



This ARCA Reseller and Sales Agreement (this "Agreement") is between **Zenith Infotech**, an India Corporation, ("**Zenith**"), which maintains an office in the USA at One Williamsburg Place, Suite 100, Mail Stop 5, Warrendale, Pennsylvania, 15086, and the individual, corporate entity or other entity who accepts this Agreement by providing the information requested below and assents to the terms of this Agreement by clicking "I ACCEPT" (or similar syntax), below ("**Reseller/s**").

## Recitals

- A. Zenith is the producer of an onsite, standby server that is known as ARCA which complements existing backup devices and archiving solutions.
- B. Reseller desires to sell and provide support for ARCA to Reseller's customers on a worldwide basis.

NOW THEREFORE, in consideration of the mutual promises and covenants made in this Agreement, Zenith and Reseller agree as follows:

## Terms

### 1) Definitions.

- a) "ARCA" shall mean that certain appliance distributed and sold by Zenith known commercially as Zenith's "Advanced Recovery and Continuity Appliance", or "ARCA", as that appliance may be modified or updated by Zenith from time-to-time. "ARCA" shall also include all software and hardware used by the appliance to operate, as such hardware and/or software may be modified or updated from time-to-time by Zenith.
- b) "Defect" or "Defective" shall mean Items that are not (i) in accordance with the Specifications that apply to ARCA, or (ii) free from material errors or omissions in workmanship or design which materially impair the functionality of ARCA.
- c) "Level One Technical Support" shall mean basic ARCA feature and functionality support. Such support generally includes frequently asked questions (or "FAQs"), "how to" questions, limited troubleshooting advice, and descriptions of ARCA's functions and features. Such support shall not include customer-specific advice, nor shall such support include advanced installation or advanced troubleshooting services.
- d) "Products" shall mean, collectively, the ARCA device(s) purchased from Zenith by Reseller through an Order Form.
- e) "Order Form" shall mean Zenith's online order form through which Reseller requests and purchases one or more ARCA appliances from Zenith.
- f) "Reseller" shall mean the entity defined in the opening paragraph of this Agreement.
- g) "Specifications" shall mean the ARCA specifications and associated functionality descriptions that accompany each ARCA device and/or that may be provided to Reseller by Zenith from time-time.
- h) "Third Party Products" shall have that definition described in Section 9(b), below.

### 2) Term; Termination.

- a) *Term.* This Agreement shall be effective as of the date of Zenith's written acceptance of this document, and will remain in effect and govern all ARCA-related transactions between Zenith and Reseller, until terminated as described below.
- b) *Termination.* Either party may terminate this Agreement at any time, for any reason, by providing written notice of termination to the other party. It is agreed that any Order Forms accepted in writing by Zenith (as evidenced by the provision of an invoice to Reseller by Zenith) as of the date of termination of this Agreement shall be fulfilled, and Reseller shall be responsible for payment of any ARCA devices ordered under same. Similarly, any warranty periods that are in effect as of the date of termination of this Agreement shall continue under such warranty's terms, and shall continue to be governed under the terms of this Agreement.
- c) *Liability.* Zenith shall not be liable to Reseller or any third party for any compensation, reimbursement, losses, expenses, costs or damages arising from or related to, directly or indirectly, the termination of this Agreement for any reason. This waiver of liability shall include, but shall not be limited to, the loss of actual or anticipated profits, anticipated or actual sales, and of expenditures, investments, or commitments in connection with Reseller's or any third party's goodwill or business.

### 3) Order Forms.

- a) *Orders.* All Order Forms shall be subject to the provisions of this Agreement. By completing and submitting an Order Form for one or more of the Products, Reseller confirms and re-affirms its agreement with, and acceptance of, all terms and conditions hereunder. In the event of any discrepancy between the provisions set forth in this Agreement and any Order Form, order confirmation, or other communication between the parties, the provisions of this Agreement shall prevail.
- b) *Additional Terms.* No additional terms contained in any Order Form, order confirmation or other communication between the parties shall be binding unless such additional terms are expressly (i) acknowledged in writing by Zenith and (ii) accepted in

writing by Zenith, as indicated by a notation by Zenith to effect of, "This additional term is acceptable to Zenith," or similar syntax.

- c) *Shipment.* Zenith shall endeavor to manufacture and ship ARCA devices to Reseller in a timely manner. Should shortages occur, Zenith may allocate its production as it deems appropriate, delay or stop shipments, and/or send partial shipments with prior notice. Zenith shall not be liable to Reseller for any delay in shipping of the ARCA devices purchased by Reseller.
- d) *Modifications.* Zenith may, upon providing written notice to Reseller, make changes in or to ARCA (whether in design, materials, the addition of improvements, or otherwise), and/or may discontinue the manufacture or provision of ARCA, all in its sole discretion, without incurring any obligation or liability of any kind as a result thereof.

4) **Delivery.**

- a) *Charges.* Zenith will ship the Products as indicated in a relevant Order Form. Unless otherwise agreed upon by Zenith, all transportation, insurance and handling charges for Products shipped to Reseller shall be borne by Reseller.
- b) *Risk of Loss.* Risk of loss for the Products shall pass to Reseller upon the delivery of the Products to the delivery location specified by Reseller.
- c) *Changes.* Reseller shall be permitted to cancel, reduce, reconfigure or reschedule any order hereunder (collectively, a "Change Request") without the prior consent of Zenith, provided, however, that such Change Request is received by Zenith prior to the order entering Zenith's manufacturing or shipping queue. No Change Request for an order shall be implemented or take effect on or after the order has entered Zenith's manufacturing or shipping queue.

5) **Reseller's Obligations.**

- a) *Technical Support.* Level One Technical Support shall be provided by Zenith directly to Reseller's customers via a support portal and real-time chat, and shall be available at times designated by Zenith. Zenith reserves the right to modify the hours and scope of Level One Technical Support at any time without prior notice. Reseller shall be responsible for the provision of all customer or technical support for the Products beyond Zenith's Level One Technical Support.
- b) *Parameters.* The Products may be subject to certain technological limitations and/or have limited availability or functionalities as described in the Specifications. Reseller shall use its best efforts to stay apprized of the Specifications and refrain from offering Reseller's end user customers ("End Users") features or functionalities relating to the Products that fall outside of the Specifications.
- c) *Labeling.* Reseller agrees that Reseller shall promote and sell the Products as "Zenith ARCA", and shall not remove, obscure or otherwise modify any Zenith-related labeling, splash screens, tags, or related items from the Products.
- d) *Updates.* From time-to-time, Zenith may issue updates or upgrades for ARCA. Generally, such upgrades or updates will be made available to Reseller online, and Reseller shall promptly notify Reseller's End Users of the existence of such upgrades or updates.

6) **Pricing; Payment.**

- a) *Prices.* The prices for the Products are as set forth in the most current version of the Zenith Reseller ARCA Price List ("Price List"). Zenith reserves the right to amend the Price List upon written notice to Reseller. Such revisions shall apply to all orders received by Zenith on or after the effective date of revision.
- b) *Payment.* All purchases must be prepaid either by credit card, check or wire transfer.
- c) *Remedies.* Late or untimely payments shall be subject to interest at the lesser of 1.5% per month or the highest interest rate permitted by law (in each case, calculated as of the date when such payment is due).
- d) *Currency.* All prices of the Products are reported in, and shall be paid in, U.S. dollars.
- e) *Taxes.* Reseller shall be responsible for the payment of all taxes levied on Zenith for the sale of the Products (except for taxes on Zenith's net income), unless Reseller provides Zenith with a tax exemption certificate.

7) **Return Policy.**

- a) *Exchange.* ARCA appliances cannot be exchanged, traded in or upgraded. Once such appliances are purchased and full payment is received by Zenith, Reseller owns them. The only warranties relevant to any purchased ARCA appliance are as stated in Section 8, below.
- b) *No Modification.* Reseller is hereby instructed that the ARCA appliances cannot be physically modified in any manner, and any such modifications may void the warranty for such appliances. Reseller must refrain from adding software applications to the appliances, adding memory or hard drives as such activity may void the warranty for such modified appliances.

8) **Warranties; Limitations.**

- a) *Warranty.* Purchased ARCA appliances are warranted against material Defects for three (3) years from date of delivery of the appliances to Reseller, as evidenced by third party shipping company records. Extended warranties are available as per the Price List. Any onsite repair needed as part of the Warranty service shall be provided by the Reseller.
- b) *Repairs.* Zenith undertakes and warrants that the Products it ships will be of good quality and free from material Defects. If, however, an ARCA appliance requires repair under warranty, Reseller shall contact Zenith to obtain a RMA number for such defective part(s) of the ARCA appliance. Replacement parts will be shipped via next day business air and prepaid by Zenith. Faulty parts must be returned to Zenith in the time allotted by Zenith and communicated to Reseller. Reseller's failure to adhere to such time table may result in Reseller being charged for replacement parts. If, in Zenith's discretion, it is determined

the ARCA appliance has been tampered with or no fault is found, Reseller will bear the freight and shipping costs for the replacement part, as well as the shipping costs for the return of the original part to Zenith.

- c) *Infringement.* Zenith warrants that the Products do not and will not violate the intellectual property rights of any third party.
- d) *Modifications.* Zenith reserves the right to modify or discontinue the warranties described herein at any time, in Zenith's sole discretion, upon advance written notice to Reseller. Such modifications and/or discontinuations shall not apply to Products already purchased by Reseller.
- e) *Sole Remedy.* The warranties described in this Section 8 are the only warranties provided to Reseller under this Agreement, and are in lieu of all other warranties, including but not limited to implied warranties of merchantability and fitness for a particular purpose. Except as stated in this Section 8, all Products are provided on an "as is" basis, and Zenith does not warrant or represent that any particular Product or, specifically, any ARCA appliance, will be suitable for Reseller's needs. The parties acknowledge and agree that Zenith's sole liability for any breach of any warranty described herein is expressly limited to a credit of the fee paid to Zenith for the Product under warranty.

9) **LIMITATION OF LIABILITY.**

- a) In no event shall Zenith have any liability with respect to any claims arising out of or related to this Agreement for consequential, exemplary, special, indirect or punitive damages, even if Zenith has been advised of the possibility of such damages. In all cases, the total liability and financial obligations of Zenith to Reseller shall be limited to the amount actually paid by Reseller to Zenith under this Agreement. This limitation applies to all causes of action and obligations in the aggregate, including without limitation, any claim of breach of contract or negligence.
- b) Any risk associated with the use or acquisition of hardware or software in conjunction with ARCA from sources other than Zenith ("Third Party Products"), even if Zenith aided Reseller in the acquisition of, or suggested, such hardware or software to Reseller, shall be borne by Reseller. Zenith is not responsible for, and specifically disclaims, any liability for the performance or quality of Third Party Products.

10) **Ownership; Intellectual Property.**

- a) *Rights.* At all times, Zenith is and shall remain the sole and exclusive owner and/or authorized licensor of ARCA, and all trademarks, copyrights, patents, works of authorship, property rights and goodwill relating to ARCA (collectively, "Zenith's Intellectual Property Rights"). Reseller shall not take any action, directly or indirectly, that injures or diminishes, or may tend to injure or diminish, any of Zenith's Intellectual Property Rights, nor shall Reseller encourage any third person to do so. Reseller agrees to inform Zenith immediately of any infringement of any of Zenith's intellectual Property Rights of which Reseller may become aware.
- b) *Goodwill.* If Reseller, in the course of reselling the Products or otherwise exercising its rights under this Agreement, acquires any goodwill or reputation in or to any of the Products, all such goodwill or reputation shall automatically be transferred to and shall vest in Zenith when and as, on an on-going basis, such acquisition of goodwill or reputation occurs, as well as at the expiration or termination of this Agreement, without any separate payment or other consideration of any kind to Reseller, and Reseller agrees to take all such actions necessary to effect such vesting.
- c) *License.* Zenith hereby grants to Reseller a transferable, non-exclusive right to use any software that is installed in, or that comprises, ARCA, provided that, at all times (i) such software is used solely with ARCA and not for any other purpose, (ii) such software remains unmodified, (iii) Reseller refrains from uninstalling, re-installing, reverse engineering or copying the software, and (iv) Reseller refrains from engaging in any activity that circumvents any protective devices employed by the software.

11) **Miscellaneous.**

- a) *Force Majeure.* Neither party shall be liable for any delay or failure to perform hereunder due to floods, riots, strikes, freight embargoes, acts of God, acts of war or hostilities of any nature, laws or regulations of any government (whether foreign or domestic, federal, state, county or municipal) or any other similar cause beyond the reasonable control of the party affected. A party relying on such an event to excuse its performance hereunder shall, as soon as reasonably possible, notify the other party in writing of the nature of that event and the prospects for that party's future performance and shall thereafter, while that event continues, respond promptly and fully in writing to all reasonable requests for information from the other party relating to that event and those prospects.
- b) *Waivers; Amendments.* The delay or failure by either party to exercise or enforce any of its rights under this Agreement shall not constitute or be deemed a waiver of that party's right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right. No amendment or waiver of any provision of this Agreement shall be effective unless it is in writing, and it is signed by the party against which it is sought to be enforced.
- c) *Severability.* If any provision of this Agreement is held to be void, the remaining provisions shall remain valid and shall be construed in such a manner as to achieve their original purposes in full compliance with the applicable laws and regulations.
- d) *Merger.* This Agreement is the sole and complete statement of the obligations and rights of the parties as to all matters covered by this Agreement, and supersedes all previous or contemporaneous understandings, agreements, negotiations and proposals relating thereto. The parties agree that no promises or inducements have been offered or made to Reseller (other than those expressly stated in this Agreement) to induce Reseller to enter into this Agreement and to be bound by the terms contained herein.

- e) *Assignment.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors. This Agreement shall not be assigned by Reseller without the prior written consent of Zenith, which Zenith may withhold until and unless Zenith is satisfied (and so notifies Reseller in writing) that (i) Reseller's assignee is qualified, from a financial and technological perspective, to be bound by the terms of this Agreement, and that (ii) such assignment does not cause any Zenith to incur any conflict of interest.
- f) *Captions.* Captions contained in this Agreement are inserted only as a matter of convenience or for reference and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provision of this Agreement.
- g) *Attorneys' Fees.* If Zenith commences any action or proceeding against Reseller to enforce the terms of this Agreement, Zenith shall be entitled to an award against Reseller for all reasonable attorneys' fees, costs and expenses incurred by Zenith in connection with such action or proceeding (including any mediation or arbitration, and at all levels of trial and appeal), and in connection with the enforcement of any judgment or order thereby obtained.
- h) *Governing Law.* This Agreement shall be governed by, and construed in accordance with, the laws of the State of Pennsylvania. The parties agree that the sole and exclusive venue for any and all issues, claims, causes of action or matters arising from or related to this Agreement shall be in the state courts of Allegheny County, Pennsylvania or, for federal claims and pendant state claims, the Federal Court in and for the Western District of Pennsylvania
- i) *Notices.* Whenever under the provisions of this Agreement, notice is required or permitted to be given to Reseller, Zenith may deliver such notice(s) to Reseller by electronic mail ("email"). Email notice shall be deemed given to Reseller when such notice is sent to the last known email address provided to Zenith by Reseller, regardless of whether such email address is functional or not. Notwithstanding any provision to the contrary, however, email notice to Zenith shall be effective only if Zenith subsequently acknowledges receipt of Reseller's email via a return email to Reseller in which Reseller's original email is either referenced or reproduced. Notice provided in any method other than by email shall be deemed given either when delivered personally, or by courier, or by facsimile machine with printed transmittal confirmation sheet; or, three (3) days after mailing, postage prepaid by registered or certified mail, return receipt requested, addressed to the party for whom it is intended with copies provided to the address set forth above or to such other addresses as a party shall hereafter designate in writing to another party. Subject to the terms described herein, the parties acknowledge and agree that electronic mail ("email") and/or digital copies or electronic transmissions satisfy all "writing" requirements under this Agreement.
- j) *Usage in Trade.* It is understood and agreed that no usage of trade or other regular practice or method of dealing between the parties to this Agreement shall be used to modify, interpret, supplement, or alter in any manner the terms of this Agreement.
- k) *Amendment.* No amendment, waiver, or modification (collectively, an "Amendment") of this Agreement or any provision of this Agreement shall be valid unless in writing, stating with specificity the particular amendment or modification to be made, and duly executed by the parties. Upon mutual acceptance and execution of an Amendment, the terms of such Amendment shall be deemed incorporated into this Agreement. To the extent that an Amendment conflicts with the terms of this Agreement, the Amendment shall control.
- l) *Independent Contractor Relationship.* The parties are independent contractors to one another, and neither party is an employee, servant, agent, partner or joint venturer of the other party.
- m) *No Third Party Beneficiaries.* The parties are entering into this Agreement solely for themselves and no other party, and nothing contained in this Agreement, whether expressed or implied shall be deemed to confer any rights or remedies (including, without limitation, third party beneficiary rights) upon, or obligate either Zenith or Reseller to, any third person or entity.