or (ii) three business days after mailing when sent by certified or registered mail, postage prepaid. Notice required to be given to You hereunder will be sent to the address specified in the Order Form. Notice required to be given to Midmark should be sent to Midmark Corporation, attention Legal Counsel, at 60 Vista Dr., Versailles, OH 45380.
- 16.10 **Relationship.** The parties' relationship is that of independent contractors. Neither party is an agent for the other, nor does either party have the right to bind the other to any agreement with a third party.
- 16.11 **Remedies.** In the event You default under this Agreement, Midmark shall have available all rights and remedies at law or in equity. You agree to pay Midmark all costs and expenses, including attorney's fees, incurred by Midmark in exercising any of its rights and remedies.
- 16.12 **Severability.** In the event that any term of this Agreement is held or determined by a court of competent jurisdiction to be invalid, illegal, or otherwise unenforceable, the remaining provisions hereof shall continue in full force and effect.
- 16.13 **Third-party beneficiaries.** Certain aspects of the Software may be licensed to Midmark, in which case those licensors are deemed to be third-party beneficiaries of this Agreement with the authority to enforce all aspects herein. Except as set forth in this Section 16.13, this Agreement is being entered into for the sole benefit of the Parties hereto, and nothing herein, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever.
- 16.14 **Waiver.** Midmark's failure or delay to enforce any rights hereunder, irrespective of the length of time for which such failure continues, shall not constitute a waiver of those or any other rights. The waiver by a party of any breach of any provision of this Agreement will not operate or be construed as a waiver of any subsequent breach.