K2 Medical Systems™ Ltd

END-USER SOFTWARE LICENCE AGREEMENT

This End-User Software Licence Agreement (the "Agreement") is entered into between ==xxxxxxxxxxxx== of ==xxxxxxxx== (**"Licensee"**) and **K2 Medical Systems Ltd, Summit House, 26 William Prance Road, Plymouth, PL6 5WR, United Kingdom** ("**K2MS**"), for the use of the K2MS Guardian, Athena and INFANT systems limited to the purchased items detailed in Schedule A. **This Licence Agreement supersedes all previous agreements, arrangements and understandings between the parties in relation to its subject matter.** By installing or otherwise using the Product, the Licensee agrees to be bound by the terms of this Agreement. If the Licensee does not agree to the terms of this Agreement, it must not install or use the Product or must immediately discontinue to use the Product if already installed, and must promptly return such Product to K2MS. In this event the Licensee must immediately inform K2MS that it does not agree to the terms of this Agreement and that the Product is being returned.

1. DEFINITIONS

1.1 **PRODUCT** means the object code version of all software components of the K2MS Guardian, Athena and INFANT System supplied by K2MS (Schedule A) together with any updates and/or revisions provided, and may include associated media or printed materials if such media and/or materials are provided by K2MS together with the Product.

1.2 **LICENCE** means the rights to use the Product as described in clause 2 and Schedule A during the term of this Agreement

1.3 **EFFECTIVE DATE** means the date of original supply of the Product to the Licensee this being ==xxxxxxx==

    1.3.1 **CONTRACT EXTENSION DATE** means the date the contract is renewed and becomes the new **EFFECTIVE DATE** ==*********==

1.4 **INITIAL PERIOD** means the period for which the Licensee is initially contracted to pay the Annual Licence and Service Fee, being FIVE years from the Effective Date.

1.5 **SERVICE** means the Licensee's right to receive Product support in accordance with the service detail provided in Schedule A.

1.6 **ANNUAL LICENCE AND SERVICE FEE** means the fee of ==£xxxxx== that the Licensee is required to pay to K2MS for the software Licence and the right to the availability of Service for one year.

1.7 **REPORTS** means the reports and metrics generated by the product.

2. RIGHTS AND LIMITATIONS

2.1 Subject to the terms and conditions of this Agreement, K2MS grants the Licensee a non-exclusive, non-assignable Licence without the right to grant sub-licences to use the Product during the term of this Agreement (as referred to in clause 5), in accordance with paragraphs 1 and 2 of Schedule A.

2.2 This Agreement further grants the Licensee the right to receive Service during the term of this Agreement, provided the Annual Licence and Service Fee is paid by the Licensee

2.3 The extent of this Licence to permit software use on multiple installations is defined within Schedule A

2.4 Notwithstanding anything else contained in this Agreement, K2MS retains (i) all title to, and, except as expressly and unambiguously Licensed herein, all rights to the Product, and all related documentation and materials, (ii) all of its service marks, trademarks, trade names or any other designations and (iii) all copyrights, patent rights, trade secret rights and other intellectual property and proprietary rights in the Product. K2MS will own all intellectual property rights in any copy, translation, modification, adaptation or derivation of the Product, including any improvement or development thereof.

3. LICENSEE'S OBLIGATIONS

The Licensee agrees:

3.1 Not to reverse assemble, de-compile, or otherwise attempt to derive source code (or the underlying ideas, algorithms, structure or organisation) from the Product or from any other information, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation.

3.2 To keep the copy of the Product in the possession of the Licensee, and not to attempt to prepare any further copies. The Licensee may make copies of any printed materials comprised in the Products in accordance with paragraph 1 of Schedule A. The Licensee shall keep the originals and all copies made under this clause secure at all times and shall take all necessary steps to prevent any unauthorised use or copying.

3.3 Not to sell or otherwise transfer the Product to any person; and not to give, lend or give access to the Product or copies of the Product to anyone that is not an employee or consultant of the Licensee. The Licensee shall only give, lend or give access to the Product or copies of the Product under this clause if the relevant employee or consultant has agreed in writing to be bound to all of the terms and conditions of this Agreement.

3.4 Except to the extent permitted under clause 3.3, not to allow any other person or third party to access or use the Product.

3.5 Not to modify or remove from any copy of the Product any Product identification, copyright or other notices.

3.6 Not to modify, alter or adapt the Product, incorporate it into or combine it with other software, or create a derivative work of any part of the Product or create any functionally equivalent software.

3.7 Not to disclose to any third party any user name or password provided to the Licensee for access to the Product.

3.8 To pay the Annual Licence and Service Fee in advance of the anniversary of the relevant Effective Date for the Service to be provided in the subsequent year of the Agreement

3.9 The Licensee shall not assign, sub-licence, sub-contract, transfer or otherwise dispose of any of its rights or obligations under this Agreement without the prior written consent of K2MS.

3.10 The Licensee shall at all times use the Product in accordance with the instructions of K2MS and all applicable laws, regulations, directives, standards and industry codes of conduct (including any amendment, extension, or replacement thereof) which is in force from time to time.

4. TERMINATION

4.1 Without prejudice to any other rights, K2MS may immediately terminate this Agreement if:

4.1.1 the Licensee fails to comply with any of the terms and conditions of this Agreement; or

4.1.2 the Licensee becomes insolvent or suffers any event which is likely to result in insolvency.

4.2 If this Agreement is terminated, the licence granted to the Licensee under clause 2 shall automatically terminate and the Licensee shall immediately:

a. cease to use the Product;

b. return to K2MS all copies of the Product and all of its component parts;

c. pay to K2MS any unpaid fees; and

d. return to K2MS any confidential information of K2MS in its possession or control.

e. arrange with K2MS an access licence.

4.3 Any accrued rights or remedies of either party shall not be affected by termination of this Agreement.

4.4 The following provisions shall survive termination: clauses 4, 6, 7, 8, 10, 11, 12, and 13. Termination is not an exclusive remedy and all other remedies will be available to K2MS whether or not this Agreement is terminated

5. TERM & RENEWAL

5.1 This Agreement incorporates a Licence to use the Product from the Effective Date for one year and to receive Service for one year. **This Agreement will automatically renew for a further year on each anniversary of the Effective Date. The Licensee may cancel such automatic renewal by giving at least 12 months' notice in writing to K2MS.** Upon the relevant anniversary of the Effective Date, such cancellation notice will terminate this Agreement and cancel the Licensed right to use the Product and the right to receive Service, and clauses 4.2 – 4.4 shall apply. **Such cancellation can only be implemented after FIVE years from the Effective Date or Contract Extension date, whichever is newer**.

5.2 Renewal of the Agreement each year is conditional upon the payment by the Licensee of the Annual Licence and Service Fee in advance of the anniversary of the Effective Date for the Service to be provided in the subsequent year. The Licensee is required to pay the Annual Licence and Service Fee for at least the Initial Term. The Licensee shall pay the Annual Licence and Service Fee for the first year within [30 days] of the date of the invoice issued by K2MS.

5.3 Expiration of Agreement. Upon expiration of the term of this Agreement, the software license and warranties and obligations of the Company hereunder shall cease. Use of Software will not be permitted unless and until a subsequent agreement between the parties is reached through best endeavours.

6. PAYMENT TERMS

6.1 In line with the European Late Payment Directive 2011/7/EU, the following will apply:-

a. The Licensee shall indemnify K2MS and will be responsible for payment of any reasonable recovery costs (included but not limited to legal and other professional costs) incurred by K2MS as a result of late payment. Late payments will incur an interest charge of 8% per annum.

b. The Licensee will be responsible for payment of any reasonable recovery costs incurred by K2 Medical Systems as a result of late payment.

7. LATE PAYMENT AND FEES

7.1 The Annual Licence and Service Fee is exclusive of, and the Licensee shall pay to K2MS in addition, and at the same time as paying the Annual Licence and Service Fee, all applicable value added tax and other taxes of whatever nature, including sales, use, excise, or similar taxes associated with this Agreement or Licensee's use of the Product, except where based upon K2MS's net income or corporate franchise.

7.2 K2MS reserves the right to charge interest on all payments due which are not paid by the Licensee by the relevant due date at a rate in accordance with 'Statutory Interest' currently 8% plus Bank of England base rate. Such interest will accrue from the date on which payment became overdue to the date on which K2MS receives the outstanding amount.

7.3 K2MS reserves the right to suspend the Product and services where payments become overdue. Such suspension will result in a re-commencement fee of £500.

8. GOVERNING LAW

This Agreement, and any non-contractual obligations arising out of or in connection with it, will be governed by and shall be construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to hear and determine or otherwise settle any disputes arising out of or in connection with this Agreement.

9. LIMITED WARRANTY AND DISCLAIMER

9.1 The Product is complex computer software. The Product's performance may vary depending upon hardware platform and software interactions. Licensee therefore accepts the responsibility of satisfying itself that the Product is suitable for use within its own system.

9.2 The function of the Product is limited to the provision of advice that may or may not be accepted by clinicians. It is the Licensee's full and exclusive responsibility to determine whether or not to accept such advice and whether to take any specific action as a result, within the context of the full clinical environment. K2MS does not make any representation and to the maximum extent permitted by law excludes all liability with respect to the accuracy, efficacy or completeness of the Product, or the advice provided by the Product, or

its appropriateness for use in any specific medical
situation, and the Licensee shall not be entitled to
rely on such advice.

Licensee shall have full and sole responsibility for the care and well-being of its patients, and any use by Licensee of the Product shall not diminish that responsibility and the Licensee hereby waives and releases any claim against K2MS to the contrary.

9.3 K2MS warrants that for a period of ninety (90) days following the Effective Date the Product will materially conform to K2MS's then current operational specifications. The foregoing warranty covers only problems reported to K2MS during the warranty period. Except as determined by applicable law, any liability of K2MS with respect to the software or the performance thereof or defects therein under any warranty, negligence, strict liability or other theory will be limited exclusively to Product replacement or, if K2MS determines, in its sole discretion, that replacement is inadequate as a remedy or impractical, to refund of the Annual Licence and Service Fee paid by the Licensee in the previous calendar year [less depreciation based on a 5-year straight-line depreciation schedule], in which case this Agreement shall automatically terminate and clauses 4.2 – 4.4 shall apply.

9.4 K2MS does not warrant that access to the Product will be uninterrupted or error-free. K2MS may need to perform scheduled and unscheduled maintenance of its servers from time to time which may result in interruptions to the Licensee's access to the Product.

9.5 The Licensee is responsible, at its own cost, for ensuring that it has all necessary software, firmware and hardware to use the Product (including without limitation Microsoft SQL Server, Windows Operating System, Internet Browser, Personal Computers), and that such software, firmware and hardware is fully compatible with the Product. The Licensee is also responsible at its own cost for arranging and maintaining access to its computer network and Internet.

9.6 The Licensee accepts all responsibility for ensuring that the Product will meet its requirements, and K2MS makes no representation in this regard.

9.7 The Licensee is required to have in place all necessary firewalls to protect its software, firmware and data against viruses, and K2MS excludes all liability for damage to the Licensee's software, firmware and data as a result of viruses arising from use of the Product.

9.8 To the maximum extent permitted by applicable law, K2MS, its suppliers, distributors and resellers disclaim all other terms and warranties that may otherwise have effect between the parties or be implied or incorporated into this Agreement whether by statute, common law or otherwise, including, but not limited to, implied warranties of satisfactory quality, or fitness for a particular purpose, or use of reasonable care and skill.

10. LIABILITY FOR CONSEQUENTIAL DAMAGES

10.1 Subject to clause 8.2, and except as otherwise determined by applicable law in no event will K2MS its parents or subsidiaries or any of the licensors, directors, officers, employees or affiliates of any of the foregoing be liable for any:

10.1.1 consequential, incidental, indirect, or special damages

10.1.2 loss of revenue, loss of actual or anticipated profits, loss of the use of money or anticipated savings, loss of business, loss of opportunity, loss of goodwill or reputation, loss of, damage to or corruption of data;

10.1.3 death or personal injury.

10.2 nothing in this Agreement shall operate to exclude or limit either party's liability for:

10.2.1 death or personal injury caused by its negligence; or

10.2.2 fraud or fraudulent misrepresentation.

11. DATA PROTECTION

K2 Medical Systems agrees to use the information supplied by the licensee in accordance with the General Data Protection Regulation (EU) 2016/679), Commonwealth of Australia Privacy Act, 1988 and the New Zealand Privacy Act, 1993 and only for the purpose of providing the agreed reports and product support for the Licensee. K2MS will not hold the records for longer than is necessary and will not share them with or distribute them to any other party without prior approval from the Licensee and Data Subjects. K2MS will not process or use the records in any other way and for any other purpose than to create and provide the agreed reports and product support to the Licensee.

Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause is in addition to, and does not relieve, remove or replace, a party's obligations under the data protection legislation.K2MS further agrees not to use for any other purpose, including marketing purposes, any information provided by Licensee including the contact details of Licensee's staff or service providers.

12. CUSTOMER REMEDIES

K2MS entire liability under this Agreement shall not in any event exceed the Annual Licence and Service Fees paid by the Licensee for the Product. This shall be the Licensee's exclusive remedy under this Agreement.

13. CONFIDENTIAL INFORMATION

13.1 **Licensee** acknowledges that the Product is confidential and a proprietary trade secret of K2MS, and that all user names and passwords provided by K2MS to the Licensee for access to the Product are also confidential.

13.2 Licensee shall keep and shall procure that its employees and consultants keep the Product and all related confidential materials (including all user names and passwords for access to the Product) in strictest confidence. Licensee shall not copy the Product or any related confidential materials, and shall ensure that the Product and such materials are kept secure and protected from unauthorised access and use at all times.

13.3   Neither K2MS nor Licensee will have any confidentiality obligation with respect to any portion of the Product or related materials that (i) has become publicly known through no wrongful act of the receiving party; (ii) has been rightfully received from a third party without restriction on disclosure and without breach of this Agreement; (iii) has been independently developed by the receiving party without reference to the Confidential Information; (iv) has been approved for release by written authorisation of the disclosing party; (v) has been furnished by the disclosing party to a third party without a similar restriction on disclosure.

14.   INFRINGEMENT INDEMNIFICATION

Provided K2MS is given prompt written notice of any claim and complete authority and information required for the defence thereof, K2MS shall indemnify and hold Licensee harmless from any suit or proceeding brought against Licensee based on a claim that the Product violates any existing patent, copyright, or trade secret. If a claim described in this clause 12 may be or has been asserted, Licensee will permit K2MS, at K2MS's option and expense, to (i) procure the right to continue using the Product, (ii) replace or modify the Product to eliminate the infringement while providing functionally equivalent performance, or (iii) accept the return of the Product and refund to Licensee the Annual Licence and Service Fee actually paid to K2MS for such Product in the previous calendar year, [less depreciation based on a 5-year straight-line depreciation schedule].

15.   INDEMNITY FROM LICENSEE

Subject to the indemnity in clause 12, the Licensee shall indemnify K2MS for all losses, damages, costs and expenses suffered or incurred by K2MS whether directly or indirectly, in connection with any claim by a third party against K2MS relating to the use of the Product by the Licensee, including without limitation any claim relating to the matters referred to in clause 7.2.

16.   GENERAL PROVISIONS

16.1   Assignment

This Agreement may not be assigned by Licensee or by operation of law without the express written approval of K2MS. K2MS may assign this Agreement and/ or its rights under this Agreement, including its right to receive payments hereunder, to an affiliate or any third party. The Licensee agrees not to assert against such affiliate or third party any claims or defences which the Licensee may have against K2MS whether by operation of law or otherwise.

16.2   Notices

All notices and demands hereunder shall be in writing and shall be served by personal service or by mail at the address of the receiving party set forth above (or at such different address as may be designated by such party by written notice to the other party). All notices or demands by mail shall be by certified or registered mail, with delivery confirmation or signature on receipt, and shall be deemed delivered on the date of signature or delivery confirmation.

16.3   All Amendments in Writing

This Agreement is the entire and exclusive understanding between K2MS and Licensee with respect to the Product, superseding any prior agreements and understandings regarding the Product, and may only be modified by written amendments executed by both parties. Purchase orders or similar documents relating to the Product issued by Licensee shall be for Licensee's internal use only, and shall not be binding on the parties and shall have no effect on this Agreement.

16.4   Third Party Rights

Nothing in this Agreement is intended to confer on any person any right to enforce any term of this Agreement which that person would not have had but for the Contracts (Rights of Third Parties) Act 1999.

16.5   If any provision of this Agreement is declared void or unenforceable in any respect under the law of any jurisdiction this shall not nullify the remaining provisions of this Agreement and the provision of this Agreement so affected will be curtailed and limited only to the extent necessary to bring it within the law of the relevant jurisdiction.

16.6   No delay or omission by either party to this Agreement in exercising any right, power or remedy provided by law or under this Agreement shall operate as a waiver thereof. The single or partial exercise of any right, power or remedy provided by law or under this Agreement shall not preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

16.7   With the exception of any payment obligation hereunder, neither party shall be liable to the other party for any loss or damage due to delays or failure to perform resulting from events beyond the reasonable control of such party. The party invoking such force majeure rights shall:

16.7.1   promptly notify the other party in writing upon the occurrence of the force majeure event, describing the nature of the force majeure and its expected duration, and shall promptly notify the other party of the cessation of the force majeure event; and

16.7.2   use all reasonable efforts to remedy its inability to perform and to mitigate the effects of the force majeure event.

If the delay resulting from a force majeure event exceeds 120 days, then the non –affected party shall have the right to terminate this Agreement upon [fourteen (14)] days written notice to the other party.

17.   IMPORTANT NOTE

If this license is not returned within 14 days [PUT DATE OF EMAIL IN] and the Product continues to be used, it will be deemed that you have accepted the terms and conditions of this Agreement and you are contracted with K2MS on said terms and conditions.

SCHEDULE A

A1.   The Licensee's rights to use the K2MS Product under this Agreement are limited to,

PRODUCT DETAILS	
Guardian	**Version No:, component names **
Number of Bedsides	**Number**
Central Stations	** Number**
SaFERR Board	**Number**
INFANT	** YES / NO **
Athena	** List **
Interfaces	** List **
Additional	** Specify**

*the above Products Details are correct at time of issue and may be subject to change.

Hospitals covered under this Licence are:-

Customer Name:	**********
Hospital Name:	**********

A2.   The Licensee has rights to use any associated media or printed materials provided by K2MS to the Licensee in its discretion. This Licence further permits reproduction of such printed materials provided by K2MS only for the internal use of the Licensee's staff and only to further the effective use of the K2MS Product

A3.   The Licensee's rights to use the Product is limited to use by the employees and consultants, staff or service providers of the Licensee. Such use may be achieved through installation of the Product on individual PC's or within the network of the Licensee.

A4.   Service - the Licensee's right to receive Product Support and Updates is defined in the Service Level Agreement entered into by K2MS and the Licensee.

A5.   If requested by the Licensee, induction and installation services will be provided at K2MS's standard rates from time to time upon prior written agreement with K2MS. Training shall be provided at K2MS's premises, unless otherwise agreed in writing between the parties.

Signed for K2 Medical Systems Ltd
Name:
Date:
Signed for XXXXXXX (NAME OF TRUST)
Name:
Date:

Please sign and return one copy to K2MS and keep one for your records.