

# HP Network Automation

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This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior and contemplated agreements or representations, written or oral, of the parties pertaining to the subject matter. This Agreement may not be modified except in a written amendment signed by authorized representatives of both parties.

#### 12. SEVERABILITY.

If any provision of this Agreement is declared to be illegal, unenforceable or void, the remainder of this Agreement shall be enforced to the extent permitted by law, and the illegal, unenforceable or void provision shall be replaced with a mutually acceptable provision which comes closest to the intention of the parties underlying the original provision.

#### 13. APPLICABLE LAW.

This Agreement shall be interpreted, construed and governed by the laws of the State of California without regard to its conflict of law rules. The parties hereby irrevocably submit to the exclusive jurisdiction and venue of the state and federal courts sitting in Orange County, California for the purpose of all legal

proceedings arising out of or relating to this Agreement.

#### 14. WAIVER.

No delay or omission by either party to exercise any right or remedy hereunder shall be construed as a waiver of such right or remedy. Further, the waiver by either party of a particular breach of this Agreement by the other party shall not be construed as, or constitute, a continuing waiver of such breach, or of other breaches of the same or other provisions of the Agreement.

#### 15. PREVAILING PARTY.

In the event a dispute arising under this Agreement results in litigation, the non-prevailing party shall pay the prevailing party's reasonable litigation costs, including, without limitation, reasonable attorneys' fees.

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The Security Division of EMC

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**C. Entire Agreement.** This Agreement (i) is the complete statement of the agreement of the parties with regard to the subject matter hereof; and (ii) may be modified only by a writing signed by both parties. All terms of any purchase order or similar document provided by Customer, including but not limited to any pre-printed terms thereon and any terms that are inconsistent or conflict with this Agreement, shall be null and void and of no legal force or effect.

**D. Force Majeure.** Except for the payment of fees, if any, due RSA from Customer, neither party shall be liable under this Agreement because of a failure or delay in performing its obligations hereunder on account of any force majeure event, such as strikes, riots, insurrection, terrorism, fires, natural disasters, acts of God, war, governmental action, or any other cause which is beyond the reasonable control of such party.

**E. Assignment.** Customer shall not assign this Agreement or any right or delegate any performance without RSA's prior written consent, which consent shall not be unreasonably withheld. Customer shall promptly notify RSA, and RSA may terminate this Agreement on thirty days' notice, if Customer merges with or is acquired by a third party or otherwise undergoes a change of control.

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**H. Partial Invalidity.** If any part of this Agreement, a purchase order or an RSA quote is held unenforceable, the validity of the remaining provisions shall not be affected.

**I. Select or Brokerage Products.** Periodically, RSA may offer to supply or license certain products that are made by a third party manufacturer/supplier and not RSA. Some of such products are specifically identified as "**EMC Select Products for RSA**". Other such third party manufacturer/supplier products may be provided by RSA on a case-by-case basis in response to a Customer request ("**Brokerage Products**"), and will be identified on the Quote using "Brokerage" or a similar descriptor. Notwithstanding any other provisions herein, EMC Select Products for RSA and Brokerage Products are subject to the standard license, warranty, indemnity and support terms of the third party manufacturer/supplier (or an applicable agreement between Customer and such manufacturer/supplier), to which Customer shall adhere. Even if support fees are invoiced through RSA, EMC Select Products for RSA and Brokerage

Products are not supported by RSA and Customer must contact such third party directly for support services. Any warranty or indemnity claims against RSA in relation to EMC Select Products for RSA or Brokerage Products are expressly excluded. In no event shall RSA be liable to Customer for any damages that in any way arise out of or relate to any EMC Select Products for RSA or Brokerage Products. EMC Select Products for RSA and Brokerage Products are provided by RSA "AS IS."

### 13. COUNTRY SPECIFIC TERMS.

**A. United Kingdom.** The terms in this subsection A apply only when RSA means the EMC sales subsidiary located in the United Kingdom (currently EMC Computer Systems (UK) Limited):

1. Section 5B (Limitations of Warranty). The entire section is deleted and replaced with:

**D. Warranty Exclusions.** Except as expressly stated in the applicable warranty set forth in this Agreement, RSA (including its suppliers) provides Software "AS IS" and makes no other express or implied warranties, written or oral, and ALL OTHER WARRANTIES AND CONDITIONS (SAVE FOR THE WARRANTIES AND CONDITIONS IMPLIED BY SECTION 12 OF THE SALE OF GOODS ACT 1979) ARE SPECIFICALLY EXCLUDED TO THE FULLEST EXTENT PERMITTED BY LAW, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE.

2. Section 7 (LIMITATION OF LIABILITY). This Section is deleted in its entirety and replaced with:

#### 7. LIMITATION OF LIABILITY AND PRESERVATION OF DATA.

**A.** The entire aggregate liability of RSA (including its suppliers) under or in connection with the supply of the Software, whether in tort (including negligence), for breach of contract, misrepresentation or otherwise, is limited in respect of each event or a series of events: (i) to the amounts actually paid by Customer for the Software which give rise to such liability during the twelve (12) month period immediately preceding the date of the cause of action giving rise to such claim; or (ii) Great British Pounds Sterling one million (£1,000,000), whichever is the greater amount. In no event shall RSA (including its suppliers) or Customer be liable to the other or any other person or entity for loss of profits, loss of revenue, loss of use or any indirect, special, incidental, consequential or exemplary damages arising out of or in connection with this Agreement, the license of the Software, and the use, performance, receipt or disposition of such Software, even if such party has been advised of the possibility of such damages or losses. Nothing in this Agreement shall operate to exclude or restrict RSA's liability for: (a) death or personal injury resulting from negligence; (b) breach of obligations arising from section 12 of the Sale of Goods Act 1979; or (c) fraud.

**B. CUSTOMER OBLIGATIONS IN RESPECT OF PRESERVATION OF DATA.** During the Term of the Agreement, the Customer shall:

1) from a point in time prior to the point of failure, (i) make full and/or incremental backups of data which allow recovery in an application consistent form, and (ii) store such back-ups at an off-site location sufficiently distant to avoid being impacted by the event(s) (e.g. including but not limited to flood, fire, power loss, denial of access or air crash) and affect the availability of data at the impacted site;

2) have adequate processes and procedures in place to restore data back to a point in time and prior to point of failure, and in the event of real or perceived data loss, provide the skills/backup and outage windows to restore the data in question;

3) use anti-virus software, regularly install updates across all data which is accessible across the network, and protect all storage arrays against power surges and unplanned power outages with Uninterruptible Power Supplies; and

4) ensure that all operating system, firmware, system utility (e.g. but not limited to, volume management, cluster management and backup) and patch levels are kept to RSA recommended versions and that any proposed changes thereto shall be communicated to RSA in a timely fashion.

3. Section 12 (MISCELLANEOUS). Add the following as new subsection J:

J. Each of the parties acknowledges and agrees that in entering into this Agreement, it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly set out in this Agreement as a warranty. The only remedy available to Customer for a breach of the warranties shall be for breach of contract under the terms of this Agreement. Nothing in Section 7 shall however operate to limit or exclude any liability for fraud. No term of this Agreement shall be enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person that is not a party to this Agreement. If any part of this Agreement is held unenforceable, the validity of the remaining provisions shall not be affected.

**B. Ireland.** The terms in this subsection B apply only when RSA means the EMC sales subsidiary located in Ireland (currently EMC Information Systems International):

1. Section 5B (Limitations of Warranty). The entire section is deleted and replaced with:

**D. Warranty Exclusions.** Except as expressly stated in the applicable warranty set forth in this Agreement and the applicable exhibits, RSA (including its suppliers) and makes no warranties, and ALL WARRANTIES, TERMS AND CONDITIONS, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED BY LAW, CUSTOMER OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES, TERMS AND CONDITIONS, OF FITNESS FOR PURPOSE, DESCRIPTION, AND QUALITY ARE HEREBY EXCLUDED TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAW.

2. Section 7 (LIMITATION OF LIABILITY). This section is deleted in its entirety and replaced with the following:

**7. LIMITATION OF LIABILITY.**

**A.** RSA does not exclude or limit its liability to the Customer for death or personal injury, or, breach of obligations implied by Section 12 of the Sale of Goods Act, 1893, as amended by the Sale of Goods and Supply of Services Act, 1980, or, due to the fraud or fraudulent misrepresentation of RSA, its employees or agents.

**B.** Subject always to subsection 7.A, the liability of RSA (including its suppliers) to the Customer under or in connection with an order, whether arising from negligent error or omission, breach of contract, or otherwise (“Defaults”) shall be: (i) the aggregate liability of RSA for all Defaults resulting in direct loss of or damage to the tangible property of the Customer shall be limited to damages which shall not exceed the greater of two hundred per cent (200%) of the applicable price paid and/or payable for the Software, or one million euros (€1,000,000); or (ii) the aggregate liability of RSA for all Defaults, other than those governed by subsection 7.B shall be limited to damages which shall not exceed the greater of one hundred and fifty per cent (150%) of the applicable price paid and/or payable or five hundred thousand euro (€500,000).

**C.** In no event shall RSA (including its suppliers) be liable to Customer for (i) loss of profits, loss of business, loss of revenue, loss of use, wasted management time, cost of substitute services or facilities, loss of goodwill or anticipated savings, loss of or loss of use of any software or data; and/or (ii) indirect, consequential or special loss or damage; and/or (iii) damages, costs and/or expenses due to third party claims; and/or (iv) loss or damage due to the Customer’s failure to comply with obligations under this Agreement, failure to do back-ups of data or any other matter under the control of the Customer. For the purposes of this Section 7, the term “loss” shall include a partial loss, as well as a complete or total loss.

**D.** The parties expressly agree that should any limitation or provision contained in this Section 7 be held to be invalid under any applicable statute or rule of law, it shall to that extent be deemed omitted, but if any party thereby becomes liable for loss or damage which would otherwise have been excluded such liability shall be subject to the other limitations and provisions set out in this Section 7.

**E.** The parties expressly agree that any order for specific performance made in connection with this Agreement in respect of RSA shall be subject to the financial limitations set out in sub-section 7.B.

**F. CUSTOMER OBLIGATIONS IN RESPECT OF PRESERVATION OF DATA.** During the Term of the Agreement the Customer shall:

1) from a point in time prior to the point of failure, (i) make full and/or incremental backups of data which allow recovery in an application consistent form, and (ii) store such back-ups at an off-site location sufficiently distant to avoid being impacted by the event(s) (e.g. including but not limited to flood, fire, power loss, denial of access or air crash) and affect the availability of data at the impacted site;

2) have adequate processes and procedures in place to restore data back to a point in time and prior to point of failure, and in the event of real or perceived data loss, provide the skills/backup and outage windows to restore the data in question;

3) use anti-virus software and regularly install updates across all data which is accessible across the network; and

4) ensure that all operating system, firmware, system utility (e.g. but not limited to, volume management, cluster management and backup) and patch levels are kept to RSA recommended versions and that any proposed changes thereto shall be communicated to RSA in a timely fashion.

3. Section 7.D (Limitation Period). This Section is deleted in its entirety and replaced with the following as a totally separate section:

**(D)WAIVER OF RIGHT TO BRING ACTIONS:** The Customer waives the right to bring any claim arising out of or in connection with this Agreement more than twenty-four (24) months after the date of the cause of action giving rise to such claim.

**C. European Union.** The terms in this subsection C apply only when RSA means an EMC sales subsidiary located in the European Union:

1. Section 2.A (License for Software). The following is added at the end of this section:

Customer shall not, and Customer shall not permit any third party to, modify, enhance, supplement, create derivative works from, reverse assemble, reverse engineer, reverse compile or otherwise reduce to human readable form the Software without RSA's prior written consent, except to the extent that local, mandatory law grants Customer the right to decompile such Software in order to obtain information necessary to render such interoperable with other software. In such event, Customer shall first inform RSA of its intention and request RSA to provide Customer with the necessary information. RSA may impose reasonable conditions on the provision of the requested information, including the payment of a reasonable fee.

**D. Australia.** The terms in this subsection D apply only when RSA means the RSA sales subsidiary located in Australia (currently **EMC Global Holdings Company (Australian Branch)** ABN 86 669 010 6895:

1. Section 7 (LIMITATION OF LIABILITY). This section is deleted in its entirety and replaced with the following:

**6. LIMITATION OF LIABILITY.**

**A. Limitation on Direct Damages.** RSA’S AND ITS SUPPLIERS’ TOTAL LIABILITY AND CUSTOMER’S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF ANY TYPE WHATSOEVER, ARISING OUT OF SOFTWARE OR SERVICE PROVIDED HEREUNDER, SHALL BE LIMITED TO PROVEN DIRECT DAMAGES CAUSED BY RSA’S SOLE NEGLIGENCE IN AN AMOUNT NOT TO EXCEED (i) AUD\$2,000,000, FOR DAMAGE TO REAL OR TANGIBLE

PERSONAL PROPERTY; AND (ii) THE PRICE PAID BY CUSTOMER TO RSA FOR THE SPECIFIC SERVICE (CALCULATED ON AN ANNUAL BASIS, WHEN APPLICABLE) SOFTWARE FROM WHICH SUCH CLAIM ARISES, FOR DAMAGE OF ANY TYPE NOT IDENTIFIED IN (i) ABOVE OR OTHERWISE EXCLUDED HEREUNDER.

**B. No Indirect Damages.** EXCEPT WITH RESPECT TO CLAIMS REGARDING VIOLATION OF RSA'S INTELLECTUAL PROPERTY RIGHTS, NEITHER CUSTOMER NOR RSA (INCLUDING RSA'S SUPPLIERS) SHALL (a) HAVE LIABILITY TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, OR INDIRECT DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, REVENUES, DATA AND/OR USE), EVEN IF ADVISED OF THE POSSIBILITY THEREOF; AND (b) BRING ANY CLAIM BASED ON SOFTWARE OR SERVICE PROVIDED HEREUNDER MORE THAN EIGHTEEN (18) MONTHS AFTER THE CAUSE OF ACTION ACCRUES.

**C. Trade Practices Legislation:** RSA's liability under any statutory right or any condition or warranty, including any implied by any State Fair Trading Act or the Trade Practices Act, 1974 (Cth) is, to the maximum extent permitted by law, excluded. To the extent that such liability cannot be excluded, RSA's liability is limited at the option of RSA to any one or more of the following: (i) the replacement thereof or the supply of its equivalent; (ii) the repair thereof; (iii) the payment of the cost of replacement thereof or of acquiring its equivalent; or (iv) the payment of the cost of having such repaired.

**F. New Zealand** - The terms in this subsection E apply only when RSA means the RSA sales subsidiary located in New Zealand (currently EMC CORPORATION (NEW ZEALAND BRANCH) AKOS. 1188883):

1. Section 7 (LIMITATION OF LIABILITY). This section is deleted in its entirety and replaced with the following:

#### **6. LIMITATION OF LIABILITY.**

**A. Limitation on Direct Damages.** RSA'S AND ITS SUPPLIERS' TOTAL LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF ANY TYPE WHATSOEVER, ARISING OUT SOFTWARE OR SERVICE PROVIDED HEREUNDER, SHALL BE LIMITED TO PROVEN DIRECT DAMAGES CAUSED BY RSA'S SOLE NEGLIGENCE IN AN AMOUNT NOT TO EXCEED (i) NZ\$2,000,000, FOR DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY; AND (ii) THE PRICE PAID BY CUSTOMER TO RSA FOR THE SPECIFIC SERVICE (CALCULATED ON AN ANNUAL BASIS, WHEN APPLICABLE) SOFTWARE FROM WHICH SUCH CLAIM ARISES, FOR DAMAGE OF ANY TYPE NOT IDENTIFIED IN (i) ABOVE OR OTHERWISE EXCLUDED HEREUNDER.

**B. No Indirect Damages.** EXCEPT WITH RESPECT TO CLAIMS REGARDING VIOLATION OF RSA'S INTELLECTUAL PROPERTY RIGHTS, NEITHER CUSTOMER NOR RSA (INCLUDING RSA'S SUPPLIERS) SHALL (a) HAVE LIABILITY TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, OR INDIRECT DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, REVENUES, DATA AND/OR USE), EVEN IF ADVISED OF THE POSSIBILITY THEREOF; AND (b) BRING ANY CLAIM BASED ON SOFTWARE OR SERVICE PROVIDED HEREUNDER MORE THAN EIGHTEEN (18) MONTHS AFTER THE CAUSE OF ACTION ACCRUES.

**C. Fair Trading Legislation.** RSA's liability under any statutory right or any condition or warranty, including any implied by the Fair Trading Act 1986 or Consumer Guarantees Act 1993 ("FTA") or any similar law is, to the maximum extent permitted by law, excluded. To the extent that such liability cannot be excluded, RSA's liability is limited at the option of RSA to any one or more of the following: (i) the replacement thereof or the supply of its equivalent; (ii) the repair thereof; (iii) the payment of the cost of replacement thereof or of acquiring its equivalent; or (iv) the payment of the cost of having such repaired.

#### **14. CUSTOMER OBLIGATIONS**

**A.** Customer may not engage any third parties to conduct security audits of RSA Software without the prior written consent of RSA.

**B.** Customer agrees to comply with the RSA Security Vulnerability Reporting Policy, currently located at <http://www.emc.com/contact-us/contact/product-security-response-center.htm>.

**C.** If Customer has purchased maintenance services, Customer understands that such maintenance services are subject to the Maintenance Agreement for RSA Software, currently located at <http://rsa.com/node.aspx?id=1067>, which Customer agrees to accept.

Tanuki Software, Ltd.  
Development Software License Agreement  
Version 1.1

License Agreement Number: TSILA-\_\_\_\_\_

Pursuant to this DEVELOPMENT SOFTWARE LICENSE AGREEMENT (the "Agreement") dated this th day of \_\_\_\_\_, 20\_\_ (the "Effective Date"), \_\_\_\_\_ ("Licensee") and Tanuki Software, Ltd. ("TSI") agree to the following terms and conditions:

## Section 1 - Grant of License

Effective upon the payment of the license fees presented in Exhibit 1, TSI grants to Licensee a non-exclusive, non-transferable, non-sublicensable right and license to use, reproduce, display, sell, lease, distribute and transfer copies, directly or indirectly, of the Software Program and documentation, in executable code form only, as parts of Licensee Products, for the purposes of marketing such Products to Licensee customers and for internal development of Products, during the period Licensee's subscription of the TSIMS (as defined in Section 5) effectively continues. Licensee may continue to market and distribute Products containing the Software Program so long as such Products have been completely developed by the end of the period Licensee's subscription of the TSIMS is active; provided however that under no circumstances may Licensee develop or continue to develop any new Product using or containing the Software Program after Licensee discontinues subscription of TSIMS. Licensee may not, under any circumstances, distribute or resell the Software Program as a stand-alone product, nor use the Software Program to create any product to directly compete with the Software Program.

## Section 2 - Definitions

2.1. "Community Edition" shall mean versions of the Software Program distributed in source form under the Tanuki Software, Ltd. Community Software License Agreement ("CSLA"), and all new releases, corrections, enhancements and updates to the Software Program, which TSI makes generally available under the CSLA.

2.2. "Documentation" shall mean the contents of the website describing the functionality and use of the Software Program, located at <http://wrapper.tanukisoftware.org>

2.3. "Product" shall mean the computer programs, that are provided by Licensee to Licensee customers or potential customers, and that contain both the Software Program as a component of the Product, and a component or components (other than the Software Program) that provide the material functionality of the Product. If the Product is released in source form, the Software Program or any of its components may only

be included in executable form.

2.4. "Software Program" shall mean the computer software and license file provided by TSI under this Agreement, including all new releases, corrections, enhancements and updates to such computer software, which TSI makes generally available and which Licensee receive pursuant to Licensee subscription to TSIMS. Some specific features or platforms may not be enabled if they do not fall under the feature set(s) covered by the specific license fees paid.

### Section 3 - Licensee Obligations

Licensee shall be solely responsible for all marketing, manufacturing, packaging, documentation production, distribution and customer pricing of the Products, and ensure that the Products and Licensee's such activities shall be in compliance with the applicable laws and regulations. Except as otherwise provided in this Agreement, Licensee shall also assume all responsibility and liability to customers for related support and assistance. Under no circumstances may Licensee modify, decompile, reverse engineer or disassemble any executable code contained within the Software Program nor create or prepare derivative works of, or attempt to discover or modify in any way the underlying source code of the Software Program or any part thereof. Licensee agrees that Licensee will not, nor will Licensee authorize or license another to, sell, market or license the Software Program, or any portion thereof, as a standalone computer software program, component or software development tool, or as a component or components of a computer software program, the chief marketability and functionality of which is the Software Program. Licensee further agrees that Licensee will not publish, present or document the application programming interface (API) of the Software Program except as required for specific use within the Product.

Licensee shall ensure that each end user receiving a copy of any Product shall receive a license agreement containing terms no less protective of the Software Program than those contained in Exhibit 2, which shall include the Copyright Notices described therein in a location that is obvious to Licensee's customers.

Neither the Software Program nor Product may be modified, nor in any way obfuscate or obstruct the copyright notice and license information displayed in the console and log files by the Software Program on startup.

Licensee may extend and/or modify the Community Edition of the Software Program and distribute under the terms of this agreement provided that a) the Software Program is only distributed in executable form, and b) a valid license key is distributed with Software Program such that the Software Program is able to access the license key, and c) the Copyright and "Licensed to {Licensee} for {Product}" notices are clearly visible in the console and log files of the Software Program on startup, and d) the "Licensed to {Licensee}

for {Product}" notice displays the Licensee and Product values from the license key file.

## Section 4 - Copyright and Trademark

Licensee acknowledges that all copyrights in the Software Program and the goodwill associated therewith are vested in and belong to TSI.

## Section 5 - Maintenance Services

### 5.1 Scope and Duration

TSI Maintenance Services ("TSIMS") are provided on an annual basis for the Software Program. The initial order for TSIMS shall be included in the initial fees paid for the license. After the first year of TSIMS, Licensee shall automatically receive TSIMS for successive one (1) year periods at the then current rates established by TSI for such TSIMS. TSI shall provide Licensee with notice of such renewal, via invoice, at least thirty (30) days prior to such renewal date, and Licensee may elect to discontinue TSIMS by written notification delivered to TSI prior to such renewal date.

### 5.2 Maintenance Obligations of the Parties

Licensee agrees to provide first line support for the Product and Software Program to Licensee customers which support will include (i) appropriate number of trained personnel available to provide, in a competent manner, first line support of the Software Program to Licensee customers, (ii) log of all communication between Licensee and Licensee customer, as well as a reproducible test case (wherever possible) and any relevant information for any second line support cases that have been opened by Licensee with TSI.

## Section 6 - Warranty and Limited Liability

Software Warranty: TSI warrants that, for a period of ninety (90) days from the initial delivery of the Software Program to Licensee, the Software Program, if used by Licensee in accordance with the Documentation, shall operate in material conformity with the Documentation for such Software Program. TSI does not warrant that the Software Program will meet all of Licensee requirements or that the use of the Software Program will be uninterrupted or error free. TSI's entire liability, and Licensee exclusive remedy, under this limited Software Warranty shall be for TSI (i) to attempt, through reasonable efforts, to correct any reproducible material nonconformity discovered within the ninety (90) day warranty period; or (ii) to replace the nonconforming Software Program with Software Program which conforms to the foregoing warranty. In the event TSI is unable to cure the breach of warranty described in this Section 6, after attempting the remedies described in (i) and (ii) above, Licensee may return the Software Program and TSI shall refund any license and maintenance fees paid by Licensee to TSI for the Software Program provided the refund of



maintenance fees shall be limited to the amount representing the period during which the Software Program showed nonconformity. The above remedies are available only if TSI is promptly notified in writing, within the warranty period, upon discovery of the nonconformity by Licensee and TSI's examination of the Software Program discloses that such nonconformity exists, and that the Software Program has not been (i) altered or modified, other than by TSI, (ii) subjected to negligence, or computer or electrical malfunctions, or (iii) used, adjusted, or installed other than in accordance with the Documentation.

**TSIMS and Other Services Warranty:** TSI warrants that any TSIMS or other services performed pursuant to the terms of this Agreement shall be performed in a professional and workmanlike manner consistent with generally accepted industry standards.

**Disclaimer:** THE EXPRESS LIMITED WARRANTIES SET FORTH ABOVE ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY WITH RESPECT TO THE SOFTWARE PROGRAM, AND TSI EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

**Limitation of Liability:** IN NO EVENT SHALL EITHER PARTY'S LIABILITY ARISING OUT OF THIS AGREEMENT OR THE TERMINATION OF THIS AGREEMENT EXCEED THE AMOUNTS PAID OR DUE TO TSI HEREUNDER DURING A FULL YEAR IMMEDIATELY PRECEDING SUCH EVENT. IF SUCH LIABILITY RELATES TO PARTICULAR ITEMS OF SOFTWARE PROGRAM OR SERVICES PROVIDED BY TSI, SUCH LIABILITY SHALL BE LIMITED TO THE FEES PAID FOR THE RELEVANT SOFTWARE PROGRAM OR SERVICES. IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY FOR ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, LOSS OF DATA OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, ARISING IN ANY WAY OUT OF THIS AGREEMENT UNDER ANY CAUSE OF ACTION, WHETHER OR NOT THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NO ACTION MAY BE BROUGHT AGAINST TSI LATER THAN ONE (1) YEAR AFTER THE CAUSE OF ACTION OCCURRED. EXCEPT FOR CLAIMS MADE UNDER SECTION 7 (INDEMNIFICATION), IN NO EVENT SHALL TSI BE LIABLE FOR ANY CLAIMS, DEMANDS OR ACTIONS OF ANY NATURE BROUGHT BY ANY THIRD PARTY AGAINST LICENSEE. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

**Warranty Claims:** Any claims made by Licensee for the breach of a warranty set forth in this Section 6, shall be made in writing and delivered to TSI by the end of the applicable warranty period, and Licensee shall provide TSI a reproducible test case, if applicable, demonstrating the breach of warranty.

## Section 7 - Indemnification

TSI warrants that the use or distribution of unaltered Software Program(s), or the exercise of the licenses granted hereunder, will not infringe any copyright or patent, or other intellectual property

rights of any third party, and TSI has all rights necessary for the grant of the rights and licenses granted by this Agreement. TSI agrees to indemnify, defend and hold Licensee harmless from any and all actions, causes of action, claims, demands, reasonable costs, liabilities, reasonable expenses (including reasonable attorney's fees) and damages (collectively, a "Loss" or "Losses") arising from any claim that the Software Program infringes any copyright or patent, or other intellectual property right of a third party, provided, however:

(1) Licensee shall promptly deliver to TSI notice in writing of any infringement claim made by a third party, and, if known, specify in reasonable detail the nature of the claim and the amount, or an estimate of the amount, of the liability arising therefrom.

Licensee shall, at TSI's expense, provide to TSI as promptly as practicable thereafter information and documentation reasonably requested by TSI to support and verify the claim asserted, provided that, in so doing, TSI may restrict or condition any disclosure in the interest of preserving privileges of importance in any foreseeable litigation.

(2) TSI may assume and retain sole control of the investigation, the defense or the settlement of any third party infringement claim made against Licensee or TSI with respect to the Software Program, including the employment of counsel or accountants, at its cost and expense. Licensee shall have the right to employ counsel separate from counsel employed by TSI in any such action and to participate therein, but the fees and expenses of such counsel employed by Licensee shall be at Licensee expense. TSI shall have the right to determine and adopt (or, in the case of a proposal by Licensee, to approve) a settlement of such matter in its reasonable discretion. TSI shall not be liable for any settlement of any claim effected without its prior written consent, which shall not be unreasonably withheld. Whether or not TSI chooses to so investigate or defend such claim, Licensee shall cooperate with TSI in the defense thereof and shall furnish such records, information and testimony, and attend such conferences, discovery proceedings, hearings, trials and appeals, as may be reasonably requested by TSI in connection therewith.

(3) If such a claim arises, or in either party's judgment is likely to arise, Licensee agrees to allow TSI, at TSI's option, to either (i) procure the right to permit the continued exercise of the rights and licenses in the Software Program granted under this Agreement; (ii) replace or modify the Software Program so it becomes non-infringing, while affording equivalent performance; or (iii) terminate the license for the infringing Software Program and upon return thereof by Licensee, refund the unearned portion of any license fees paid by Licensee for the remainder of the current term hereof.

(4) TSI shall have no indemnity obligation for claims of infringement resulting from any combination, operation or use of the Software Program, or any components thereof, with any software programs or data not supplied by TSI if such infringement would have been avoided by use of the Software Program alone. Licensee acknowledges and agrees that these four items are the exclusive

remedy of Licensee for damages for breach of warranty or representations contained in this Section 7.

## Section 8 - Termination

Should either party commit a material breach of its obligations hereunder, the other party may, at its option, terminate this Agreement by written notice to the party in default. Such notice shall identify and describe the default upon which termination is based. The defaulting party shall have thirty (30) days from the effective delivery of the notice to cure such default, which, if effected, shall prevent termination by virtue of such default. Should an insolvency proceeding be filed by or against either party, the other party may terminate this Agreement forthwith by giving a written notice to the first party. Upon termination of this Agreement, Licensee will either return to TSI or destroy all copies of the Software Program and documentation then in Licensee's possession. Licenses to the Software Program granted in the normal course of business by Licensee to its customers shall survive termination of this Agreement. Licensee shall, within thirty (30) days after the date of such termination, furnish TSI with a certificate of compliance in accordance with this Section. The parties agree that TSI shall have the right to enforce the obligations arising under this Section and to enjoin or compel Licensee through injunctive relief. Licensee may retain a commercially reasonable number of copies of the Software Program and documentation solely for the purpose of supporting Licensee customers who purchased a Product prior to the termination of this Agreement.

## Section 9 - Export Controls

Licensee shall comply with, and ensure that Licensee sublicensees and resellers comply with, all applicable laws, regulations, rulings and executive orders of Japan or any other relevant jurisdiction relating to the export and re-export of the Software Program or any products containing the Software Program. Licensee shall not directly or indirectly export or re-export any Software Program or any Products containing the Software Program unless Licensee have obtained a license to do so if such a license is required. Licensee further agree that Licensee take appropriate measure to ensure that the Software Program or any Products containing the Software Program will not be exported or re-exported in violation of any applicable laws or regulations of any relevant jurisdiction.

## Section 10 - Entire Agreement

This Agreement, including any attachments, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements, both oral and written, representations, statements, negotiations and undertakings, with respect to the subject matter hereof, which such agreements, representations, statements, negotiations and undertakings are merged herein. No amendment or modification of this Agreement or any

provision or attachment of this Agreement shall be effective unless it is in writing and signed by both parties.

### Section 11 - Governing Law

The validity, construction and performance of this Agreement shall be governed by the substantive laws of Japan (excluding conflicts of law principles). Licensee and TSI agree that any dispute arising out of this Agreement shall be subject to the exclusive jurisdiction of the Tokyo District Court of Japan. If any legal action is undertaken to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs in addition to any other relief to which that party may be entitled.

You agree that the United Nations Convention on Contracts for the International Sales of Goods will not apply to this Agreement.

### Section 12 - Assignment and Benefit

Without the consent of the other party in writing, neither party may assign this Agreement; provided, however, TSI or Licensee may assign this Agreement to a wholly-owned subsidiary of the respective corporation or a corporation in which the shareholders of the respective corporation own a majority interest of the voting control provided that the assigning party remains obligated hereunder; further provided, however, TSI or Licensee may assign this Agreement to another corporation which acquires or has acquired substantially all of the stock or assets of the assignor. If Licensee assigns this Agreement to an assignee as permitted in this Section, the assignee's license to use the Software Program is limited to use in Products which were offered by Licensee to Licensee customers or potential customers and the assignee is prohibited from use of the Software Program in other products or parts of products developed, sold or distributed by the assignee.

This Agreement shall be binding upon and shall inure to the benefit of Licensee and TSI and each party's successors, subject to the other provisions of this Section.

### Section 13 - 3rd Party Components

(1) The Software Program includes software and documentation components developed in part by Silver Egg Technology, Inc. ("SET") prior to 2001 and released under the following license.

Copyright (c) 2001 Silver Egg Technology

Permission is hereby granted, free of charge, to any person obtaining a copy of this software and associated documentation files (the "Software"), to deal in the Software without restriction, including without limitation the rights to use, copy, modify, merge, publish, distribute, sub-license, and/or sell copies of the Software, and to permit persons to whom the

Software is furnished to do so, subject to the following conditions:

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 IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective duly authorized representatives.

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Department name Title: \_\_\_\_\_

\_\_\_\_\_ Date: \_\_\_\_\_

Licensee's Authorized Signature

\_\_\_\_\_

Typed or Printed Name

\_\_\_\_\_

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Java Service Wrapper version \_\_\_\_\_, \_\_\_\_\_ Edition Bit

Licensed Operating System and Hardware Platform:

All platforms

## Licensed Software Commercial Restrictions:

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## Licensed Software Use:

Bundle Development / Deployment.

## Licensed Software Use Location:

Bundle Development/Deployment Worldwide

## Authorized Number of Users:

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## FEES:

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\$ \_\_\_\_\_

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