

Omni Software Licence Agreement

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OMNI SOFTWARE LICENCE AGREEMENT

between

C & A KUDLA SERVICES CC

("the Licensor")

and

OMNI ACCOUNTS SOFTWARE USER

("the Licensee")

in respect of

OMNI SOFTWARE

WHEREAS the Licensor is the originator, author and proprietor of all of the intellectual property (more fully defined below) comprising the software marketed, sold and distributed under the title "Omni" and "Omni AccountsTM" together with all associated registered or common law marks, logos and getup, alone or in conjunction with other related or descriptive terms, all of which comprise "the Software" as defined below;

AND WHEREAS the Licensee recognises and accepts the exclusivity of the Licensor's intellectual property rights;

AND WHEREAS the Licensee wishes to purchase and use the Software the terms and conditions of this Agreement;

AND WHEREAS the Licensee, as purchaser of the Software from a third party, separately or preinstalled on a computer, wishes to use the Software lawfully.

IT IS AGREED:

1. Interpretation

The headings of the clauses in this Agreement are for purposes of convenience and reference only and shall not be used in the interpretation, nor modify or amplify the terms of this Agreement nor any clause hereof. Unless a contrary intention appears

1.1. Words importing-

1.1.1. any one gender includes the other gender;

1.1.2. the singular includes the plural and vice versa; and

1.1.3. a natural person includes juristic persons (corporate or unincorporated) and vice versa.

1.2. A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.

1.3. References to clauses and annexures are to the clauses and annexures of this Agreement; references to paragraphs are to paragraphs of the relevant annexures to this Agreement.

1.4. If any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the Agreement.

1.5. When any number of days is prescribed in this Agreement, it shall be reckoned exclusively of the first and inclusively of the last day unless the last day is not a business day, in which case the last day shall be the next succeeding business day.

1.6. The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

2. Definitions

2.1. The definitions and rules of interpretation in this clause apply to this Agreement.

2.2. The following words and phrases have the meanings ascribed hereunder:

2.2.1. "AFSA" means the Arbitration Foundation of Southern Africa;

2.2.2. "Agreement" means this software licence, maintenance and support services agreement and any schedules and annexures thereto;

2.2.3. "Authorised Users" means those users who are authorised by the Licensor to use the Omni Software;

2.2.4. "Commencement Date" means the date of registration;

- 2.2.5. "Date of registration" means the date upon which the Licensee activates the Unlock Key;
- 2.2.6. "Confidential Information" means information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information by a Party, or information which the receiving Party knows or reasonably should have known is of a proprietary or confidential nature;
- 2.2.7. "Documentation" means the documentation in respect of the Software as provided by the Licensor to the Licensee, including user documentation and the specifications of the Software;
- 2.2.8. "Intellectual Property" means any know-how (not in the public domain), invention (whether patented or not), design, trade mark (whether or not registered), or copyright material (whether or not registered), processes, process methodology (whether patented or not), and all other identical or similar Intellectual Property as may exist anywhere in the world which is not in the public domain and any applications for registration of such Intellectual Property;
- 2.2.9. "Maintenance and Support Services" means the performance of scheduled and/or preventative maintenance services required for the purpose of ensuring the continued functionality of the Software, including the provision and installation of upgrades, updates, enhancements and new releases;
- 2.2.10. "Party" means either the Licensor or the Licensee, and "Parties" means the Parties to this Agreement;
- 2.2.11. "Software" means the Omni Accounts™ computer program licenced by the Licensor to the Licensee, including any object code;
- 2.2.12. "Unlock Key" means the unique alphanumeric code provided to the Licensee by the Licensor;
- 2.2.13. "Website" means the Omni Website www.omniaccounts.co.za.

3. Grant of software licence

The Licensor hereby grants to the Licensee, a non-exclusive and non-transferrable licence to use the Software within the licenced territory/authorised location in accordance with the terms and conditions of this Agreement.

4. Restrictions of use of software

- 4.1. The Licensee shall only be entitled to use the Software for its internal business purposes and shall not permit any other person, save for the Authorised Users, to use the Software.
- 4.2. The Licensee may not, or cause any other person to-
- 4.2.1. modify or reverse engineer the Software, or create derivative works of the Software; or
 - 4.2.2. sub-license the Software to third parties; or
 - 4.2.3. use the Software outside of the permitted use of the Software as set forth in this Agreement.
- 4.3. The Licensee shall be entitled to make and maintain 1 (one) back-up copy of the Software for operational security and archival purposes, or such other additional copies as agreed to by the Licensor.
- 4.4. The Licensee may not reuse or transfer the Unlock Key or the Software.

5. Purchase of the Software

5.1. The Software may be purchased online by accessing the Website or by way of a Compact Disc ("CD") or Digital Versatile Disc ("DVD") from approved retailers.

5.2. The purchase price of the relevant Software package indicated on the Website is inclusive of VAT.

5.3. The terms and conditions of this agreement apply to all purchases of the Software.

6. Delivery of the Software

6.1. Delivery of the Software purchased online shall be effected when the Licensee has:

6.1.1. downloaded the Software from the Website;

6.1.2. accepted the terms and conditions of this agreement by clicking on the "I agree" button which is displayed during the Omni software installation process

6.1.3. paid the purchase price indicated on the purchase form;

6.1.4. been supplied by the Licensor with an Unlock Key.

6.2. The Licensor shall not be obliged to supply an Unlock Key until the Licensee has paid the stated purchase price of the Software.

6.3. Delivery of the Software purchased by way of a CD or DVD in packaging containing an Unlock Key specific to the Software loaded onto such CD or DVD, shall be upon its purchase from an approved retailer.

6.4. The Software shall be deemed to be accepted by the Licensee upon delivery aforesaid.

6.5. The Licensee will be deemed to have accepted the terms and conditions of this agreement by clicking on the "I agree" button which is displayed during the Omni software installation process

6.6. The obligations of the Licensor under this agreement shall commence on the Registration Date.

7. DURATION OF THIS LICENCE

7.1. This licence shall remain valid for so long as the Software applicable to the products described as "Essential", "Trader", "Point Of Sale" and "Business", together with any "Add-On Switches", designated by the conjunct "Plus", is in use.

7.2. This licence in respect of the products described as "Business Pro", "Enterprise" and "Premium" and any "Add-On Switches" designated by the conjunct "Plus" shall be valid for one year from the Registration Date whereafter it shall lapse unless renewed for a further year upon payment of the prevailing licence fee.

7.3. Upon the lapse or cancellation of this licence for any reason, the Software will become inoperable, except that saved data may be retrieved.

8. Support services

8.1. In respect of the products described as Essential, Trader, Point Of Sale and Business, the Licensor shall provide reasonable support to resolve faults with the Software free of charge within 3 (three) days of notification of the fault, or, if the Licensee has subscribed to the Licensor's support service, on the day of notification of the fault, or as is reasonably practicable thereafter.

8.2. In respect of the products described as Business Pro, Enterprise and Premium, the Licence fee includes support and service on the day of notification of the fault, or as is reasonably practicable thereafter.

8.3. The Licensor shall respond promptly to any system generated fault reports emanating from the Licensee's Software.

8.4. The Licensor shall notify the Licensee of any upgrades, updates, enhancements and/or new releases to and of the Software ("the Upgrades"), provided that:

8.4.1. the holders of licences in respect of the Essential, Trader, Point Of Sale and Business packages shall not be entitled to nor obliged to acquire the Upgrades;

8.5. the holders of the Business Pro, Enterprise and Premium packages shall as part of their licence fee, be entitled to such Upgrade as soon as is practicable after it becomes available.

8.6. If a Licensee requires changes to or modification of the Software, the Licensor may make such changes if in its sole discretion it considers them desirable provided that:

8.6.1. if the change or modification is peculiar to the Licensee's requirements, it shall be made at the cost of the Licensee;

8.6.2. if the change or modification is beneficial to the Software as a whole, it will be incorporated into subsequent releases of the Software.

8.7. The Licensor shall not be required to perform support services where:

8.7.1. the error, fault or defect arose from a modification made by the Licensee;

8.7.2. the Licensee failed to use the Software in accordance with the Documentation;

8.7.3. the Licensee failed to use any new or corrected versions of the Software; or

8.7.4. the Licensee failed to properly operate and/or maintain and support the operating environment.

8.8. The Licensor is unable to support versions of the Software that are more than 5 (five) years old and/or have become redundant.

9. Warranty

9.1. The Licensor warrants that the Software on registration, shall comply with the Documentation in all material aspects. The Licensor makes no other warranties, regarding the Software, including that the Software is fault or error free.

9.2. If the Software and or the CD/DVD purchased from an authorised dealer, separately or pre-loaded on a computer, is defective, the Licensee may, within 30 (thirty) days of purchase, claim a replacement CD/DVD, or a refund of the purchase price from such dealer against the surrender of the defective CD/DVD and its accompanying documentation.

9.3. If the Licensee obtained the Software by downloading it to its computer, and the Software did not install properly, the Licensee may seek the assistance of the provider of the download site or the Licensor to repair the installation.

9.4. The Licensor warrants that in providing the support for the Software that it will perform its obligations in a professional and competent manner.

10. Audit rights

10.1. The Licensee shall, on reasonable notice by the Licensor, provide the Licensor with access to the Licensee's premises and records, for purposes of verifying the Licensee's compliance with the terms and conditions of this Agreement, including confirming the number of Authorised Users.

10.2. Any audit as contemplated in clause 10.1 shall be at the expense of the Licensor, save that should the results of the audit indicate a negative finding, the Licensee shall be liable for payment of the audit exercise and any additional licence fees owing to the Licensor.

11. Intellectual property

The Licensee acknowledges and agrees that the Licensor owns all rights to the Intellectual Property in the Software and Documentation. Except as expressly stated herein, the Licensor does not grant the Licensee any rights to or in, patents, copyrights, database rights, trade secrets, trade names, trademarks (whether registered or unregistered), or any other Intellectual Property rights, other rights or licences in respect of the Software and/or the Documentation.

12. Confidentiality

12.1. Each Party may be given access to Confidential Information of the other Party in order to perform its obligations under this Agreement. A Party's Confidential Information shall not be deemed to include information that:

12.1.1. is or becomes publicly known other than through any act or omission of the receiving Party;

12.1.2. was in the other Party's lawful possession before the disclosure;

12.1.3. is lawfully disclosed to the receiving Party by a third party without restriction on disclosure;

12.1.4. is independently developed by the receiving Party, which independent development can be shown by written evidence; or

12.1.5. is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.

12.2. Each Party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this Agreement.

12.3. Each Party shall take all reasonable steps to ensure that the other Party's Confidential Information to which it has access, is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement.

13. Indemnity

13.1. The Licensor warrants that it is the proprietor of the Software and indemnifies the Licensee against claims, actions, proceedings, losses, damages, expenses and costs arising from or in connection with a breach of third party intellectual property, provided that (a) such breach was caused by the use of the Software by the Licensee in strict compliance with this Agreement; and (b) the Licensee promptly notifies the Licensor of becoming aware of such claim.

13.2. The Licensee hereby indemnifies and holds the Licensor harmless against any claim that may be made by any person because of the Licensee's use of the Software, or the use of the Software by any other person through the Licensee.

14. Limitation of liability

14.1. The Parties agree that, in the event of a breach of any of the provisions of this Agreement by the Licensor as consequence whereof the Licensee suffers any loss or damages, the liability of the Licensor shall be limited to the amount paid by the Licensee to the Licensor for the Software and related services.

14.2. Neither Party shall be liable to the other for any losses, which constitute indirect, special or consequential damages.

14.3. Except as provided for in this agreement, the Licensee shall have no claim against the Licensor, its employees or agents, howsoever arising and irrespective of the nature of the harm or damages suffered.

14.4. The Licensee acknowledges and agrees that it:

14.4.1. purchases the Software, as is and it will have no claim against the Licensor for any defects, patent or latent, except as provided for in this agreement.

14.4.2. was not induced to purchase the Software by any representation of the Licensor or its employees or agents;

14.4.3. is fully acquainted with the Software and its capabilities;

14.4.4. has determined for itself, the fitness of the Software for the purpose for which it was purchased;

14.5. Save as provided for herein, the Licensor makes no warranties as to the Software, in particular that it is free of bugs, viruses, errors or other program limitations.

14.6. If the Licensee is offered and accepts the Software for a trial period, the Licensor does not warrant that after the trial period, the Licensee will have access to the Software or any data it may contain, and that it will have no claim against the Licensor for the loss of such data.

15. Termination

15.1. This Agreement Licence may be terminated by the Licensor immediately and without notice if the Licensee fails to comply with any term or condition of this Agreement.

15.2. On termination of this Agreement, the Licensor shall be under no obligation to refund the purchase price or any fees paid prior to termination.

15.3. Upon such termination or discontinuance of the Agreement for any reason, the Licensee must immediately destroy all complete and partial copies of the Software, including all backup copies.

16. TRIAL PERIOD

16.1. The Licensee shall have the right to use certain Features (switches) or Bundles on either the single user version or multi user version of the Software prior to purchase for twenty eight (28) days of purchase of the Software for evaluation ("the trial period").

16.2. During the trial period, the Licensee will be granted a limited non-exclusive non-transferable licence to use such Features or Bundles (whether in the single or multi user versions of the Software) for evaluation purposes only for the duration of the trial.

16.3. Thereafter, the Licensee may purchase the right to use the appropriate Feature or Bundle in accordance with this Agreement by communicating this intention to the Licensor or the retailer from whom the Software was purchased.

16.4. During the trial period, the Licensee may not copy any printed materials associated with the Features being evaluated that accompany the Software, if any, or print copies of any online user documentation.

16.5. The Licensee acknowledges and agrees that on expiry of the trial period it will not have any right to continue to access and/or use the Features or any data it has entered into the Software, unless the Licensee has purchase the Feature.

17. Data privacy and protection

17.1. Each Party's data shall be and remain the property of that Party and its affiliates. Neither Party shall divulge the data of the other Party to third parties (unless provided otherwise in this Agreement) nor shall a Party use the data of the other Party except for purposes of this Agreement.

17.2. Neither Party shall possess or assert any lien or other right against or to the other Party's data, or sell, assign, lease or otherwise dispose of the other Party's data, or any part thereof, to third parties.

17.3. In particular, the Licensee shall not:

17.3.1. make additional copies of the Software;

17.3.2. enable others to use registration code(s) or serial number(s), if any allocated to the Licensee;

17.3.3. give copies to a person who has not purchased the appropriate licence for the Software from the Licensor or install the Software on computers not covered by the appropriate licences for the Software from the Licensor or to duplicate the Software by any other means including electronic transmission;

17.3.4. de-compile, reverse engineer, disassemble, or otherwise reduce the Software to human-perceivable form (except as permitted by applicable law and on prior written notice to the Licensor) or disable any functionality, thereby limiting the use of the Software;

17.3.5. modify, adapt, translate, rent, sub-licence (including offering the Software to third parties on an applications service provider or time-sharing basis), assign, loan, resell for profit, or distribute the Software, disk(s), or related materials or create derivative works based upon the Software or any part thereof;

17.3.6. network the Software, except to the extent you have purchased a licence for the multi-user version as referenced above;

17.3.7. circumvent or attempt to circumvent any copy management or prevention system by any means;

17.3.8. to use the Software for immoral, illegal or for any other purpose which may be determined threatening, abusive or harmful including but not limited to the creation or transmission of any virus, worms, trojan horse, cancelbot or any other destructive or contaminating program; and

17.4. The Licensee shall:

17.5. test the Software thoroughly in a non-critical environment before relying on it;

17.6. maintain accurate and up-to-date records of the number and location of all copies of the Software;

17.7. supervise and control use of the Software in accordance with the terms of this Licence;

17.8. ensure that your employees or others who will use the Software are notified of this Licence and the terms hereof prior to using the same;

17.9. reproduce and include the copyright notice of OMNI as it appears in or on the Software on all copies;

17.10. frequently back up important data entered into the Software as data not backed up might be lost whether in the event of a crash or other error or on destruction of the Software on termination or otherwise.

18. Force majeure

The Licensor shall have no liability to the Licensee under this Agreement if it is prevented from or delayed in performing its obligations under this Agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes, an act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, fire, flood, or storm.

19. Waiver

19.1. A waiver of any right under this Agreement is only effective if it is in writing, and it applies only to the Party to whom the waiver is addressed and to the circumstances for which it is given.

19.2. Unless specifically provided otherwise, rights arising under this Agreement are cumulative and do not exclude rights provided by law.

20. Severance

20.1. If any provision (or part of a provision) of this Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

20.2. If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the Parties.

21. Entire agreement

21.1. This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.

21.2. Each of the Parties acknowledges and agrees that in entering into this Agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this Agreement or not) relating to the subject matter of this Agreement, other than as expressly set out in this Agreement.

22. Assignment

22.1. The Licensee shall not, without the prior written consent of the Licensor, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

22.2. The Licensor may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

23. Notices

The Parties chooses the following as their respective addresses for the purposes of giving any notice, the payment of any sum, the serving of any process and for any other purposes arising from this Agreement:

23.1. the Licensor at the address disclosed on its Website;

23.2. the Licensee at the addressed disclosed when registering the Software.

24. Dispute resolution

24.1. In the event of there being any dispute or difference between the Parties arising out of this Agreement, the said dispute or difference shall on written demand by either Party be submitted to arbitration in DURBAN in accordance with the AFSA rules, which arbitration shall be administered by AFSA.

24.2. Should AFSA, as an institution, not be operating at that time or not be accepting requests for arbitration for any reason, then the arbitration shall be conducted in accordance with the AFSA rules for commercial arbitration (as last applied by AFSA) before an arbitrator appointed by agreement between the Parties to the dispute or failing agreement within 30 (thirty) business days of the demand for arbitration, then any Party to the dispute shall be entitled to forthwith call upon the chairperson of the KwaZulu-Natal Society of Advocates to nominate the arbitrator, provided that the person so nominated shall be an advocate of not less than 10 (ten) years standing as such. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the attorneys of the Parties to the dispute failing to agree on any matter relating to the administration of the arbitration, such matter shall be referred to and decided by the arbitrator whose decision shall be final and binding on the Parties to the dispute.

24.3. Any Party to the arbitration may appeal the decision of the arbitrator or arbitrators in terms of the AFSA rules for commercial arbitration.

24.4. Nothing herein contained shall be deemed to prevent or prohibit a Party to the arbitration from applying to the appropriate court for urgent relief or for judgment in relation to a liquidated claim.

24.5. Any arbitration in terms of this clause 24 (including any appeal proceedings) shall be conducted in camera and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.

24.6. This clause 24 will continue to be binding on the Parties notwithstanding any termination or cancellation of this Agreement.

24.7. The Parties agree that the written demand by a Party to the dispute in terms of clause 24. that the dispute or difference be submitted to arbitration is to be deemed as a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act, 1969.

25. Governing law and jurisdiction

This Agreement and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) are governed by and construed in accordance with the laws of South Africa.

26. CONSUMER PROTECTION ACT 68 OF 2008

26.1. The Licensee acknowledges that it is aware of its rights under the Consumer Protection Act and that such rights are not infringed by the provisions of this agreement.

26.2. The Licensee agrees that this agreement is written in plain and understandable language and contains all the information necessary for it to make an informed decision to enter this agreement.