



# 2009 CMS Software Support Agreement

This Software Support Agreement (the "Agreement") is made as of January 1, 2009 (the "Effective Date"), by and between BrodieWare Limited, d/b/a NewHaven Software, a Washington corporation with its principal office located at P.O. Box 3456, Redmond, WA 98073-3456, Telephone: 425-861-7120, Facsimile: 425-861-7460, Email: support@newhavensoftware.com ("NHS") and the Licensed CMS Customer whose name appears below ("Customer").

Customer and NHS hereby agree as follows:

## 1. NHS SOFTWARE PRODUCTS

Pursuant to the Commerce Management System License Agreement included with the CMS Software and/or the Software License Purchase Agreement (the "License Agreement"), Customer has licensed from NHS the right to use the Licensed Software as defined in the License Agreement.

## 2. DEFINITIONS

2.1 **Error** means a reproducible failure of the Licensed Software to perform in substantial conformity with the Licensed Software specifications set forth in the corresponding User's Guide(s), help files or other printed documentation.

2.2 **Initial Support Term** means the period beginning on the Effective Date of this Agreement and ending December 31, 2009.

2.3 **Major Enhancement** means any major functional revision to the Licensed Software (designated by a renumbered release number such as 5.1 to 6.0) released by NHS during the Initial Support Term or any Renewal Support Term.

2.4 **Minor Enhancement** means any minor release, update, modification or "bug fix" (designated by a renumbered release number such as 6.0 to 6.1) which does not necessarily provide materially new functionality, as determined by NHS in its sole discretion, and made generally available to NHS's supported customers.

2.5 **Renewal Support Term** means a successive one-year renewal term following the Initial Support Term agreed upon by the parties pursuant to Section 7.1. Unless otherwise specified, all Renewal Support Terms are based on a calendar year beginning on January 1<sup>st</sup> and ending on December 31<sup>st</sup> of each year. Renewal Support Terms will automatically renew 60 days prior to the expiration of the current Initial or Renewal Support Term, at the same Support Plan level currently in effect at the time of renewal.

2.6 **Support Times** means the hours of each day and the days of each week set forth in Schedule 1 hereto.

2.7 **Support Incident** is defined as one specific Error or other technical issue that begins when a customer contacts NHS Technical Support (via telephone, email, internet or fax) and ends when either the single specific Error or other technical issue is resolved or NHS Technical Support deems it non-resolvable. Each specific support incident will generate a "ticket", which will be opened, tracked and closed separately from any other specific support incidents.

2.8 **Support Plan** means the specific software support and maintenance plan offered by NHS and selected by Customer (i.e. "Silver", "Gold", etc.). NHS may offer different plans with specific support levels, number of covered incidents and extent of software maintenance provided.

### 3. SOFTWARE SUPPORT

#### 3.1 Software Support Services

During the Initial Support Term and any Renewal Support Term, NHS shall render the software support services set forth in this section to Customer subject to: (i) Customer's payment of the support fees described in Section 5, and (ii) Customer's compliance with its obligations set forth in Section 4 and elsewhere in this Agreement.

#### 3.2 Services

The software support services to be provided by NHS pursuant to this Agreement are as follows:

(a) **Help Desk**

NHS will provide Customer with reasonable help desk assistance during the Support Times regarding the installation and implementation of the Licensed Software, and the identification, diagnosis and correction of Errors. NHS will attempt to resolve any support questions posed by Customer. If NHS determines that it would be appropriate to do so, NHS may defer resolution of a support question until a later time. At its discretion, NHS may provide Customer with help desk support during times other than the Support Time and/or beyond the maximum number of monthly and/or annual Support Incident limits (if applicable) at NHS's then standard rates. Customer shall be responsible for paying charges for such additional help desk support.

(b) **Web Site**

NHS will provide Customer with access to technical information via its web site(s) on the Internet.

(c) **Minor Enhancements**

NHS will provide Customer with copies of all Minor Enhancements at no additional cost to Customer.

(d) **Major Enhancements**

Major Enhancements for the Licensed Software are not included under this Agreement unless otherwise specified in Schedule 2. NHS may, but is not obligated to, offer Major Enhancements to Customer at a reduced fee.

#### 3.3 Procedures for Error Correction Services

(a) **Notification**

To obtain Error correction services, Customer must notify NHS immediately of any suspected Error and must provide NHS with reasonable detail of the nature of and

circumstances surrounding the Error. "Reasonable detail" includes complete software, hardware, and network configuration information as requested by NHS.

**(b) Remote Diagnostics**

NHS may perform remote diagnostics to determine the existence and nature of an Error.

**(c) Error Correction**

NHS will make reasonable commercial efforts to correct and resolve Errors that Customer reports to NHS and which NHS is able to reproduce. Customer will promptly provide NHS with all information requested by NHS to reproduce such Errors. For each such Error, NHS will use reasonable commercial efforts to provide Customer with a work-around, a software patch or, if NHS is unable to provide Customer with either of the foregoing, a specific action plan for addressing the Error, including a good faith estimate of the time required to correct and resolve such Error.

**(d) Remote Correction**

NHS may perform any Error correction work via remote telecommunications. If such remote support is unavailable, in NHS' opinion, to satisfactorily resolve the Confirmed Error, NHS may require Customer to provide data files on removable media via overnight courier (or other shipping method that provides end-to-end tracking) or other mutually agreed upon electronic medium at Customer's expense.

**3.4 Response Times**

NHS will use reasonable commercial efforts to communicate with Customer, by telephone, e-mail, fax, or NHS' website within the following targeted response times, regarding Errors that Customer reports to NHS during the Support Times. **For purposes of this Agreement, a "response" means NHS' acknowledgment of a reported Error, and does not necessarily mean that a resolution will be achieved.**

**ERROR PRIORITIES AND RESPONSE TIMES:**

Priority	Failure Description	Response Time in Working Days		
		Silver/V4	Gold	Platinum
1	<b>Fatal:</b> Licensed Software not operational.	2	1	1
2	<b>Severe Impact</b> (functionality disabled): Errors that result in a lack of Licensed Software functionality or that cause intermittent system failure.	4	3	2
3	<b>Degraded Operations:</b> Errors that cause non-critical Licensed Software features consistently to malfunction.	5	4	3
4	<b>Minimal Impact:</b> Errors that cause attributes and/or optional modules of Licensed Software not to operate in accordance with specifications.	Next scheduled maintenance release		

### 3.5 Limitations on NHS's Support Obligations

Notwithstanding anything to the contrary elsewhere in this Agreement, NHS will have no obligation to provide any support services to Customer if:

- (a) Such support relates to or involves any products, data, features, devices, or equipment not provided by NHS;
- (b) Customer or a third party has altered or modified any portion of the Licensed Software in any manner without the prior written consent of NHS;
- (c) Customer has not installed or used the Licensed Software in accordance with instructions provided by NHS, including failure to follow implementation procedures;
- (d) Customer has failed to replace earlier versions of the Licensed Software with Enhancements provided to Customer;
- (e) A party other than NHS (or a party authorized by NHS) has serviced the Licensed Software and the Licensed Software no longer conforms to its specifications; or
- (f) Customer is not in full compliance with the other terms of this Agreement, the terms of the License Agreement, or any other agreement between NHS and Customer.

### 3.6 Hardware

NHS's support obligations under this Agreement shall not include computer hardware, computer network, electrical, telephone, interconnection, or the installation or repair of accessories, alterations, parts or devices not furnished by NHS.

### 3.7 Additional Services

In its discretion, NHS may provide Customer with additional support services for the Licensed Software not otherwise covered under this section or specifically excluded pursuant to Section 3.4 above, provided that Customer pays NHS for such service at NHS's then standard hourly and expense reimbursement rates. Except to the extent specifically otherwise provided in this Agreement, such support service is not included within the terms of this Agreement.

## 4. CUSTOMER'S OBLIGATIONS

### 4.1 Access

During the Initial Support Term or any Renewal Support Term, Customer will provide NHS with reasonable access (via remote telecommunications or on-site access at Customer's premises) to Customer's copies of the Licensed Software to the extent necessary, in NHS's discretion, to enable NHS to meet its support obligations as set forth in this Agreement.

### 4.2 Communications Link

During the Agreement, Customer, at its sole expense, will provide access via the Internet. NHS shall be entitled to use this Internet connection in discharging its responsibilities under this Agreement. NHS shall have no liability to Customer if NHS's ability to render support is impaired by Customer's inability to provide telecommunications functionality required for remote support.

### 4.3 Support Contact

Customer shall designate one employee and one alternate as its "**Support Contacts**" to be generally available during the Support Times to confer with NHS regarding Errors and other support-related issues. Customer's Support Contacts are identified in Schedule 1. Customer shall notify NHS immediately of any changes in the persons designated as Support Contacts. NHS will

provide technical support only to Customer's Support Contacts. If Customer requires NHS to provide technical support to Customer's employees, representatives, or consultants other than Customer's Support Contacts, NHS may charge additional fees for such support at its sole discretion.

#### **4.3 Language**

Customer shall communicate with NHS in English only.

### **5. FEES AND CHARGES**

#### **5.1 General Fees and Charges**

Customer shall pay NHS the fees and charges for the Support Plan selected as set forth in Schedule 2 and as invoiced by NHS. NHS may make reasonable adjustments to fees and charges at the beginning of any Renewal Support Term. NHS reserves the right to charge additional amounts to any Customer who requires additional or excessive support at its sole discretion.

#### **5.2 Miscellaneous Items**

Customer shall bear all costs associated with procuring, installing, and maintaining all equipment, telephone lines, and communications interfaces necessary for Customer to obtain NHS support services.

#### **5.3 Payment Procedures**

At the start of the Initial Support Term and on an annual basis 60 days prior to any Renewal Support Term, NHS will invoice Customer for all fees and charges incurred by Customer pursuant to this Agreement. Renewal Support Terms will be invoiced at the then-current rates for the Support Plan currently in effect as of the renewal date. Customer shall pay all invoiced amounts in U.S. dollars within fifteen (15) days of the date of invoice. Any payments for Renewal Support Term fees made after December 31<sup>st</sup> will be subject to a 10% late fee and incur interest at 1.5% per month until the fees are paid in full.

### **6. DISCLAIMER OF WARRANTY AND LIMITATION OF LIABILITY**

#### **6.1 Warranty**

The support services under this Agreement will be provided in a workman-like manner by individuals who are knowledgeable in the operation of the Licensed Software. All software bug fixes, work-arounds, Error corrections and Enhancements are provided on an "AS IS" basis. This software support agreement does not augment or alter the warranties provided under the Licensed Software's license or purchase agreements, or any other agreements between Customer and NHS.

#### **6.2 Disclaimer**

Except as provided in Section 6.1, NHS expressly disclaims all other warranties related to the Licensed Software or services provided under this Agreement, whether express or implied, including (without limitation) any warranty of merchantability or fitness for a particular purpose, or noninfringement. NHS does not warrant that all Errors will be corrected. NHS shall have no liability to Customer for any liability or damage sustained by Customer as a result of any claim or action brought or asserted against Customer by any third party.

#### **6.3 Maximum Liability**

In no event shall NHS' cumulative liability for any claim arising in connection with this Agreement exceed the amount of the total fees and charges paid to NHS for Support Services by Customer during the six (6) months preceding any such claim.

#### **6.4 Consequential Damages**

REGARDLESS OF WHETHER ANY REMEDY SET FORTH IN THIS AGREEMENT FAILS OF ITS ESSENTIAL PURPOSE, IN NO EVENT SHALL NHS BE LIABLE TO CUSTOMER FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, EXEMPLARY, OR INCIDENTAL DAMAGES OF ANY KIND AND HOWEVER CAUSED, EVEN IF NHS KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES AND WHETHER OR NOT SUCH DAMAGES ARE FORESEEABLE.

#### **6.5 Indemnification**

Customer shall indemnify and hold harmless NHS, its respective employees, officers, directors, shareholders and agents (collectively, the "**Indemnitee**") against any and all losses, costs (including court costs and reasonable attorneys' fees), damages, settlements, suits, actions, expenses, liabilities, and claims sustained by the Indemnitee arising out of or resulting from any material breach by Customer of the terms and conditions of this Agreement.

### **7. TERM AND TERMINATION**

#### **7.1 Term**

This Agreement will commence on the Effective Date and continue in effect during the Initial Support Term. This Agreement will automatically renew for successive, one (1) year Renewal Support Terms unless terminated by either NHS or Customer in accordance with this section, subject to Customer's payment of the applicable fee pursuant to Section 5 above.

#### **7.2 Termination for Convenience**

If at any point, either party decides not to renew this Agreement or change to another currently offered Support Plan, it shall provide the other party written notice of its intention not to renew at least sixty (60) days prior to the end of the Initial Support Term or the then-current Renewal Support Term, as the case may be.

#### **7.3 Additional Termination Rights**

This Agreement may be terminated as follows:

**(a) License Agreement**

This Agreement shall immediately and automatically terminate upon the termination of the License Agreement.

**(b) For Breach**

Either NHS or Customer may terminate this Agreement immediately upon the occurrence of an uncured breach by the other party of a material provision of this Agreement, or any other agreement that exists between NHS and Customer. This includes but is not limited to the License Agreement, ASP/Hosting Agreement (for eCMS), Professional Services Agreement(s) and corresponding Work Orders or any other agreement that may exist between NHS and Customer. An uncured breach is defined as a breach or violation of any Agreement that the breaching party has not corrected to the non-breaching party's reasonable satisfaction within thirty (30) days after the non-breaching party has provided the breaching party with written notice specifying details of the breach.

**(c) Financial Condition**

Either party may terminate this Agreement on the occurrence of the filing of a petition or seeking of relief under applicable bankruptcy or insolvency laws by or against the other party.

#### **7.4 Post-Termination Responsibilities**

Following termination of this Agreement, NHS shall immediately invoice Customer for all accrued

fees and charges and all reimbursable expenses, and Customer shall pay the invoiced amount immediately upon receipt of such invoice.

## 8. NOTICES

### 8.1 Notice

Unless otherwise specified in this Agreement, all notices shall be in writing and shall be mailed (via registered or certified mail, return receipt requested), telecopied, telegraphed, delivered by a nationally recognized express courier service, or personally delivered to the other party at the address set forth below (or at such other address as either party may designate in writing to the other party). All notices will be effective upon receipt.

For NHS:

For Customer:

Support Department

\_\_\_\_\_

Post Office Box 3456

\_\_\_\_\_

Redmond, WA 98073-3456

\_\_\_\_\_

Tel: 425.861.7120

Tel: \_\_\_\_\_

Fax: 425.861.7460

Fax: \_\_\_\_\_

## 9. GENERAL

### 9.1 Amendment

No amendment of this Agreement shall be effective unless in a writing specifically referencing this Agreement and signed by the duly authorized representative of both parties.

### 9.2 Assignment

Except as set forth herein, this Agreement may not be assigned or transferred by Customer without the prior written consent of NHS. In the event of assignment or transfer, fees may apply. NHS shall be allowed to assign this Agreement to any third party; or to a successor entity by way of merger, acquisition, purchase of all or substantially all of its assets, or operation of law, provided that such successor agrees in writing to be bound by the terms of this Agreement.

### 9.3 Choice of Law

The validity, construction, and enforcement of this Agreement, and the determination of the rights and duties of the parties, shall be governed by the laws of the State of Washington exclusive of any choice of law provisions.

### 9.4 Headings

The headings in this Agreement are for convenience of reference only and shall not be used for the construction or interpretation of this Agreement.

### 9.5 Entire Agreement

This Agreement, together with the attached Schedules, constitutes the entire agreement between the parties with respect to the subject matter hereof. All prior or contemporaneous statements or agreements with respect to such subject matter are superseded by this Agreement.

#### **9.6 Force Majeure**

Except for making payments, should either party fail to perform or should its performance under this Agreement be delayed by any factor beyond the reasonable control of the delayed party, then the time for performance of the delayed party shall be extended by a period of time equal to the duration of such delay provided that the parties work diligently to minimize any such delay.

#### **9.7 Severability**

A holding by a court of competent jurisdiction that one or more of the provisions contained in this Agreement is unenforceable in any respect shall have no effect on the validity of any of the remaining provisions of this Agreement.

#### **9.8 Time Limitation**

No action arising out of the performance of services by NHS under this Agreement may be brought by Customer more than one (1) year after such cause of action arose.

#### **9.9 Waiver**

Waiver by any party of the breach of any provisions of this Agreement by the other party shall not be construed as a continuing waiver of such provision or a waiver of any other breach of any other provision of this Agreement. To be enforceable, a waiver must be in writing and signed by the waiving party.

### **10. ACCEPTANCE**

Receipt of payment and/or Support Order Form by NHS via e-mail, fax, postal mail, electronic form submission from website or any other means; or use of support services or acceptance by Customer of updated software from NHS shall constitute Customer's complete and unconditional acceptance of the foregoing.

## SCHEDULE 1

### Support Times and Support Contact

#### A. Support Times

The Support Times as provided in Section 2.6 are as follows:

Silver Support Plan: 9:00 a.m. through 5:00 p.m.; Gold Support Plan: 8:00 a.m. through 6:00 p.m.; Platinum Plus Support Plan: 7:00 a.m. through 6:00 p.m. (all times are Pacific Time). In addition, Platinum Plus Support Plan customers have access to support 24x7 by calling the Platinum Plus Support after-hours line. The following holidays are excluded: New Year's Day; Memorial Day; Independence Day; Labor Day; Thanksgiving Day; and Christmas Day. Additionally, hours may be limited on other national holidays and/or days preceding or following certain holidays.

#### B. Support Contact

The Customer's Support Contact (as required by Section 4.3), and his/her address, phone number, fax number, and e-mail address at Customer's location are as follows:

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ St. \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

#### Alternate Support Contact:

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ St. \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

## SCHEDULE 2A

### Fees and Charges for 2009 Silver Support and Software Maintenance Plan

Annual Software Support Fee: Commerce Management System Server (CMS Solo = \$599; CMS Standard = \$999; CMS Professional = \$1,999)	\$____/ year
Annual Software Support Fee: X Seat licenses (\$259.00 each)	\$____/ year
Standard Hourly NHS Support Fees (for services in addition to those provided as part of the above support fees)	\$150 / hour
Additional Support Incidents (beyond annual allotment of 4 phone/12 email)	\$150
Standard Hourly NHS Professional Services Fees (for custom report writing, training, consulting, onsite services, etc.)	\$200 / hour
Standard Hourly NHS Programming Fees (for any programming required by Customer beyond the scope of normal product support)	\$250 / hour
Credit Card Gateways other than PCCharge Payment Server	\$119 / year
Multi-company/Multi-database Module	\$299 / company
eCMS eCommerce Module	\$399 / year
3 <sup>rd</sup> Party eCommerce Modules (Yahoo, Americart, Miva, etc.)	\$199 / year
CMS POS Module	\$599 / year
CMS Purchasing Module	\$399 / year
Support & Maintenance of custom reports, programming or other non-standard functionality provided by NHS	\$100 / year min. or 20% of billed cost

The annual support fees are payable in full by Customer upon execution of this Agreement. Any additional fees and charges will be billed by NHS to Customer by invoice. Customer shall pay all such fees and charges within thirty (30) days of invoice.

## SCHEDULE 2B

### Fees and Charges for 2009 Gold Support and Software Maintenance Plan

Annual Software Support Fee: Commerce Management System Server (CMS Solo = \$899; CMS Standard = \$1,249; CMS Professional = \$2,499)	\$____/ year
Annual Software Support Fee: X Seat licenses (\$319.00 each)	\$____/ year
Standard Hourly NHS Support Fees (for services in addition to those provided as part of the above support fees)	\$150 / hour
Additional Support Incidents (beyond annual allotment of 12 phone/24 email)	\$150
Standard Hourly NHS Professional Services Fees (for custom report writing, training, consulting, onsite services, etc.)	\$200 / hour
Standard Hourly NHS Programming Fees (for any programming required by Customer beyond the scope of normal product support)	\$250 / hour
Credit Card Gateways other than PCCharge Payment Server	\$149 / year
Multi-company/Multi-database Module	\$369 / company
eCMS eCommerce Module	\$499 / year
3 <sup>rd</sup> Party eCommerce Modules (Yahoo, Americart, Miva, etc.)	\$149 / year
CMS POS Module	\$749 / year
CMS Purchasing Module	\$499 / year
Support & Maintenance of custom reports, programming or other non-standard functionality provided by NHS	\$150 / year min. or 25% of billed cost

The annual support fees are payable in full by Customer upon execution of this Agreement. Any additional fees and charges will be billed by NHS to Customer by invoice. Customer shall pay all such fees and charges within thirty (30) days of invoice.

## SCHEDULE 2C

### Fees and Charges for 2009 Platinum *PLUS* Support and Software Maintenance Plan

Annual Software Support Fee: Commerce Management System Server (CMS Solo = \$999; CMS Standard = \$1,749; CMS Professional = \$3,499)	\$____/ year
Annual Software Support Fee: X Seat licenses (\$449.00 each)	\$____/ year
Standard Hourly NHS Support Fees (for services in addition to those provided as part of the above support fees)	\$150 / hour
Additional Support Incidents	Unlimited
Standard Hourly NHS Professional Services Fees (for custom report writing, training, consulting, onsite services, etc.)	\$200 / hour
Standard Hourly NHS Programming Fees (for any programming required by Customer beyond the scope of normal product support)	\$250 / hour
Credit Card Gateways other than PCCharge Payment Server	\$199 / year
Multi-company/Multi-database Module	\$499 / company
CMS POS Module	\$999 / year
eCMS eCommerce Module	\$699 / year
3 <sup>rd</sup> Party eCommerce Modules (Yahoo, Americart, Miva, etc.)	\$199 / year
CMS Purchasing Module	\$699 / year
Support & Maintenance of custom reports, programming or other non-standard functionality provided by NHS	\$200 / year min. or 25% of billed cost

The annual support fees are payable in full by Customer upon execution of this Agreement. Any additional fees and charges will be billed by NHS to Customer by invoice. Customer shall pay all such fees and charges within thirty (30) days of invoice.

## SCHEDULE 2D

### Fees and Charges for 2009 V4 Support and Software Maintenance Plan

Annual Software Support Fee: Commerce Management System Server (CMS Solo = \$799; CMS Standard = \$1,099; CMS Professional = \$2,199)	\$____/ year
Annual Software Support Fee: X Seat licenses (\$279.00 each)	\$____/ year
Standard Hourly NHS Support Fees (for services in addition to those provided as part of the above support fees)	\$150 / hour
Additional Support Incidents	\$200
Standard Hourly NHS Professional Services Fees (for custom report writing, training, consulting, onsite services, etc.)	\$200 / hour
Standard Hourly NHS Programming Fees (for any programming required by Customer beyond the scope of normal product support)	\$250 / hour
Credit Card Gateways other than PCCharge Payment Server	\$129 / year
Multi-company/Multi-database Module	\$329 / company
CMS POS Module	\$649 / year
eCMS eCommerce Module	\$449 / year
3 <sup>rd</sup> Party eCommerce Modules (Yahoo, Americart, Miva, etc.)	\$129 / year
CMS Purchasing Module	\$449 / year
Support & Maintenance of custom reports, programming or other non-standard functionality provided by NHS	\$200 / year min. or 25% of billed cost

The annual support fees are payable in full by Customer upon execution of this Agreement. Any additional fees and charges will be billed by NHS to Customer by invoice. Customer shall pay all such fees and charges within thirty (30) days of invoice.