

**MASTER SOFTWARE LICENSE AGREEMENT**  
**Embarcadero Technologies, Inc.**  
4001 W. Parmer Lane  
Suite 125  
Austin, Texas 78727

BY PROCEEDING TO DOWNLOAD, INSTALL OR USE THE SOFTWARE IN WHICH THIS AGREEMENT IS ELECTRONICALLY EMBEDDED OR BY OBTAINING A LICENSE KEY FOR THIS SOFTWARE, YOU HEREBY ACKNOWLEDGE AND AGREE TO BE BOUND BY THE FOLLOWING TERMS AND CONDITIONS. IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, THEN CLICK “DO NOT ACCEPT.” DO NOT INSTALL OR USE THE SOFTWARE AND DELETE THE SOFTWARE FROM YOUR COMPUTER SYSTEM. BY INSTALLING OR USING THE SOFTWARE OR BY CLICKING ON “ACCEPT” YOU ACKNOWLEDGE AND AGREE THAT ON BEHALF OF YOURSELF AND YOUR EMPLOYER YOU HAVE READ THIS SOFTWARE LICENSE AGREEMENT CAREFULLY, THAT YOU AND YOUR EMPLOYER AGREE TO BE BOUND BY THIS AGREEMENT AND THAT IF APPLICABLE YOUR EMPLOYER HAS INFORMED YOU OF THE RELEVANT PROVISIONS OF THIS AGREEMENT WHICH MAY BE APPLICABLE TO YOU. THIS AGREEMENT SHALL GOVERN YOUR INSTALLATION AND USE OF THE SOFTWARE IN WHICH THIS AGREEMENT IS ELECTRONICALLY EMBEDDED. EMBARCADERO URGES YOU TO CAREFULLY READ THIS AGREEMENT AND ASSESS YOUR USE OF THE SOFTWARE PRIOR TO INSTALLING OR USING THE SOFTWARE OR MAKING ANY DECISION TO USE OR PURCHASE IT.

THIS MASTER SOFTWARE LICENSE AGREEMENT, is dated as of the date of, in the case of any Evaluation Software (as defined in Section 16 below), the date of Customer’s acquisition of a License Key, or in the case of any purchase of a license for use of the Licensed Software (as defined below), the date of the Order Form (as defined below) pursuant to which such license is purchased, is between Embarcadero Technologies, Inc., a Delaware corporation (“Embarcadero”), and, in the case of any Evaluation Software, the customer to whom temporary Licenses Keys are delivered or, in the case of any purchase of a license for use of the Licensed Software, the customer set forth on the purchase order pursuant to which such license is purchased (in each case, herein “Customer”), and sets forth the terms and conditions whereby Embarcadero agrees to provide to Customer and Customer agrees to acquire from Embarcadero one or more licenses to install and use certain software and documentation and maintenance services related thereto, as set forth on the Order Form (as defined below) pursuant to which Customer agrees to purchase a license for the Products licensed hereby, which is hereby incorporated herein reference and made a part of this Agreement. Each individual license under this Agreement will be defined in an Order Form (as defined below). Each Order Form shall be executed separately and, when so executed by both parties and delivered to Embarcadero, shall constitute and be construed as a separate agreement consisting of the terms and conditions contained in such Order Form together with the terms of this Agreement. To the extent any terms or conditions contained in an Order Form conflict with the terms or conditions contained in this Agreement, the terms and conditions of such Order Form shall supersede only those conflicting terms or conditions contained in this Agreement and only to the minimum extent necessary to harmonize the terms in such Order Form with the terms contained herein. This Agreement specifically supersedes and replaces the terms and conditions of all prior agreements between Embarcadero and Customer relating to the software licensed hereunder, including, but not limited to, any shrink-wrap agreements, click-wrap agreements or any demo or trial agreements which may accompany or are embedded in Embarcadero’s products or which have been previously in force between the parties. All Exhibits, Schedules, Annexes, Order Forms referred to herein are hereby incorporated into this Agreement by this reference and made a part hereof. If Customer is evaluating Evaluation Software (as defined in Section 16 below), then only the terms and conditions of Section 16 below (including those Sections of this Agreement incorporated therein by reference) will govern Customer’s temporary use of such Evaluation Software (and no other terms of this Agreement shall apply to Customer or govern Customer’s use of Evaluation Software) and upon purchase of a commercial license for such Evaluation Software, this entire Agreement, exclusive of Section 16, shall apply to Customer and govern all use of the Licensed Material (as defined below). In consideration of the mutual promises and agreements contained herein, the parties hereto also agree as follows:

**GENERAL TERMS AND CONDITIONS**

**1. Definitions –**

- (a) “Agreement” means this master software license agreement, together with all exhibits, schedules, annexes and Order Forms made a part hereof in accordance with the terms of this Agreement and all amendments, modifications, supplements and alterations thereto effected in accordance with the terms of this Agreement.
- (b) “Americas Territory” means those geographical areas found within the boundaries of North America and South America (but excluding Cuba).
- (c) “Asia Pacific Territory” or “AsiaPac Territory” means those geographical areas found within the boundaries of Asia and Australia/Pacific (but excluding North Korea).
- (d) “Confidential Information” means all technical and non-technical information in both tangible and intangible form, including, but not limited to, product design information, software code, technical information, customer information, discounting, cost and pricing information, financial information and the results derived from or methodology employed by Customer in conducting any benchmark testing of the Licensed Software; provided that the term “Confidential Information” shall not include information which the recipient can show by reasonable proof (i) to have been known by the recipient prior to the time of disclosure by the disclosing party, (ii) to have become part of the public domain through no fault or breach of this Agreement by the recipient, (iii) to have been disclosed to the recipient in good faith by a third party who is not under any obligation of confidence or secrecy to

the disclosing party at the time such third party discloses the information to the recipient or (iv) to have been compelled to be produced by a court of competent jurisdiction, provided that the recipient shall first give notice to the disclosing party of any such request or order of the court to give the disclosing party an opportunity to contest or limit said request or order of the court.

- (e) “CPU” means the logic circuitry that responds to and processes the instructions that run a computer and/or that access or runs the Licensed Software and each CPU may be comprised of multiple processing cores, each of which may be configured to independently act as an individual CPU and shall, when so configured, be deemed a separate CPU under this definition for purposes of this Agreement.
- (f) “Error” means any error, defect or omission that (i) is discovered in the Licensed Software, (ii) is reproducible and (iii) prevents its operation substantially in accordance with the Licensed Documentation.
- (g) “Europe, Middle East and Africa Territory” or “EMEA Territory” means those geographical areas found within the boundaries of Europe, Middle East and Africa, including countries in the former Soviet Union (but excluding Syria, Iran and Sudan).
- (h) “Licensed Country” means, with respect to any Single Seat License, Workstation License, Concurrent Users License, Network Named User License or Named User License, the country designated in the applicable Order Form or, in the absence of such designation, the country listed in such Order Form as the “ship to” address; provided that in the case of a

country within the European Union, the "Licensed Country" shall be the European Union.

- (i) "Licensed Documentation" means the published user manuals that Embarcadero makes generally available for the Licensed Software.
- (j) "Licensed Material" means the Licensed Software and the Licensed Documentation.
- (k) "Licensed Software" means the machine-readable object code version of (i) the software specified on each Order Form, whether embedded on disc, tape, internet download site or other media and (ii) all Updates for the Licensed Software that Customer is entitled to receive in connection with its receipt of Maintenance Services pursuant to Section 4 of this Agreement.
- (l) "Maintenance Services" means the technical support services provided by Embarcadero pursuant to Section 4 hereof.
- (m) "Maintenance Term" means the period of time for which Customer has purchased Maintenance Services, as evidenced by the Order Form delivered by Customer in connection therewith, together with all renewals effected in accordance with Section 4 of this Agreement.
- (n) "Order Form" means (i) Embarcadero's standard price quote, purchase order, order form or purchase confirmation (including any purchase confirmation delivered electronically through an online store owned or controlled by Embarcadero, its affiliates, its authorized resellers, or its subsidiaries), as such document may be amended, supplemented or modified from time to time in accordance with this Agreement or (ii) any other non-Embarcadero price quote, purchase order, order form or purchase confirmation delivered by Customer to Embarcadero but solely to the extent permitted by and delivered in accordance with Section 15.
- (o) "Territory" means, with respect to a Concurrent User License, the geographical area in which the Licensed Software may be accessed and used, which geographical area may be any one, and only one, of the following three geographic areas: Americas Territory, the EMEA Territory or the AsiaPac Territory, as specified pursuant to Section 2(a) below.
- (p) "Update" means any revision, enhancement, improvement or modification to or programming fix for the Licensed Software or Licensed Documentation which Embarcadero makes generally available, incorporates into and makes a part of the Licensed Software or Licensed Documentation and does not separately price or market.

## 2. LICENSE –

- (a) **Use** – Subject to the terms and conditions of this Agreement, including, but not limited to the applicable licensing restrictions set forth in Section 2(b) below, and subject further to Customer's full compliance herewith and according to the scope, time period and other terms indicated on the applicable Order Form delivered in connection with this Agreement, Embarcadero hereby grants Customer and Customer hereby accepts from Embarcadero, a perpetual, non-exclusive and non-transferable right and license to install the Licensed Software on computer hardware that is owned or operated by or on behalf of Customer, to access and use the Licensed Material in accordance with the applicable restrictions and conditions contained in this Agreement and to copy the Licensed Material as permitted by this Agreement. Customer's right to use the Licensed Material shall extend to use by third parties under a written agreement with Customer to provide outsourcing services for Customer's own internal business operations; provided, that (i) such third parties have agreed to abide by the terms of this Agreement and (ii) Customer shall remain primarily liable for all acts and omissions by such third parties.

- (b) **License Usage and Restrictions** – Customer acknowledges and agrees that, as between Customer and Embarcadero, Embarcadero or its subsidiaries owns and shall continue to own all right, title, and interest in and to the License Material, including associated intellectual property rights under copyright, trade secret, patent, or trademark laws. This Agreement does not grant Customer any ownership interest in or to the Licensed Material, but only a limited right and license to install and use the Licensed Software and to use the Licensed Materials in accordance with the terms of this Agreement and each applicable Order Form. Customer further acknowledges and agrees that the licenses granted hereunder and the restrictions applicable to Customer's installation and use of the Licensed Software will vary according to the type of Licensed Software purchased by Customer and the type of license purchased by Customer. One or more of the restrictions set forth in this Section 2 may apply to the Licensed Software depending upon the type of licensed purchased and the terms contained in the applicable Order Form relating to the Licensed Software. Customer is encouraged to carefully review all terms and restrictions contained in this Section 2 and each Order Form. Customer hereby agrees to the following license restrictions and conditions applicable to the Licensed Software as set forth in the Order Forms delivered by Customer under this Agreement:

- (i) For all Licensed Software made generally available by Embarcadero on a "per-instance" basis and licensed hereunder by Customer on a "per-instance" basis, Customer may install, operate and use such Licensed Software on one (1) instance per license purchased by Customer;
- (ii) For all Licensed Software made generally available by Embarcadero on a "per-database" basis and licensed hereunder by Customer on a "per-database" basis, Customer may install, operate and use such Licensed Software on one (1) database per license purchased by Customer;
- (iii) For all Licensed Software made generally available by Embarcadero on a "per-server" basis and licensed hereunder by Customer on a "per-server" basis, Customer may install, operate and use such Licensed Software on one (1) physical or one (1) virtual server per license purchased by Customer;
- (iv) For all Licensed Software made generally available by Embarcadero on a "per-user" or "per-seat" basis and licensed hereunder by Customer on a "per-user" or "per-seat" basis, Customer may install and operate such Licensed Software on up to two physical servers or virtual servers but Customer shall not access and use such Licensed Software by more than one (1) user per license purchased by Customer;
- (v) For all Licensed Software expressly specified in an Order Form as a "Site-License," Customer may install, operate and use the Licensed Software on any number of instances, CPUs, seats, workstations, physical servers or virtual servers physically located at the building or computing facilities specified in the Order Form by address as the site and may do so with any number of users or seats;
- (vi) For all Licensed Software expressly specified in an Order Form as an "Enterprise-License," Customer may install, operate and use the Licensed Software on any number of instances, CPUs, physical servers or virtual servers and may do so with any number of users or seats; provided, that periodically upon Embarcadero's written request Customer shall provide Embarcadero with a written report evidencing actual installation and usage of the License Software and pay for all excess license usage in accordance with the terms of Embarcadero's standard true-up addendum (the terms

of which are incorporated herein by reference upon Customer purchasing such enterprise license);

- (vii) For all Licensed Software made generally available by Embarcadero on a "single seat" or "workstation" basis and licensed hereunder by Customer on a "single seat" or "workstation" basis (a "Single Seat License" or "Workstation License"), Customer may install and operate such Licensed Software on one (1) computer for use by one (1) end user within the Licensed Country;
- (viii) For all Licensed Software made generally available by Embarcadero on a "concurrent users" basis (each, a "Concurrent License") and licensed hereunder by Customer as a Concurrent License, Customer may install and operate such Licensed Software on a network within the Licensed Country to be used concurrently on different computers by up to the authorized number of users for which Customer has purchased a license, provided that the Licensed Software is accessed and used only in the Territory;
- (ix) For all Licensed Software made generally available by Embarcadero on a "network named user" or "named user" basis and licensed hereunder by Customer on a "network named user" or "named user" basis (a "Network Named User License" or "Named User License"), Customer may install and operate such Licensed Software on up to two (2) computers and designate one (1) person in Customer's organization (the "Named User") who shall have the right to use the Licensed Software within the Licensed Country, provided that only the Named User uses the Licensed Software and such use is not conducted on more than one such computer simultaneously;
- (x) If Customer has purchased a license for ER/Studio Team Server Core or ER/Studio Portal, such license is an exclusive connection license and may only be installed on Customer's computers up to the total number of licenses purchased to connect to a single server; provided, that such licenses may be reapportioned to different users up to the total number of licenses purchased;
- (xi) Customer may not mix and match or use ER/Studio Team Edition licenses with ER/Studio Enterprise licenses or other ER/Studio editions which can connect to the repository applicable to ER/Studio; and
- (xii) Customer shall not connect non-Team Edition of ER/Studio, such as ER/Studio Enterprise, to the Team Edition repository applicable to ER/Studio and if Customer has purchased a license for ER/Studio Team Edition, Customer must upgrade all existing ER/Studio licenses having repository connectivity to ER/Studio Team Edition.

For any Licensed Software that is restricted by a Licensed Country or Territory, temporary usage of such Licensed Software by a user outside the Licensed Country or Territory is permitted while such user is traveling provided that all such usage does not exceed thirty (30) days in any twelve-month period. In no event shall Customer install, operate, use or access the Licensed Software in contravention of the foregoing restrictions applicable to the Licensed Software or any other restrictions contained in this Agreement.

- (c) **Additional Terms Governing Server Licenses** – Customer may re-assign a Server-Based License to a different server; provided, that (i) such Server-Based License may not be installed or operated on more than one server simultaneously and (ii) except for a re-assignment in connection with a hardware failure, a Server-Based License may not be re-assigned on a different

server within the first ninety (90) days following its most recent installation.

- (d) **Copies & Disaster Recovery** – Customer may make a reasonable number of back-up archival copies of the Licensed Software. In the event of any outage that results in the complete failure of the computer system upon which Customer has installed the Licensed Software, Customer's right to use the Licensed Software shall include, during the pendency of such outage, the temporary right to use the Licensed Software in a replacement computing environment substantially similar to the original computing environment upon which the Licensed Software was installed immediately prior to such outage. Customer shall reproduce all confidentiality and proprietary notices on each of the copies permitted hereunder and maintain an accurate record of the location of each of the copies. Customer shall not otherwise copy or duplicate the Licensed Material. Customer shall not reverse engineer, disassemble, translate, modify, adapt, or decompile the Licensed Material or apply any procedure or process to the Licensed Material in order to ascertain, derive, and/or appropriate the source code or source listings for the Licensed Software or any trade secret or other proprietary information contained in the Licensed Software.
- (e) **Maintenance Optional** – Customer's right to use the Licensed Software shall survive any election by Customer to terminate or not renew Maintenance Services from Embarcadero.
- (f) **Other Services** – All licenses and Maintenance Services purchased by Customer in respect of the Licensed Material shall be governed by this Agreement, together with the applicable Order Forms delivered hereunder. Unless otherwise agreed by the parties in writing, all other services purchased by Customer in respect of the Licensed Software, if any, including implementation services, training services and professional services (collectively, "Ancillary Services"), shall be governed solely by a separate written mutually acceptable services agreement entered into by the parties or, in the absence of such agreement, Embarcadero's standard professional services agreement, and acceptance of the Licensed Material shall not be contingent upon Customer's acceptance of any such Ancillary Services.

### 3. DELIVERY AND PAYMENT TERMS –

- (a) **Delivery** – All Licensed Material shall be delivered by Embarcadero to Customer via electronic delivery using a secure internet download site. Ownership of all licenses purchased hereunder and risk of loss for the related Licensed Materials shall be deemed to have passed to Customer once Embarcadero has made the Licensed Material available for download by Customer, notified Customer of the availability of the Licensed Material for download and provided Customer with License Keys necessary for the installation and operation of the Licensed Software.
- (b) **Payment** – Upon delivery of an Order Form by Customer, Embarcadero or its payment processing agent shall deliver an invoice to Customer specifying the license fees and Maintenance Services fees payable pursuant to such Order Form. Customer shall pay all license fees and Maintenance Services fees specified therein within thirty (30) days of Customer's receipt of such invoice. In the event that Customer elects to pay any fees due hereunder with a credit card, (i) Customer is required to provide Embarcadero with a valid form of credit card payment and to keep all such credit card information current and accurate in respect of all renewal fees, (ii) Customer shall promptly notify Embarcadero if its credit card has changed or has been declined and (iii) Customer hereby consents to Embarcadero and its payment processing agent automatically processing and charging all fees due by Customer hereunder, including all renewal subscription fees, to the credit card submitted by Customer. All fees payable by Customer in respect of any Ancillary Services may be separately invoiced. Customer's payment obligation with respect to all license fees and Maintenance Services fees owing hereunder shall be independent of the provision of Ancillary Services, whether or not

such Ancillary Services are separately invoiced. Any late payment of any amount owing hereunder shall accrue interest at a rate equal to the lesser of (i) 15% per annum and (ii) the maximum rate permitted by law.

- (c) **Taxes** – All payments referred to in this Agreement are exclusive of value added tax, sales tax and any other applicable taxes, duties or imposts which (with the exception only of those based on Embarcadero's income) shall also be payable by Customer in accordance with applicable law.

**4. MAINTENANCE** – Embarcadero does not warrant that the Licensed Software will operate error-free or may be used error-free. Upon Customer's payment of the Maintenance Services fees associated with the Maintenance Term purchased by Customer for the Licensed Software specified in an Order Form, Embarcadero shall provide Maintenance Services in accordance with this Section 4 and in accordance with any additional Maintenance Services terms specified in such Order Form.

- (a) **Maintenance Agreement** – Embarcadero or its authorized representative will provide Maintenance Services for the Licensed Software during each Maintenance Term. Maintenance Services includes problem determinations, reasonable problem resolutions, provisioning of software program temporary fixes and new releases. Maintenance Services shall also include the additional Maintenance Service terms expressly set forth in writing in the applicable Order Form delivered by Customer, which are hereby incorporated herein by reference. Maintenance Services shall entitle Customer to receive, at no additional cost, all Updates.
- (b) **Additional Maintenance Term** – Upon expiration of each Maintenance Term, Maintenance Services shall automatically renew for an additional 12-month Maintenance Term and Embarcadero will invoice Customer unless Embarcadero or its authorized representative is notified by Customer in writing at least sixty (60) days prior to the expiration of the current Maintenance Term that Customer will not purchase Maintenance Services for another Maintenance Term.
- (c) **Reinstatement** – If Customer terminates Maintenance Services or elects not to renew Maintenance Services, Customer may, at its option, purchase Maintenance Services within one year of such termination or non-renewal by providing notice to Embarcadero and making payment of Embarcadero's then-current list maintenance fees for the upcoming 365-day period plus an amount equal to 1.5 times the Maintenance Services fees that would have accrued during the period subsequent to such termination or non-renewal, had Customer not terminated or elected not to renew Maintenance Services.

**5. PROPRIETARY RIGHTS** – Customer shall not acquire, by virtue of this Agreement, any right or license other than as expressly provided herein. Customer shall not reproduce the Licensed Material or other confidential or proprietary information of Embarcadero, except as provided in this Agreement. All proprietary rights in and to the Licensed Material and all Evaluation Software (as defined in Section 16 below), all derivatives, translations, modifications, adaptations, improvements, enhancements or developments thereof and all confidential or proprietary information of Embarcadero, including without limitation, all rights under and with respect to patents, copyrights, trademarks and rights under the trade secret laws of any jurisdiction shall remain the sole property of Embarcadero or its applicable licensor, whether recognized by or perfected under applicable local law. Customer shall promptly notify Embarcadero of any infringement of Embarcadero's proprietary rights of which it becomes aware.

## **6. LIMITED WARRANTIES**

- (a) **Warranty** – Embarcadero warrants to Customer that during the first thirty (30) days after purchase of the Licensed Software (the "Warranty Period") the Licensed Software will perform substantially as described in the accompanying Licensed Documentation. Embarcadero does not warrant that (i) the Licensed Software will satisfy or may be customized to satisfy

any of Customer's requirements or any other particular use or (ii) the use of the Licensed Software will be uninterrupted or error-free. Laws from time to time in force may imply warranties that cannot be excluded or can only be excluded to a limited extent. This Agreement shall be read and construed subject to any such statutory provisions.

- (b) **Remedies** – If (i) at any time during a Maintenance Term, the Licensed Software contains Errors which make the Licensed Software unable to perform substantially as described in the accompanying Licensed Documentation or (ii) during the Warranty Period, Embarcadero breaches the warranty set forth in clause (a) above, then Customer shall promptly notify Embarcadero of such Error or breach and Embarcadero shall (A) use all commercially reasonable efforts to correct such Error or breach within thirty (30) days of notification or (B) provide Customer within thirty (30) days of notification with a plan acceptable to Customer for correcting such Error or breach. If such Error or breach is not corrected or if an acceptable plan for correcting such Error or breach is not established within such thirty (30) day period, Embarcadero shall replace the defective Licensed Software or, if not practicable, accept the return of the defective Licensed Software and refund to Customer the amount paid for the defective Licensed Software, less depreciation based on a 3-year straight line schedule. Embarcadero's obligations under this Section 6(b) shall be waived in the event such Error or breach is due to (I) any defect in or misconfiguration of the computer hardware upon which the Licensed Software is installed, (II) improper handling or use of the software media by Customer, or (III) an unauthorized alteration, revision or configuration of the Licensed Software or to Customer's computer system by Customer or its employees. Customer acknowledges that this Section 6(b) sets forth Customer's sole and exclusive remedy, and Embarcadero's and its authorized representatives' sole and exclusive liability, for any breach of warranty, Error or failure of the Licensed Software to function properly.
- (c) **Disclaimer** – **EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, ALL WARRANTIES, REPRESENTATIONS, INDEMNITIES AND GUARANTEES WITH RESPECT TO THE LICENSED MATERIAL, WHETHER EXPRESS OR IMPLIED, ARISING BY LAW, CUSTOM, PRIOR ORAL OR WRITTEN STATEMENTS BY EMBARCADERO OR ITS AUTHORIZED REPRESENTATIVES OR OTHERWISE (INCLUDING, BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE) ARE HEREBY OVERRIDDEN AND DISCLAIMED.**

## **7. INDEMNITY**

- (a) **Indemnity** – Subject to this Section 7 and Section 8 below, Embarcadero agrees to indemnify, defend and hold harmless Customer from and against all claims, damages, losses, liabilities and expenses (including, but not limited to, reasonable attorneys' fees) arising out of any claim by a third party asserting that the Licensed Material or any of Customer's use thereof, infringes upon any third party's patent, copyright or trademark, provided that (i) Customer promptly notifies Embarcadero in writing no later than thirty (30) days after Customer's notice of any potential claim, (ii) Customer permits Embarcadero to defend, compromise or settle the claim, and provided further that no settlement intended to bind Customer shall be made without Customer's prior written authorization and (iii) Customer gives Embarcadero all available information, reasonable assistance, and authority to enable Embarcadero to do so.
- (b) **Alternative Remedy** – If a claim described in Paragraph 7(a) may or has been asserted, Customer will permit Embarcadero, at Embarcadero's option and expense, to (i) procure the right to continue using the Licensed Material, (ii) replace or modify the Licensed Material to eliminate the infringement while providing functionally equivalent performance or (iii) accept the return of the Licensed Material and refund to Customer the amount actually paid to Embarcadero or its authorized representative for

such Licensed Material, less depreciation based on a 3-year straight-line depreciation schedule.

- (c) **Limitation** – Embarcadero shall have no indemnity obligation to Customer hereunder if the violation or infringement claim results from (i) a correction or modification of the Licensed Material not provided by Embarcadero or its authorized representative, (ii) the failure to promptly install an Update, (iii) the combination of the Licensed Software with other non-Embarcadero software and (iv) continuing the allegedly infringing activity after receiving written notice of such infringement claim from Embarcadero.

**8. NO CONSEQUENTIAL DAMAGES – UNDER NO CIRCUMSTANCES WILL EMBARCADERO OR ITS AUTHORIZED REPRESENTATIVES BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY OR INCIDENTAL DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE, BASED ON CLAIMS BY CUSTOMER OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, CLAIMS FOR LOSS OF DATA, GOODWILL, PROFITS, USE OF MONEY OR USE OF THE LICENSED MATERIALS, INTERRUPTION IN USE OR AVAILABILITY OF DATA, STOPPAGE OF OTHER WORK OR IMPAIRMENT OF OTHER ASSETS), ARISING OUT OF BREACH OF EXPRESS OR IMPLIED WARRANTY, BREACH OF CONTRACT, BREACH OF ANY INTELLECTUAL PROPERTY RIGHT, MISREPRESENTATION, NEGLIGENCE, STRICT LIABILITY IN TORT OR OTHERWISE, EXCEPT ONLY IN THE CASE OF PERSONAL INJURY WHERE AND TO THE EXTENT THAT APPLICABLE LAW REQUIRES SUCH LIABILITY. IN NO EVENT WILL THE AGGREGATE LIABILITY INCURRED IN ANY ACTION OR PROCEEDING BY EMBARCADERO OR ITS AUTHORIZED REPRESENTATIVE EXCEED THE TOTAL AMOUNT ACTUALLY PAID BY CUSTOMER FOR THE SPECIFIC LICENSED SOFTWARE THAT DIRECTLY CAUSED THE DAMAGE.**

## **9. CONFIDENTIALITY**

- (a) **Confidentiality.** – Customer acknowledges that the Licensed Materials incorporate confidential and proprietary information developed or acquired by or licensed to Embarcadero and that all results of testing of the Licensed Software, whether performed by Customer or another third party, are confidential. In no event will Customer publish or disclose the results of any testing or performance specifications of the Licensed Software without Embarcadero's express prior written consent. A party that receives Confidential Information (the "Receiving Party") from the other party (the "Disclosing Party") shall not: (i) export or re-export (within the meaning of US laws or other export control laws or regulations) any Confidential Information, except in strict compliance with US laws; (ii) reverse engineer any Confidential Information; or (iii) disclose or make available the Disclosing Party's Confidential Information to any of the Receiving Party's employees, agents, contractors or consultants or to any third parties, except those that have agreed in writing to be bound by terms and conditions substantially similar to, and no less restrictive with respect to limitations on use and disclosure, than those contained in this Agreement and each of which have a "need to know" in order to carry out the purposes set forth in this Agreement. Each party shall take all reasonable precautions necessary to safeguard the confidentiality of all Confidential Information disclosed by the other party, including those precautions (A) taken by the disclosing party to protect its own Confidential Information and (B) which the disclosing party or its authorized representative may reasonably request from time to time. Neither party shall allow the removal or defacement of any confidentiality or proprietary notice placed on the Confidential Information disclosed by the disclosing party. The placement of copyright notices on Confidential Information shall not constitute publication or otherwise impair their confidential nature of such information.

- (b) **Disclosure** – If an unauthorized use or disclosure of the disclosing party's Confidential Information occurs within the recipient party's enterprise, the recipient party will immediately notify the disclosing party or its authorized representative and take, at recipient party's expense, all steps which may be

available to recover such Confidential Information and to prevent its subsequent unauthorized use or dissemination.

**10. TERMINATION** – Upon thirty (30) days prior written notice to Embarcadero, Customer may terminate this Agreement; provided however that Customer shall not be entitled to a refund (except as otherwise expressly set forth in Sections 6(b) and 7(b)) of any amounts paid or a release from or cancellation, waiver or novation of any amount payable, and all such amounts payable or promised to be paid through the Maintenance Term shall automatically accelerate and be immediately due and payable and shall survive such termination of this Agreement. If Customer or any of Customer's employees, consultants, authorized representatives or permitted third parties breach any term or condition of this Agreement, Embarcadero may terminate this Agreement, without judicial or administrative resolution or obligation to refund. This Agreement will terminate automatically if Customer ceases to do business, becomes insolvent, goes or is put into receivership or liquidation, passes a resolution for its winding up (other than for the purpose of reconstruction or amalgamation) or for any of the foregoing, makes an arrangement for the benefit of its creditors, enters into bankruptcy, suspension of payments, moratorium, reorganization or any other proceeding that relates to insolvency or protection of creditors' rights or takes or suffers any similar action in consequence of debt. Upon the termination of this Agreement for any reason, all rights granted to Customer hereunder will cease, and Customer will promptly (i) purge the Licensed Software and any related Updates from all of Customer's computer systems, storage media and other files, (ii) destroy the Licensed Material and all copies thereof and (iii) deliver to Embarcadero an affidavit certifying that Customer has complied with these termination obligations. The provision of Sections 1, 3, 8 through 12, 14, 15 and 17 shall survive the termination of this Agreement.

**11. U.S. EXPORT RESTRICTIONS** – Customer acknowledges that the Licensed Materials and all related technical information, documents and materials are subject to export controls under the U.S. Export Administration Regulations. Customer covenants and agrees to comply with all import and export control regulations of the United States with respect to the Licensed Material. Customer acknowledges that it may not re-export or divert the Licensed Material or any related technical information, document or material, or direct derivatives thereof, to any country set forth on the U.S. Department of Commerce's list of State Sponsors of Terrorism (currently, Cuba, Iran, North Korea, and Syria), including any future changes to the government's list of State Sponsors of Terrorism.

**12. EQUITABLE RELIEF** – The parties recognize that Sections 5, 9, 11, 13 and 17(h) are necessary for the protection of the business and goodwill of the parties and are considered by the parties to be reasonable for such purpose. The parties agree that any breach of such Sections would cause the other party substantial and irreparable damage and therefore, in the event of any such breach, in addition to other remedies which may be available, the non-breaching party shall have the right to seek specific performance and other injunctive and equitable relief in a court of law.

**13. LICENSE KEY & USE REPORTING** – Customer acknowledges that a security code owned and controlled by Embarcadero or its subsidiaries (the "License Key") is required to render the Licensed Software operational on Customer's computer hardware. Upon use of a permanent License Key to install the Licensed Software on Customer's computer hardware, no other security code will be required for the Licensed Material to operate on such computer hardware in accordance with the terms and restrictions contained in this Agreement. Customer shall not attempt to crack, alter or otherwise derive the License Key. Embarcadero shall promptly provide Customer with all necessary License Keys upon purchase of the Licensed Software or upon any authorized transfer of the Licensed Software to any other hardware equipment permitted under Section 2 of this Agreement. Embarcadero reserves the right to gather data on license usage by Customer for each item of Licensed Software, including License Key numbers, server IP addresses, email addresses of users, domain counts and other information deemed relevant, to ensure that the Licensed Software is being used in accordance with the terms of this Agreement. Embarcadero expressly prohibits domain count overrides without prior written approval. Customer hereby consents to Embarcadero gathering and processing such usage information and agrees not to block, electronically or otherwise, the transmission of data required for compliance with this

Agreement. Any unauthorized use of the Licensed Software by Customer or other use by Customer in violation of the restrictions contained herein shall be deemed a material breach of this Agreement. In addition to the foregoing, within ten (10) business days of Customer's receipt of Embarcadero's written request, Customer shall provide to Embarcadero a written report certifying to Embarcadero the number of licenses for Licensed Software installed, used or accessed by Customer, the identity of the applicable servers, hardware or computers upon which such licenses are installed and, to the extent applicable, the installation location and location and number of users accessing such licenses, together with such other information as may be requested by Embarcadero and necessary to confirm Customer's compliance with the terms of this Agreement. The auditing, reporting and certification rights and obligations set forth in this Section 13 shall survive termination of this Agreement for a period of eighteen months.

**14. ENFORCEABILITY** – If for any reason a court of competent jurisdiction finds any provision of this Agreement, or portion thereof, to be unenforceable, void, invalid or illegal, that provision shall be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement shall continue in full force and effect.

#### **15. ENTIRE AGREEMENT**

(a) Customer acknowledges that it has read this Agreement, understands it and agrees to be bound by its terms. Customer and Embarcadero further agree that, subject to clause (b) below, this Agreement, together with all Order Forms delivered in connection herewith and all exhibits, schedules and annexes hereto, is the complete and exclusive statement of the agreement between Customer and Embarcadero and supersedes all proposals, oral or written, and all other communications between the parties relating to the subject matter of this Agreement, including any shrink-wrap agreements, click-wrap agreements or demo or trial agreements which may accompany the Licensed Material or which may have been previously in force between the parties. Subject to clause (b) below, this Agreement may not be amended, modified, supplemented or altered except by a written agreement that is signed by both parties.

(b) **UNDER NO CIRCUMSTANCES MAY THE TERMS OF THIS AGREEMENT OR ANY EMBARCADERO ORDER FORM BE AMENDED, MODIFIED, SUPPLEMENTED, ALTERED, SUPERSEDED OR REPLACED BY ANY NON-EMBARCADERO ORDER FORM OR NON-EMBARCADERO PURCHASE ORDER OR OTHER SIMILAR INSTRUMENT DELIVERED BY CUSTOMER TO EMBARCADERO. EACH PARTY ACKNOWLEDGES AND AGREES THAT, AS A CONVENIENCE TO CUSTOMER AND ONLY FOR CUSTOMER'S INTERNAL ACCOUNTING PROCEDURES, CUSTOMER MAY DELIVER TO EMBARCADERO A CUSTOMER ORDER FORM OR CUSTOMER PURCHASE ORDER OR OTHER SIMILAR DOCUMENT FOR ANY TRANSACTION CONTEMPLATED HEREUNDER AND THAT NO ACTION BY EMBARCADERO, INCLUDING EMBARCADERO'S DELIVERY OF ANY LICENSED MATERIALS OR ACCEPTANCE OF PAYMENT, SHALL BE DEEMED TO BE ACCEPTANCE OF ANY OF THE TERMS OR CONDITIONS CONTAINED IN SUCH CUSTOMER ORDER FORM OR CUSTOMER PURCHASE ORDER OR OTHER SIMILAR INSTRUMENT AND SUCH TERMS AND CONDITIONS SHALL BE VOID AND OF NO FORCE OR EFFECT, UNLESS ACCEPTED BY EMBARCADERO PURSUANT TO A WRITTEN INSTRUMENT SIGNED BY BOTH PARTIES.**

#### **16. TRIAL LICENSE**

(a) If Customer is has installed Evaluation Software (as defined below) and Customer is authorized by Embarcadero to evaluate such Evaluation Software, then only the terms and conditions of this Section 16 (including those Sections of this Agreement incorporated in this Section 16 by reference) will govern Customer's temporary use of such Evaluation Software (and no other terms of this Agreement shall apply to Customer or govern

Customer's use of Evaluation Software) and upon purchase of a commercial license for such Evaluation Software, this entire Agreement, exclusive of this Section 16, shall apply to Customer and govern all use of such commercial Licensed Material.

(b) Embarcadero is the owner and provider of certain proprietary software and documentation that Customer may request to use, from time to time, on a temporary basis for the sole purpose of testing and evaluating such software prior to purchasing a commercial license for such software ("Evaluation Software"). All installation and usage of Evaluation Software by Customer requires a temporary License Key or trial License Key to be issued by Embarcadero and Customer is only permitted to use Evaluation Software during the term of the temporary License Key or trial License Key issued by Embarcadero.

(c) Evaluation Software is provided to Customer solely for evaluation purposes for Customer's own testing and evaluation purposes (an "Evaluation") and upon delivering a temporary License Key or trial License Key to Customer, Embarcadero hereby grants Customer a non-transferable, nonexclusive, limited license to operate and use the Evaluation Software for such Evaluation during the period commencing on the date Customer downloads the Evaluation Software and ending on the expiration of the temporary License Key or trial License Key (including any extensions thereof authorized by Embarcadero, the "Evaluation Period"). Customer agrees not to cause or permit the reverse engineering, disassembly, modification, translation or decompilation of any Evaluation Software. Customer shall not copy the Evaluation Software, or create or develop any derivative software based upon the Evaluation Software.

(d) Customer acknowledges that all Evaluation Software incorporates confidential and proprietary information developed or acquired by or licensed to Embarcadero and that all results of testing of the Evaluation Software, whether performed by Customer or another third party, are confidential. In no event will Customer publish or disclose the results of any testing or performance specifications of the Evaluation Software without Embarcadero's express prior written consent. Customer shall not remove or deface any confidentiality or proprietary notice placed on the Evaluation Software. The placement of copyright notices on Evaluation Software shall not constitute publication or otherwise impair their confidential nature of such information.

(e) **ALL EVALUATION SOFTWARE PROVIDED BY EMBARCADERO IS DELIVERED "AS IS, WHERE IS" AND EMBARCADERO SPECIFICALLY DISCLAIMS ANY AND ALL WARRANTIES OF ANY KIND INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. EMBARCADERO DOES NOT WARRANT THAT THE EVALUATION SOFTWARE WILL OPERATE WITHOUT INTERRUPTION OR BE ERROR FREE. UNDER NO CIRCUMSTANCES WILL EMBARCADERO OR ITS AUTHORIZED REPRESENTATIVES BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY OR INCIDENTAL DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE OR WHETHER BASED ON CLAIMS BY CUSTOMER OR ANY THIRD PARTY, ARISING OUT OF OR RELATED TO CUSTOMER'S USE OF EVALUATION SOFTWARE. IN NO EVENT WILL THE AGGREGATE LIABILITY OF EMBARCADERO OR ITS AUTHORIZED REPRESENTATIVES INCURRED IN ANY ACTION OR PROCEEDING RELATING TO CUSTOMER'S USE OF EVALUATION SOFTWARE EXCEED ONE HUNDRED DOLLARS.**

(f) The Evaluation and the evaluation license granted under this Section 16 shall automatically terminate immediately upon the earliest of (i) the expiration of the Evaluation Period, (ii) the date upon which Customer purchases a commercial license for such Evaluation Software and (iii) the date upon which either party notifies the other party of its termination of the Evaluation. Upon expiration of the Evaluation Period or the Evaluation, Customer

shall cease using and shall uninstall and destroy the Evaluation Software unless Customer has purchased a commercial license for such Evaluation Software on or prior to such expiration.

- (g) Sections 1, 5, 8, 11, 14, 15 and 17(a) through 17(g) of this Agreement shall be deemed incorporated by this reference in this Section 16 and the Evaluation license granted under this Section 16.

Embarcadero, or in any other way interfere with Embarcadero's contractual or employment relations with any of its employees, nor will Customer hire or engage or attempt to hire or engage any individual who was an employee of Embarcadero at any time during such two-year period.

[END OF AGREEMENT]

## 17. MISCELLANEOUS

- (a) Customer shall not assign, delegate or otherwise transfer this Agreement or any of its rights or obligations hereunder to any other person or entity, whether by contract, merger or operation of the law, without Embarcadero's prior written consent. In the event of any merger of Customer or a sale of substantially all of the assets of Customer in which Customer is not the surviving entity, Customer may assign or transfer any licenses granted under this Agreement; provided, that Customer provides Embarcadero with written notice of such transfer within thirty days of such merger or sale. Any assignment or delegation in breach of this Section 17(a) shall be void. This Agreement shall be binding upon the parties hereto and shall inure to the benefit of the parties hereto and their respective permitted successors and assigns.
- (b) All notices or approvals required or permitted under this Agreement must be given in writing and delivered to the appropriate party at the address set forth in this Agreement or in any Order Form delivered in connection with this Agreement.
- (c) The waiver of compliance with or breach of any term or condition of this Agreement or the failure of a party to exercise any right under this Agreement shall in no event constitute a waiver as to any other failure to comply or breach, whether similar or dissimilar in nature, or prevent the exercise of any right under this Agreement.
- (d) **THIS AGREEMENT WILL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW RULES. EMBARCADERO AND CUSTOMER HEREBY IRREVOCABLY AGREE ON BEHALF OF THEMSELVES THAT THE SOLE AND EXCLUSIVE JURISDICTION AND VENUE FOR ANY LITIGATION ARISING FROM OR RELATING TO THIS AGREEMENT OR THE SUBJECT MATTER HEREOF SHALL BE IN AN APPROPRIATE FEDERAL OR STATE COURT IN THE STATE OF TEXAS LOCATED IN TRAVIS COUNTY.**
- (e) Unless otherwise specified herein, the rights and remedies of Embarcadero set forth in this Agreement are not exclusive and are in addition to any other rights and remedies available to it at law or in equity. In the event of Customer's failure to pay any fees set forth in this Agreement or any applicable Order Form, Embarcadero shall be entitled to recover its costs and expenses, including but not limited to reasonable attorneys' fees, incurred in any collection efforts or legal action.
- (f) This Agreement is not intended to be nor shall it be construed as a joint venture, association, partnership or other form of business organization or agency relationship.
- (g) Headings used in this Agreement are for reference purposes only and shall not be used to modify the meaning of the terms and conditions of this Agreement. This Agreement may be executed in counterparts, all of which shall constitute one single agreement between the parties hereto.
- (h) In consideration of the mutual covenants contained herein, including the rights and licenses granted to Customer herein, the parties hereto do hereby agree that for a period of two years following Customer's most recent purchase of any licenses or services, including Maintenance Service, from Embarcadero or its authorized representative, Customer shall not solicit, induce, hire, engage, or attempt to hire or engage any employee of