



ACTIVTRAK™ MASTER SUBSCRIPTION AGREEMENT

Date / Version: 14 May 2019

This Master Subscription Agreement (“Agreement”) governs your acquisition and use of Birch Grove Software, Inc. dba ActivTrak’s services. By accepting this Agreement, either by clicking a box that indicates your acceptance or by executing an Order Form that references this Agreement, you (hereafter “Customer” or “you”) agree to the terms of this Agreement. If you are entering into this Agreement on behalf of a company or other legal entity, you represent that you have the authority to bind such entity and its Affiliates to this Agreement. If you do not have such authority, or if you do not agree with these terms and conditions, you must not accept this Agreement and may not use the Service. This Agreement is effective as of that date that you accept it. Customer and ActivTrak hereby agree as follows:

1. Definitions.

1.1. “Affiliate” means any entity that directly or indirectly controls, is controlled by, or is under common control with the Customer entity signing this Agreement. “Control,” for purposes of this definition, means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

1.2. “Customer Data” means all electronic data submitted by or on behalf of Customer to the Service.

1.3. “Documentation” means ActivTrak’s user guides and other end user documentation for the Service available on the online help feature of the Service, as may be updated by ActivTrak from time to time, including without limitation the materials available at www.ActivTrak.com.

1.4. “Non-ActivTrak Application” means a web-based, offline, mobile, or other software application functionality that is provided by Customer or a third party and interoperates with a Service.

1.5. “Order Form” means an ordering document that specifies the Service and Support Services purchased by Customer under this Agreement that is entered into by Customer (or any Affiliate) and ActivTrak (or any Affiliate). Order Forms shall be subject solely to and incorporate by reference the terms of this Agreement. By entering into an Order Form hereunder, an Affiliate agrees to be bound by the terms of this Agreement.

1.6. “Service” means the products and services purchased by Customer and provided by ActivTrak, as specified on an Order Form. “Service” excludes Non-ActivTrak Applications.

1.7. “Support Services” means the support services provided by ActivTrak in accordance with ActivTrak’s support practices made generally available to its customers and as identified in the Order Form. In the event that the level of support is not identified in the Order Form, Customer shall receive a “basic” level of support that is included in the Service.

1.8. “Term” has the meaning set forth in Section 11.1.

1.9. “Users” means individuals who are authorized by Customer to use the Service, for whom a subscription to the Service has been procured. Users may include, for example, Customer and Customer’s Affiliates employees, consultants, clients, external users, contractors, agents, and third parties with which Customer does business.

2. Services.

2.1. ActivTrak’s Obligations. ActivTrak shall make the Service available to Customer pursuant to this Agreement and all Order Forms during the Term, and grants to Customer a limited, non-sublicensable, non-exclusive, non-transferable right

during the Term to allow its Users to access and use the Service in accordance with the Documentation, solely for Customer's business purposes. During the Term, the functionality of the Service will not materially decrease. Customer agrees that its purchase of the Service is neither contingent upon the delivery of any future functionality or features nor dependent upon any oral or written public comments made by ActivTrak with respect to future functionality or features.

2.2. Customer's Obligations. Customer is responsible for all activities conducted under its and its Users' logins on the Service. Customer shall use the Service in compliance with applicable law and shall not: (i) copy, rent, sell, lease, distribute, pledge, assign, or otherwise transfer, or encumber rights to the Service, or any part thereof, or make it available to anyone other than its Users; (ii) provide any Data and use Services, except specifically in accordance with ActivTrak's in compliance with [ActivTrak's Privacy Policy](#) and [Acceptable Use Policy](#), (iii) send or store infringing or unlawful material in connection with the Service; (iv) send or store viruses, worms, time bombs, Trojan horses and other harmful or malicious code, files, scripts, agents or programs to the Service; (v) attempt to gain unauthorized access to, or disrupt the integrity or performance of, the Service or the data contained therein; (vi) modify, copy or create derivative works based on the Service, or any portion thereof; (vii) access the Service for the purpose of building a competitive product or service or copying its features or user interface; or (viii) delete, alter, add to or fail to reproduce in and on the Service the name of ActivTrak and any copyright or other notices appearing in or on the Service or which may be required by ActivTrak at any time.

Any use of the Service in breach of this Agreement, Documentation or Order Forms, by Customer or Users that in ActivTrak's judgment threatens the security, integrity or availability of the Service, may result in ActivTrak's immediate suspension of the Service; however, ActivTrak will use commercially reasonable efforts under the circumstances to provide Customer with notice and an opportunity to remedy such violation or threat prior to such suspension.

2.3. Customer Affiliates. Customer Affiliates may purchase and use Service subscription, subject to the terms of this Agreement by executing Order Forms or Statements of Work hereunder that incorporate by reference the terms of this Agreement, and in each such case, all references in this Agreement to Customer shall be deemed to refer to such Customer Affiliate for purposes of such Order Form or Statements of Work.

3. Security, and Support.

3.1. Security. ActivTrak shall: (i) maintain industry standard administrative, physical, and technical safeguards to protect the security, confidentiality and integrity of the Service, Customer Data and Confidential Information; and (iii) access and use the Customer Data solely to perform its obligations in accordance with the terms of this Agreement, and as otherwise expressly permitted in this Agreement ("Security Program"). Such Security Program will conform with the ActivTrak security protocols..

3.2. Support Services. During the Term, ActivTrak shall provide Support Services to Customer in accordance with ActivTrak's then-current ActivTrak support policy, and as identified in an Order Form. In the event that the level of support is not identified in the Order Form, Customer shall receive a "basic" level of support that is included in the Service at no additional cost.

4. Confidentiality. Each party ("Recipient") may, during the course of its provision and use of the Service hereunder, receive, have access to, and acquire knowledge from discussions with the other party ("Discloser") which may not be accessible or known to the general public, such as technical and business information concerning hardware, software, designs, specifications, techniques, processes, procedures, research, development, projects, products or services, business plans or opportunities, business strategies, finances, costs, vendors, penetration test results and other security information; defect and support information and metrics; and first and third party audit reports and attestations ("**Confidential Information**"). Confidential Information shall not include, and shall cease to include, as applicable, information or materials that (a) were generally known to the public on the Effective Date; (b) become generally known to the public after the Effective Date, other than as a result of the act or omission of the Recipient; (c) were rightfully known to the Recipient prior to its receipt thereof from the Discloser; (d) are or were disclosed by the Discloser generally without restriction on disclosure; (e) the Recipient lawfully received from a third party without that third party's breach of agreement or obligation of trust; or (f) are independently developed by the Recipient as shown by documents and other competent evidence in the Recipient's possession. The Recipient shall not: (i) use any Confidential Information of the Disclosure for any purpose outside the scope of this Agreement, except with the Discloser's prior written permission, or (ii) disclose or make the Discloser's Confidential

Information available to any party, except those of its employees, contractors, and agents that have signed an agreement containing disclosure and use provisions substantially similar to those set forth herein and have a “need to know” in order to carry out the purpose of this Agreement. Each party agrees to protect the confidentiality of the Confidential Information of the other party in the same manner that it protects the confidentiality of its own proprietary and confidential information of like kind, but in no event shall either party exercise less than reasonable care in protecting such Confidential Information. If the Recipient is compelled by law to disclose Confidential Information of the Disclosure, it shall provide the Disclosure with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the other party's cost, if the other party wishes to contest the disclosure. The obligations set forth in Section 3.1 and not this Section 4 apply to Customer Data.

5. Ownership, Feedback, and Aggregated Data.

5.1. Customer Data. As between ActivTrak and Customer, Customer owns its Customer Data. Customer grants to ActivTrak, its Affiliates and applicable contractors a worldwide, limited-term license to host, copy, transmit and display Customer Data, as reasonably necessary for ActivTrak to provide the Service in accordance with this Agreement. Subject to the limited licenses granted herein, ActivTrak acquires no right, title or interest from Customer or Customer's licensors under this Agreement in or to any Customer Data. Customer shall be responsible for the accuracy, quality and legality of Customer Data and the means by which Customer acquired Customer Data.

5.2. ActivTrak Ownership of the Service. Except for the rights expressly granted under this Agreement, ActivTrak and its licensors retain all right, title, and interest in and to the Service, Documentation, including all related intellectual property rights inherent therein. No rights are granted to Customer hereunder other than as expressly set forth in this Agreement.

5.3. Feedback. ActivTrak shall have a royalty-free, worldwide, transferable, sublicensable, irrevocable, perpetual license to use or incorporate into the Service any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by Customer or its Users relating to the features, functionality or operation of the Service (“Feedback”). ActivTrak shall have no obligation to use Feedback, and Customer shall have no obligation to provide Feedback.

5.4. Statistical Usage Data. ActivTrak owns the statistical usage data derived from the operation of the Service, including data regarding web applications utilized in connection with the Service, configurations, log data, and the performance results for the Service (“Usage Data”). Nothing herein shall be construed as prohibiting ActivTrak from utilizing the Usage Data to optimize and improve the Service or otherwise operate ActivTrak's business; provided that if ActivTrak provides Usage Data to third parties, such Usage Data shall be anonymized and presented in the aggregate so that it will not disclose the identity of Customer or any User(s) to any third party.

6. Fees, Expenses, and Taxes.

6.1. Fees. Customer shall pay ActivTrak the fees set forth in the applicable Order Form (“Fees”) in accordance with this Agreement and the Order Form. If not otherwise specified on an Order Form, Fees will be due within thirty (30) days of date of invoice. Except as otherwise specifically provided in this Agreement, all Fees paid and payable to ActivTrak hereunder are non-cancelable and non-refundable. If Customer fails to pay any amounts due under this Agreement by the due date, in addition to any other rights or remedies it may have under this Agreement or by matter of law, ActivTrak reserves the right to suspend the Service upon thirty (30) days written notice.. If Customer fails to pay amounts owed within forty-five (45) days of when due, ActivTrak shall, upon notice to Customer, have the right to immediately terminate this Agreement and delete all Customer Data.

6.2. Taxes. Fees do not include any local, state, federal or foreign taxes, levies, duties or similar governmental assessments of any nature, including value-added, use or withholding taxes (collectively, “Taxes”). Customer is responsible for paying all Taxes associated with its purchases hereunder (excluding taxes based on ActivTrak's net income or property) unless Customer provides ActivTrak with a valid tax exemption certificate authorized by the appropriate taxing authority. The limitations set forth in Section 8 shall not apply to Customer's payment obligations under this Section 6.

7. Warranties and Disclaimer.

7.1. Warranties.

a) Service. ActivTrak warrants that during the Term: (i) the Service shall perform materially in accordance with the applicable Documentation, (ii) ActivTrak shall make commercially reasonable efforts to make the Service available to Customer 24 hours a day, 7 days a week, every day of each year (except for any unavailability caused by a Force Majeure event); (iii) ActivTrak will employ industry-standard measures to test the Service to detect and remediate viruses, Trojan horses, worms, logic bombs, or other harmful code or programs designed to negatively impact the operation or performance of the Service, and (iv) it owns or otherwise has sufficient rights in the Service to grant to Customer the rights to use the Service granted herein. As Customer's exclusive remedy and ActivTrak's entire liability for a breach of the warranties set forth in this Section 7.1(a), ActivTrak shall use commercially reasonable efforts to correct the non-conforming Service at no additional charge to Customer, and in the event ActivTrak fails to successfully correct the Service within a reasonable time of receipt of written notice from Customer detailing the breach, then Customer shall be entitled to terminate the applicable Service and receive an immediate refund of any prepaid, unused Fees for the non-conforming Service. The remedies set forth in this subsection shall be Customer's sole remedy and ActivTrak's sole liability for breach of these warranties. The warranties set forth in this Section shall apply only if the applicable Service has been utilized in accordance with the Documentation, this Agreement and applicable law.

7.2. Disclaimer. EXCEPT FOR ANY EXPRESS WARRANTIES SET FORTH UNDER SECTION 7.1, ACTIVTRAK AND ITS SUPPLIERS HEREBY DISCLAIM ALL (AND HAVE NOT AUTHORIZED ANYONE TO MAKE ANY) WARRANTIES RELATING TO THE SERVICE OR OTHER SUBJECT MATTER OF THIS AGREEMENT, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF NON-INFRINGEMENT OF THIRD PARTY RIGHTS, TITLE, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE PARTIES ARE NOT RELYING AND HAVE NOT RELIED ON ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER REGARDING THE SUBJECT MATTER OF THIS AGREEMENT, EXPRESS OR IMPLIED, EXCEPT FOR THE WARRANTIES SET FORTH UNDER SECTION 7.1. ACTIVTRAK MAKES NO WARRANTY REGARDING ANY NON-ACTIVTRAK APPLICATION WITH WHICH THE SERVICE MAY INTEROPERATE.

8. Limitation of Liability.

8.1. IN NO EVENT WILL EITHER PARTY'S (OR ACTIVTRAK'S THIRD PARTY LICENSORS') BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY (A) FOR ERROR OR INTERRUPTION OF USE, LOSS OR INACCURACY OR CORRUPTION OF DATA, (B) FOR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES, RIGHTS, OR TECHNOLOGY, (C) FOR ANY LOST PROFITS OR REVENUES, OR (D) FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, WHETHER OR NOT A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.

8.2. IN NO EVENT SHALL THE AGGREGATE LIABILITY OF EACH PARTY TOGETHER WITH ALL OF ITS AFFILIATES ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED THE TOTAL AMOUNT PAID BY CUSTOMER AND ITS AFFILIATES HEREUNDER FOR THE SERVICE GIVING RISE TO THE LIABILITY IN THE TWELVE-MONTH PERIOD PRECEDING THE FIRST INCIDENT OUT WHICH THE LIABILITY AROSE. THE FOREGOING LIMITATION SHALL APPLY WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY, BUT WILL NOT LIMIT CUSTOMER'S AND CUSTOMER'S AFFILIATES' PAYMENT OBLIGATIONS UNDER THE 'FEES' SECTION ABOVE.

9. Indemnification.

9.1. ActivTrak Indemnification Obligation. Subject to Section 9.3, ActivTrak will defend Customer from any and all claims, demands, suits or proceedings brought against Customer by a third party alleging that the Service, as provided by ActivTrak to Customer under this Agreement infringe any third party patent, copyright, or trademark or misappropriate any

trade secret of any third party (each, an “Infringement Claim”). ActivTrak will indemnify Customer for all damages, costs, reasonable attorneys’ fees finally awarded by a court of competent jurisdiction, or paid to a third party in accordance with a settlement agreement signed by ActivTrak, in connection with an Infringement Claim. In the event of any such Infringement Claim, ActivTrak may, at its option: (i) obtain the right to permit Customer to continue using the Service, (ii) modify or replace the relevant portion(s) of the Service with a non-infringing alternative having substantially equivalent performance within a reasonable period of time, or (iii) terminate this Agreement as to the infringing Service and refund to Customer any prepaid, unused Fees for such infringing Service hereunder. Notwithstanding the foregoing, ActivTrak will have no liability for any Infringement Claim of any kind to the extent that it results from: (1) modifications to the Service made by a party other than ActivTrak, (2) the combination of the Service with other products, processes or technologies (where the infringement would have been avoided but for such combination), or (3) Customer’s use of the Service other than in accordance with the Documentation and this Agreement. The indemnification obligations set forth in this Section 9.1 are ActivTrak’s sole and exclusive obligations, and Customer’s sole and exclusive remedies, with respect to infringement or misappropriation of third party intellectual property rights of any kind.

9.2. Customer Indemnification Obligation. Subject to Section 9.3, Customer will defend ActivTrak from any and all claims, demands, suits or proceedings brought against ActivTrak by a third party alleging a violation of a third party’s rights arising from Customer’s provision of the Customer Data. Customer will indemnify ActivTrak for all damages, costs, reasonable attorneys’ fees finally awarded by a court of competent jurisdiction, or paid to a third party in accordance with a settlement agreement signed by Customer.

9.3. Indemnity Requirements. The party seeking indemnity under this Section 9 (“Indemnitee”) must give the other party (“Indemnitor”) the following: (a) prompt written notice of any claim for which the Indemnitee intends to seek indemnity, (b) all cooperation and assistance reasonably requested by the Indemnitor in the defense of the claim, at the Indemnitor’s sole expense, and (c) sole control over the defense and settlement of the claim, provided that the Indemnitee may participate in the defense of the claim at its sole expense.

10. Term, Termination, and Effect of Termination.

10.1. Term. The term of this Agreement commences on the Effective Date and continues until the stated term in all Order Forms has expired or has otherwise been terminated. Subscriptions to the Service commence on the date, and are for a period, as set forth in the applicable Order Form (“Term”). Upon expiration of the Term, unless otherwise stated on an applicable Order Form, the Service will automatically renew for additional terms equal in duration to the initial Term (each a “Renewal Term”), unless and until either party gives the other notice of non-renewal at least thirty (30) days prior to the end of the then-current Term or Renewal Term.

10.2. Termination. Either party may terminate this Agreement by written notice to the other party in the event that (i) such other party materially breaches this Agreement and does not cure such breach within thirty (30) days of such notice, or (ii) immediately in the event 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 any termination for cause by Customer pursuant to this Section 11.2, ActivTrak will refund Customer a pro-rata portion of any prepaid Fees that cover the remainder of the applicable Order Form Term or Renewal Term after the effective date of termination.

10.3. Retrieval of Customer Data. Prior to the effective date of termination of this Agreement, Customer may use the export features within the Service to create and download files of Customer Data for a maximum of thirty (30) days following the end of the Term for download a file of Customer Data (other than personal confidential information such as, but not limited to, User passwords may not be included except in hash format) in comma separated value (.csv) format. After such 30-day period, ActivTrak shall have no obligation to maintain or provide any Customer Data and shall thereafter, unless legally prohibited, be entitled to delete all Customer Data by deletion of Customer’s unique instance of the Service; provided, however, that ActivTrak will not be required to remove copies of the Customer Data from its backup media and servers until such time as the backup copies are scheduled to be deleted in the normal course of business; provided further that in all cases ActivTrak will continue to protect the Customer Data in accordance with this Agreement. Additionally, during the Term, Customer may extract Customer Data from the Service using ActivTrak’s standard web services.

10.4. Effect of Termination. Upon termination of this Agreement for any reason, all rights and subscriptions granted to

Customer including all Order Forms will immediately terminate and Customer will cease using the Service (except as otherwise permitted under Section 11.3 (“Retrieval of Customer Data”) and ActivTrak Confidential Information. Termination for any reason other than termination for cause by Customer pursuant to Section 11.2(i) shall not relieve Customer of the obligation to pay all future amounts due under all Order Forms. The sections titled “Definitions,” “Confidentiality,” “Ownership; Aggregated Data,” “Fees, Expenses and Taxes,” “Warranty Disclaimer,” “Limitation of Liability,” “Indemnification,” “Term, Termination, and Effect of Termination,” and “General” shall survive any termination or expiration of this Agreement.

11. General

11.1. Assignment. Neither the rights nor the obligations arising under this Agreement are assignable or transferable by Customer or ActivTrak without the other party’s prior written consent which shall not be unreasonably withheld or delayed, and any such attempted assignment or transfer shall be void and without effect. Notwithstanding the foregoing, either party may freely assign this Agreement in its entirety (including all Order Forms), upon notice and without the consent of the other party, to an Affiliate or to its successor in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets, provided that all fees owed and due have been paid.

11.2. Controlling Law, Attorneys’ Fees and Severability. This Agreement and any disputes arising out of or related hereto shall be governed by and construed in accordance with the laws of the State of Texas, without giving effect to its conflicts of laws rules or the United Nations Convention on the International Sale of Goods. With respect to all disputes arising out of or related to this Agreement, the parties consent to exclusive jurisdiction and venue in the state and Federal courts located in Travis County, Texas. In any action to enforce this Agreement the prevailing party will be entitled to costs and attorneys’ fees. In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be unenforceable, such provisions shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable.

11.3. Notices. All legal notices hereunder shall be in writing and given upon (i) personal delivery, in which case notice shall be deemed given on the day of such hand delivery, or (ii) by overnight courier, in which case notice shall be deemed given one (1) business day after deposit with a recognized courier for U.S. deliveries (or three (3) business days for international deliveries).

11.4. Force Majeure. If the performance of this Agreement or any obligation hereunder (other than obligations of payment) is prevented or restricted by reasons beyond the reasonable control of a party including but not limited to computer related attacks, hacking, or acts of terrorism (a “Force Majeure Event”), the party so affected shall be excused from such performance and liability to the extent of such prevention or restriction.

11.5. Equitable Relief. Due to the unique nature of the parties’ Confidential Information disclosed hereunder, there can be no adequate remedy at law for a party’s breach of its obligations hereunder, and any such breach may result in irreparable harm to the non-breaching party. Therefore, upon any such breach or threat thereof, the party alleging breach shall be entitled to seek injunctive and other appropriate equitable relief in addition to any other remedies available to it, without the requirement of posting a bond.

11.6. Independent Contractors. The parties shall be independent contractors under this Agreement, and nothing herein shall constitute either party as the employer, employee, agent, or representative of the other party, or both parties as joint venturers or partners for any purpose. There are no third-party beneficiaries under this Agreement.

11.7. Export Compliance. Each party represents that it is not named on any U.S. government list of persons or entities with which U.S. persons are prohibited from transacting, nor owned or controlled by or acting on behalf of any such persons or entities, and Customer will not access or use the Service in any manner that would cause any party to violate any U.S. or international embargo, export control law, or prohibition.

11.8. Anti-Corruption. Customer agrees that it has not received or been offered any illegal or improper bribe, kickback, payment, gift, or thing of value from any of ActivTrak employees or agents in connection with this Agreement. Reasonable gifts and entertainment provided in the ordinary course of business do not violate the above restriction. If Customer learns

of any violation of the above restriction, Customer will use reasonable efforts to promptly notify ActivTrak.

11.9. Entire Agreement. This Agreement together with the Order Form(s) constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof, and any and all prior or contemporaneous written or oral agreements existing between the parties hereto, including any non-disclosure agreement(s), and related to the subject matter hereof are expressly canceled. The parties agree that any term or condition stated in Customer's purchase order or in any other of Customer's order documentation (excluding Order Forms) is void. In the event of any conflict or inconsistency among the following documents, the order of precedence shall be: (1) the applicable Order Form, (2) this Agreement, and (3) the Documentation. No modification, amendment or waiver of any provision of this Agreement will be effective unless in writing and signed by both parties hereto. Any failure to enforce any provision of this Agreement shall not constitute a waiver thereof or of any other provision.

Company _____

Birch Grove Software, Inc.

Printed Name _____

Printed Name _____

Title _____

Title _____

Date _____

Date _____



END OF AGREEMENT