

AGREEMENT
BETWEEN
SEQUOIA VOTING SYSTEMS, Inc.

AND

Bergen County, New Jersey Superintendent of Elections Office

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License Fee

THIS AGREEMENT is made on _____ day of _____ 200[]

BETWEEN

SEQUOIA VOTING SYSTEMS Inc., located at 7677 Oakport Street, Suite 800 - Oakland, CA 94621 ("the Licensor")

AND

Bergen County Superintendent of Elections having its office at One Bergen County Plaza, Room 380- Hackensack, New Jersey 07601 ("the Licensee").

WHEREAS

The Licensee wishes the Licensor to grant to it a license to use the Software in relation to the Equipment (both as hereinafter defined) and the Licensor is agreeable to granting such a license subject to the following terms and conditions:

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS

1.1 In this Agreement the following terms shall bear the following meanings:

“Documentation” the manuals, procedures and materials accompanying the Software.

“Software” WinEDS election management software

“License Fee” the license fee payable by the Licensee to the Licensor for the license of the Software herein as specified in Appendix 3.

“Specifications” the specifications for the Software set forth in the Documentation.

1.2 Words used in the singular shall include the plural and vice versa.

2. GRANT OF LICENSE

2.1 The Licensor grants to the Licensee a personal, non-transferable and non-exclusive license for one (1) year to use the Software solely for the Licensee’s own internal business purposes and solely in conjunction with the Hardware at the Locations. The license shall take effect from the date of signature of this Agreement. This Agreement may not be assigned or transferred by the Licensee, voluntarily or by operation of law (including without limitation, by transfer of ownership interests in

the Licensee), to any party without the Licensor's express prior written permission. The Licensee shall have no power to grant sub-licenses, prepare derivative works or modify the Software. Any use of all or any portion of the Software not expressly permitted by the terms of this Agreement is strictly prohibited.

- 2.2 Licensor shall retain ownership of and all copyright and other proprietary rights in the Software and any modifications or translations thereof. Licensee shall acquire only the limited license to the Software granted under the express terms of Section 2.1 above.
- 2.3 No right is granted to Licensee by this Agreement to use any identifying mark (such as, but not limited to, trade names, trademarks, trade devices, service marks or symbols, and abbreviations, contractions or simulations thereof) owned by, or used to identify any product or service of, Licensor or a corporate affiliate of Licensor. Licensee agrees that it will not, without the prior written permission of Licensor, (i) use any such identifying mark in advertising, publicity, packaging, labelling or in any other manner to identify any of its products or services, or (ii) represent, directly or indirectly, any product or service of Licensee as a product or service of Licensor or such an affiliate or is made in accordance with or utilises any information or documentation of Licensor or such an affiliate.

3. DELIVERY

- 3.1 The Software shall be supplied in executable form together with one back-up copy and one copy of Software documentation.
- 3.2 Delivery of the Software shall take place at the Location(s) or any other site of the Licensee and on the dates agreed between the parties.

4. PRICE

- 4.1 In consideration of the grant of the license the Licensee shall pay the Licensor the License Fee.
- 4.2 The Licensee shall pay all invoices within thirty (30) days of invoice date. Licensor reserves the right to withdraw its services and support if any invoice is not paid within ten (10) days of the date when due.
- 4.3 The Licensee shall pay the Licensor interest on all sums outstanding at an annual rate of interest equal to four per cent (4%) above the prime rate as published in the Wall Street Journal and changed from time to time until payment is made in full (whether before or after judgment).
- 4.4 Licensee shall be responsible for payment of all sales, personal property, use and other taxes or governmental impositions of any nature, with the sole exception of taxes calculated solely upon the income of Licensor ("Taxes"). Licensee shall, at the option of Licensor, pay Taxes directly to the taxing authority or reimburse Licensor immediately for any Taxes paid by Licensor.

5. PROHIBITED ACTS

- 5.1 The Licensee shall not (and shall not permit any other party to), except to the extent permitted by law, without the prior written permission of the Licensor:-
- 5.1.1 Transfer or copy onto any other disk or hardware or otherwise copy the Software in whole or in part except for purposes of system backup;
 - 5.1.2 Reverse engineer, disassemble, decompile, decipher or analyse the Software in whole or in part;
 - 5.1.3 Alter or modify the Software in any way or prepare any derivative works of the Software or any part of parts of the Software;
 - 5.1.4 Alter, remove or obstruct any copyright or proprietary notices from the Software, or fail to reproduce the same on any lawful copies of the Software;
or
 - 5.1.5 Use the Software other than on the Hardware at the Locations.
 - 5.1.6 Export, directly or indirectly, any Software to any country outside of the United States, or make disclosure of the Software to any foreign national where such disclosure would require an export license or other governmental permit.

6. CONFIDENTIALITY

The Licensee acknowledges that the Software is the sole and exclusive property of the Licensor or its licensors, contains confidential information of the Licensor or its licensors and embodies certain valuable proprietary information and trade secrets of the Licensor or its licensors. The Licensee shall not give or make available the Software, or any part thereof, or otherwise disclose confidential information contained in, supplied with or relating to the Software to any third party except to such of its employees as are required to have access to the Software in the normal course of use of the Software for the purpose permitted under Section 2 and under like conditions of confidentiality as contained in this Section 6. The provisions of this Section 6 shall survive the termination or expiration of this Agreement.

7. TERMINATION

- 7.1 Without prejudice to any other remedy which may be available, at law, equity or otherwise, Licensor may terminate this Agreement immediately upon written notice to the Licensee;
- 7.1.1 If the Licensee breaches any of the terms of this Agreement which, in the case of breach capable of being remedied, is not remedied within ten (10) days written notice from the Licensor, or
 - 7.1.3 If the Licensee uses the Software for any purpose not expressly permitted hereunder.

- 7.2 Either party may terminate this Agreement if the other party ceases to trade, fails to pay its debts in the normal course, makes or offers to make any voluntary arrangement or composition with its creditors, commences to be wound up otherwise than voluntarily for the purposes of solvent amalgamation or reconstruction, becomes bankrupt, insolvent or if a receiver, administrator, trustee or like officer is appointed over the whole or part of its business.

8. RETURN OF SOFTWARE

Upon termination or expiration of this Agreement, the Licensee shall (i) forthwith return to the Licensor all Software in its possession or control, or, if so requested by the Licensor, destroy all such Software and (ii) purge all Software from any electronic media, and certify in writing to the Licensor that it has been destroyed and purged.

9. WARRANTY

- 9.1 The Licensor warrants that the Software for a period of thirty (30) days following delivery of the Software to the Licensee, will function substantially in accordance with the Specification. The Licensor shall use reasonable efforts to correct any material failure of the Software to function substantially in accordance with the Specification provided the Licensee has given the Licensor written notice of the defect within the said thirty (30) day period and provided that the Licensee can reproduce the defect to the Licensor. If the Licensor establishes that a reported defect is not covered by the foregoing warranty or is not covered by the Software maintenance fee payable by the Licensee to the Licensor, pursuant to the terms of a separate Software maintenance agreement entered between the parties (if any), the Licensee shall be responsible for the costs of the Licensor's investigative and remedial work at the Licensor's then current charging rates. The foregoing warranty shall be void in the event of the Software (i) having been modified by any party other than the Licensor or its licensors or (ii) having been used by the Licensee for purposes other than those for which the Software was designed by Licensor.

- 9.2 The warranty set forth in Section 9.1 is in lieu of all other warranties, express or implied, statutory or otherwise, including but not limited to any warranty of fitness for a particular purpose, warranty of merchantability, satisfactory quality, usefulness or timeliness. The remedies set forth in Section 9.1 shall be the sole and exclusive remedies available to the Licensee for breach of the warranty set forth in Section 9.1.

- 9.3 Licensee acknowledges that the Software may contain materials prepared by other developers. Licensor makes no warranty or representation whatsoever as to those materials not prepared by Licensor contained in the Software.

10. LIMITATION OF LIABILITY

- 10.1 Subject only to the provisions of Sections 10.3 and 10.4 below, the Licensor's total aggregate liability for any loss, damage, costs or expenses under or in connection with this Agreement and in connection with the Software howsoever arising, including without limitation loss, damage, costs or expenses caused by breach of contract,

negligence, strict liability, breach of statutory or any other duty shall in no circumstances exceed the License fee paid by the Licensee to the Licensor under this Agreement.

- 10.2 The Licensor shall not be liable for any loss of profits, loss of business, loss of data, loss of use or any other indirect, incidental special or consequential loss or damage whatsoever, howsoever arising, incurred by Licensee or any third party, whether in an action in contract, negligence or other tort, even if the parties or their representatives have been advised of the possibility of such damages.
- 10.3 Notwithstanding the provisions of Section 10.1 above the Licensor shall be liable for loss or damage to any physical property of the Licensee caused solely by the negligence of Licensor provided, however, the Licensor's total aggregate liability to the Licensee for such loss or damage shall be limited to a maximum of the annual License Fee for all such occurrences.
- 10.4 The limitations contained in Sections 10.1, 10.2 and 10.3 shall not apply to any injury to, illness or death of any person caused solely by the negligence of the Licensor.

11. ENTIRE AGREEMENT

This Agreement embodies the entire agreement between the parties regarding its subject matter and supercedes of any previous communications, agreements or understandings. Both parties acknowledge that neither has placed any reliance on any previous communications or understandings other than those expressly incorporated in this Agreement. This Agreement may be amended only by agreement in writing signed by authorised representatives of each party.

12. SEVERABILITY

The provisions of this Agreement are declared to be severable. If any provision is held to be void, contrary to law or enforceable by a court of competent jurisdiction the validity and enforceability of the remainder of this Agreement shall not be affected.

13. WAIVER

Any failure or delay by either party to exercise or enforce any right or any time or indulgence given shall not affect that party's right to exercise or enforce that right against the other party nor shall any waiver of any breach of any provision be taken as a waiver of any subsequent breach or of the provision itself. To be effective any waiver must be in writing, signed by an authorised representative of the waiving party and delivered to the other party.

14. FORCE MAJEURE

Neither party shall be liable for any delay or failure to meet its obligations under this Agreement due to any cause outside its reasonable control including (without limitation), inclement weather, Acts of God, war, riot, terrorism, malicious acts of damage, civil commotion, strike, holocaust, industrial dispute, refusal of license, power failure or fire or the lack of availability of materials. If performance of this

Agreement is substantially prevented for a continuous period of six months by virtue of any of the aforesaid events then either party may terminate this Agreement by written notice to the other. This Section 14 shall not be applicable to a failure to pay any money owing by Licensee under this Agreement

15. NOTICES

Any notice given under this Agreement shall be sufficient if it is sent by ordinary first class pre-paid mail, by nationally-recognized overnight courier service or by telex or confirmed fax to the other party at the address appearing at the head of this Agreement or such other address as may have been notified. Every notice shall be deemed to have been received and given on the third working day after posting if sent by mail, on the next working day if sent by overnight courier or in the case of telex or fax, such notice shall be deemed to have been received and given at the time of transmission.

16. ASSIGNMENT

This Agreement may on notice to the Licensee be assigned by Licensor to any entity controlling, controlled by or under common control with Licensor, but otherwise this Agreement may not be assigned by either party without the written consent of the other party.

17. RELATIONSHIP OF THE PARTIES

Licensor and Licensee agree that under this Agreement:

17.1 Both parties are independent entities;

17.2 Neither party is a legal representative, agent or partner of the other;

17.3 Neither party will represent or act on behalf of the other, unless otherwise agreed to in writing; and

17.4 Both parties are free to enter into similar agreements with others and to market its products and services to others.

18. NO THIRD PARTY BENEFICIARIES

Licensor and Licensee agree that this Agreement is for the benefit of the parties hereto and is not intended to confer any rights or benefits on any third party, and that there are no third-party beneficiaries of this Agreement or any part or specific provision of this Agreement, and no third party shall have any right to enforce this Agreement or any provision hereof.

19. GOVERNING LAW

This Agreement shall be governed by and interpreted in accordance with the laws of the state of California (without regard to principles of conflict of law). The parties hereby consent to the exclusive jurisdiction of the Courts of the State of California,

and the Federal Courts located within the State of California, as to any matter arising under or relating to this Agreement.

IN WITNESS WHEREOF the parties or their duly authorised representatives have set their hands and seals the day and year first above written.

SIGNED for and on behalf of
SEQUOIA VOTING SYSTEMS Inc.

SIGNED for and on behalf of
Bergen County Superintendent of Elections

Name _____

Name _____

Title _____

Title _____

APPENDIX 1

LICENSE FEE

The Licensee (Bergen County) agrees to pay the sum of \$37,500.00 to the Licensor for the use of the WinEDS® software in accordance with this agreement on a annual basis starting one year from the date of the execution of this agreement. (The license fee for the first year is included in the contract price paid for by the State of New Jersey.)

RENEWALS

The Licensor reserves the right to adjust this yearly fee within five percent (5%) of the current fee for renewals without advanced notice to the licensee. For an increase greater that five percent (5%) the Licensee will be informed by the Licensor within sixty (60) days advanced notice.