

SOFTWARE LICENSE AGREEMENT

WhereScape, Inc.

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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. WHERESCAPE 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 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 Purchase Order (as defined below) pursuant to which such license is purchased, is between WhereScape, Inc., a Delaware corporation ("WhereScape"), and, in the case of any Evaluation Software, the customer to whom temporary License 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 WhereScape agrees to provide to Customer and Customer agrees to acquire from WhereScape one or more licenses to install and use certain software and use certain documentation and maintenance services related thereto, owned or licensed by WhereScape, as set forth on the Purchase Order delivered in connection with this Agreement. To the extent any terms or conditions contained in the Purchase Order conflict with the terms or conditions contained in this Agreement, the terms and conditions of the Purchase Order 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 Purchase Order with the terms contained herein. The Purchase Order together with the terms and conditions of this Agreement (as defined below), shall constitute and be construed as a single agreement consisting of the terms and conditions contained in the Purchase Order together with the terms of this Agreement. This Agreement specifically supersedes and replaces the terms and conditions of all prior agreements between WhereScape 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 WhereScape's products, or which have been previously in force between the parties. If Customer is evaluating Evaluation Software, 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) "Affiliate" means with respect to any specified person or entity, any other person or entity controlling, controlled by or under common control with such person or entity, where "control" means the ownership, directly or indirectly, of 50 percent or more of the ownership interest of such specified entity.
- (b) "Agreement" means this software license agreement, together with all exhibits, schedules, annexes and Purchase Orders 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.
- (c) "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.
- (d) "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.
- (e) "Licensed Group" means, with respect to any license that is expressly restricted to a group pursuant to Section 2(c) below, the group of users specified in the Purchase Order relating to such licenses designated by (i) geographic location or jurisdiction, and/or (ii) a corporate entity or business unit subdivision thereof.
- (f) "Licensed Documentation" means the published user manuals that WhereScape makes generally available for the Licensed Software.
- (g) "Licensed Material" means the Licensed Software and the Licensed Documentation.
- (h) "Licensed Software" means the machine-readable object code version of (i) the software specified on each Purchase Order, 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.
- (i) "Maintenance Services" means the technical support services provided by WhereScape pursuant to Section 4 hereof.
- (j) "Maintenance Term" means the period of time for which Customer has purchased Maintenance Services, as evidenced by the Purchase Order delivered by Customer in connection therewith, together with all renewals effected in accordance with Section 4 of this Agreement.

- (k) "Purchase Order" means (i) WhereScape'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 WhereScape 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-WhereScape price quote, purchase order, order form or purchase confirmation delivered by Customer to WhereScape but solely to the extent permitted by and delivered in accordance with Section 15.
- (l) "Update" means any revision, enhancement, improvement or modification to or programming fix for the Licensed Software or Licensed Documentation which WhereScape 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 Purchase Order delivered in connection with this Agreement, WhereScape hereby grants Customer and Customer hereby accepts from WhereScape, 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. Customer's right to use the Licensed Material shall also extend to use by Customer's Affiliates, provided that (x) such Customer Affiliates have agreed to abide by the terms of this Agreement, and (y) Customer shall remain primarily liable for all acts and omissions by such Customer Affiliates.
- (b) **License Usage and Restrictions** – Customer acknowledges and agrees that, as between Customer and WhereScape, WhereScape 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 Material in accordance with the terms of this Agreement and each applicable Purchase Order. Customer further acknowledges and agrees that the licenses granted hereunder and the restrictions applicable to Customer's installation and use of the License 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 Purchase Order relating to the Licensed Software. Customer is encouraged to carefully review all terms and restrictions contained in this Section 2 and each Purchase Order. Customer hereby agrees to the following license restrictions and conditions applicable to the Licensed Software as set forth in the Purchase Orders delivered by Customer under this Agreement:
 - (i) For all Licensed Software made generally available by WhereScape 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 one or more 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 Group, provided that only the Named User uses the Licensed Software; and

- (ii) For all Licensed Software made generally available by WhereScape 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 Group 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 Licensed Group.
- (c) **Group Restrictions.** To the extent any license purchased hereunder is restricted to a Licensed Group, such Licensed Group shall be expressly set forth in the Purchase Order, and Customer shall not permit install, access, or use of the Licensed Software (i) from any location, and/or (ii) by any corporate entity or business unit subdivision, other than the Licensed Group. To the extent the Purchase Order omits any reference to a Licensed Group and does not otherwise limit or restrict Customer's right to install, access, or use the Licensed Software to a geographic territory and/or corporate entity, such licenses of the Licensed Software may be installed, accessed and used globally by the Customer's corporate entity set forth on the applicable Purchase Order.
- (i) **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.
- (j) **Maintenance Optional** – Customer's right to use the Licensed Software shall survive any election by Customer to terminate or not renew Maintenance Services from WhereScape.
- (k) **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 Purchase Orders 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, WhereScape'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 WhereScape 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 Material shall

be deemed to have passed to Customer once WhereScape 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 a Purchase Order by Customer, WhereScape shall deliver an invoice to Customer specifying the license fees and Maintenance Services fees payable pursuant to such Purchase Order. 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 WhereScape 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 WhereScape if its credit card has changed or has been declined and (iii) Customer hereby consents to WhereScape automatically processing and charging all fees due by Customer hereunder, including all renewal fees, to the credit card submitted by Customer. All fees payable by Customer in respect of such 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 WhereScape's income) shall also be payable by Customer in accordance with applicable law.

4. MAINTENANCE – WhereScape 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 a Purchase Order, WhereScape shall provide Maintenance Services in accordance with this Section 4 and in accordance with any additional Maintenance Services terms specified in such Purchase Order.

- (a) **Maintenance Agreement** – WhereScape 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 Purchase Order 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 WhereScape will invoice Customer unless WhereScape 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 WhereScape and making payment of WhereScape'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 WhereScape, 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 WhereScape, 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 WhereScape or its applicable licensor, whether recognized by or perfected under applicable local law. Customer shall promptly notify WhereScape of any infringement of WhereScape's proprietary rights of which it becomes aware.

6. LIMITED WARRANTIES

- (a) **Warranty** - WhereScape warrants to Customer that during the first thirty (30) days after purchase of the Licensed Software (the "Warranty Period") such Licensed Software will perform substantially as described in the accompanying Licensed Documentation. WhereScape 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, WhereScape breaches the warranty set forth in clause (a) above, then Customer shall promptly notify WhereScape of such Error or breach and WhereScape 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, WhereScape 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. WhereScape'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 WhereScape'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 WHERESCAPE 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, WhereScape 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 WhereScape in writing no later than thirty (30) days after Customer's notice of any potential claim, (ii) Customer permits WhereScape 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 WhereScape all available information, reasonable assistance, and authority to enable WhereScape to do so.

- (b) **Alternative Remedy** - If a claim described in Paragraph 7(a) may or has been asserted, Customer will permit WhereScape, at WhereScape'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 WhereScape or its authorized representative for such Licensed Material, less depreciation based on a 3-year straight-line depreciation schedule.
- (c) **Limitation** - WhereScape 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 WhereScape or its authorized representative, (ii) the failure to promptly install an Update, (iii) the combination of the Licensed Software with other non-WhereScape software and (iv) continuing the allegedly infringing activity after receiving written notice of such infringement claim from WhereScape.

8. NO CONSEQUENTIAL DAMAGES - UNDER NO CIRCUMSTANCES WILL WHERESCAPE 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 MATERIAL, 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 WHERESCAPE 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 Material incorporate confidential and proprietary information developed or acquired by or licensed to WhereScape 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 WhereScape'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 prior written notice to WhereScape, Customer may terminate this Agreement without any right to refund, except as otherwise expressly set forth in 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, WhereScape 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 WhereScape 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 Material 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 Terror (currently, Cuba, Iran, North Korea, and Syria), including any future changes to the government's list of State Sponsors of Terror.

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 WhereScape 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. WhereScape 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. WhereScape 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. WhereScape expressly prohibits domain count overrides without prior written approval. Unless otherwise agreed in writing by both parties, Customer hereby consents to WhereScape 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 WhereScape's written request, Customer shall provide to WhereScape a written report certifying to WhereScape 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 WhereScape 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 WhereScape further agree that, subject to clause (b) below, this Agreement, together with all Purchase Orders delivered in connection herewith and all exhibits, schedules and annexes hereto, is the complete and exclusive statement of the agreement between Customer and WhereScape 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 WHERESCAPE PURCHASE ORDER BE AMENDED, MODIFIED, SUPPLEMENTED, ALTERED, SUPERSEDED OR REPLACED BY ANY NON-WHERESCAPE INVOICE OR NON-WHERESCAPE PURCHASE ORDER OR OTHER SIMILAR INSTRUMENT DELIVERED BY CUSTOMER TO WHERESCAPE. EACH PARTY ACKNOWLEDGES AND AGREES THAT, AS A CONVENIENCE TO CUSTOMER AND ONLY FOR CUSTOMER'S INTERNAL ACCOUNTING PROCEDURES, CUSTOMER MAY DELIVER TO WHERESCAPE A CUSTOMER INVOICE OR CUSTOMER PURCHASE ORDER OR OTHER SIMILAR DOCUMENT FOR ANY TRANSACTION CONTEMPLATED HEREUNDER AND THAT NO ACTION BY WHERESCAPE, INCLUDING WHERESCAPE'S DELIVERY OF ANY LICENSED MATERIAL OR ACCEPTANCE OF PAYMENT, SHALL BE DEEMED TO BE ACCEPTANCE OF ANY OF THE TERMS OR CONDITIONS CONTAINED IN SUCH CUSTOMER INVOICE 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 WHERESCAPE PURSUANT TO A WRITTEN INSTRUMENT SIGNED BY BOTH PARTIES.

16. TRIAL LICENSE

- (a) If Customer has installed Evaluation Software (as defined below) and Customer is authorized by WhereScape to evaluate such Evaluation Software (as defined below), 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 the Licensed Material.
- (b) WhereScape 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 WhereScape and Customer is only permitted to use Evaluation Software during the term of the temporary License Key or trial License Key issued by WhereScape.
- (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, WhereScape 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 WhereScape, the "Evaluation Period"). Without limiting the foregoing, Licensee may not use the Evaluation Software to create, modify, enhance or in way alter publicly distributed software, or for any other commercial purpose. 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 WhereScape 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 WhereScape's express prior written consent. Customer shall not remove or deface of 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 WHERESCAPE IS DELIVERED "AS IS, WHERE IS" AND WHERESCAPE SPECIFICALLY DISCLAIMS ANY AND ALL WARRANTIES OF ANY KIND INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. WHERESCAPE DOES NOT WARRANT THAT THE EVALUATION SOFTWARE WILL OPERATE WITHOUT INTERRUPTION OR BE ERROR FREE. UNDER NO CIRCUMSTANCES WILL WHERESCAPE 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 WHERESCAPE 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.

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 WhereScape or its authorized representative, Customer shall not solicit, induce, hire, engage, or attempt to hire or engage any employee of WhereScape, or in any other way interfere with WhereScape'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 WhereScape 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 by operation of the law, without WhereScape'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 WhereScape 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 Purchase Order 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. Unless otherwise specified herein, the rights and remedies of WhereScape 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.

(d) **THIS AGREEMENT WILL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW RULES. WHERESCAPE 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 WhereScape 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.

(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