

SOFTWARE LICENSE

THIS SOFTWARE LICENSE AGREEMENT (the "Agreement") effective as of _____ ("Effective Date"), is entered into by and between Radiance Technologies, Inc. ("Company"), a Delaware Corporation, with its operations located at 5050 El Camino Real, Suite 221, Los Altos, CA and _____ ("Licensee"), a _____, with its operations located at _____.

1. Definitions.

- 1.1. "Back-up Server" means the single server used to run _____ for back-up, recovery and system fail-over capability, whether the application is hosted or installed.
- 1.2. "Confidential Information" means all terms of this Agreement and: (a) with respect to information of Company, all Software and Services, Documentation, technology, drawings, diagrams, benchmark tests, specifications, trade secrets, source code, and any other business information supplied to Licensee by Company; and (b) with respect to information of Licensee, all confidential and/or proprietary business information of Licensee supplied by Licensee to Company. Confidential Information (other than source code), shall be conspicuously marked as confidential if in tangible form, or identified by the disclosing party as confidential at the time of disclosure if disclosed orally or in other intangible form.
- 1.3. "Development Server" means the single server used to run _____ for customer training, testing and development, whether the application is hosted or installed.
- 1.4. "Confidential Information" means information about all or any portion of the Software or the Documentation, including but not limited to source code, object code, pricing, processes, modifications, enhancements or other information which the parties have endeavored to withhold from the public.
- 1.5. "Documentation" shall mean the manuals, help guides, and other materials for the Software provided to Licensee, including any updated Documentation.
- 1.6. "License(s)" means the software license(s) granted by Company to Licensee, in accordance with Section 2.0 below.
- 1.7. "Licensee Data" means the business and contract information which Licensee desires to process using the Software.
- 1.8. "Licensee Marks" means those Licensee icons, trademarks, service marks and logos that Licensee desires to have displayed on the Software's web pages.
- 1.9. "Maintenance and Support Services" means the services provided by Company under a separate Maintenance and Support Agreement between the parties.
- 1.10. "Prerequisite Environment" means the minimum configuration of hardware and software programs that is necessary for the Software to operate, as stated in the Documentation.
- 1.11. "Production Server" means the single server that is used to run _____ in active business use.
- 1.12. "Professional Services" means the Company consulting services described in a separate statement of work which shall be governed by a separate Services Agreement between the parties.
- 1.13. "Services" means the Company Maintenance and Support Services, Hosting Services (if ordered), and/or Professional Services. Such Services shall be governed by a separate agreement between the parties.

- 1.14. "Software" means the object code of the commercially released version of the Company software programs made available by Company under this Agreement, and all Maintenance Releases and Updates provided by Company.
- 1.15. "Software Description" means the Exhibit A to this Agreement which specifically designates the Software ordered by Licensee and may include special terms and conditions for that particular order.
- 1.16. "Subsequent Entity" means: (a) any affiliate, subsidiary or other legal entity that is majority-controlled by Licensee; and (b) any legal entity that is wholly acquired by or merged with Licensee, subsequent to the Effective Date. Notwithstanding the foregoing, a Subsequent Entity shall not include any entity that competes with Company. Upon request, Licensee shall provide written confirmation of the status of the Subsequent Entity.
- 1.17. "Use" means: (a) the execution and utilization of the Software by means of the Hosting Services for Licensee's own information processing in accordance with this Agreement, if the Software is hosted by Company; or (b) the execution and utilization of the Software on the Production Server by Licensee for its own information processing in accordance with this Agreement.
- 1.18. "User" means any of the following categories of named users that Licensee authorizes to Use the Software, and for which Licensee has purchased licenses. Licensee shall be responsible for the compliance of all Users to the terms and conditions of this Agreement.

2. License Grant.

- 2.1. License Grant. Subject to the terms and conditions of this Agreement, and in consideration of Licensee's payment for the Software and Services, Company grants Licensee a non-exclusive, non-sub-licensable, non-transferable license to: (a) Use the Software to process Licensee's data for Licensee's own business purposes; and (b) use the Documentation only in connection with Use of the Software. Licensee shall only allow Users to access and Use the Software, and shall ensure that Users comply with the terms and conditions of this Agreement. The Software shall only be used on the Production Server, provided, however, in the event the Production Server is inoperable, Licensee may transfer the Software to substitute Production Server upon notice to Company. Licensee shall not otherwise use, copy or transfer the Software, and shall not modify, create derivative works of, distribute, sell, assign, pledge, sublicense, lease, loan, rent, timeshare, or deliver the Software, nor permit any third party to do any of the foregoing. Licensee may not remove from or alter any of the trademarks, trade names, service marks, logos, patent, copyright or other proprietary notices or markings contained on or in the Software or Services, or add any logos, notices or markings to the Software or Services. Licensee may not derive or attempt to derive the source code of the Software by any means, nor permit any other party to derive or attempt to derive such source code.
- 2.2. Software Instances. Licensee shall be entitled to the production and non-production instances as set forth in Exhibit B. In the event that Licensee wishes to license more instances of the Software, Licensee must pay additional fees.
3. Limited Warranty. Company warrants that the Software, when used as permitted under this Agreement and in accordance with the Documentation, will operate substantially as described in the Documentation for ninety (90) days from the Effective Date ("Warranty Period"). Company does not warrant that the Software will be error-free, uninterrupted or meet Licensee's specific requirements. Company will, at its own expense and as its sole obligation and Licensee's exclusive remedy for any breach of warranty, use commercially reasonable efforts to correct any reproducible error in the Software reported to Company

by Licensee during the Warranty Period, or, if Company determines that it is unable to do so, Company will refund to Licensee the pro-rated Maintenance and Support Services fee for the current year. In the event of a refund remedy, this Agreement and Licensee's right to use the Software will be terminated. Company shall have no warranty obligation if Licensee fails to provide the Prerequisite Environment. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 3, THE SOFTWARE AND THE MAINTENANCE AND SUPPORT SERVICES ARE PROVIDED "AS IS". EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 3, COMPANY AND ITS SUPPLIERS DISCLAIM ALL WARRANTIES AND CONDITIONS WHATSOEVER, EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE. Licensee acknowledges that it has not entered into this Agreement in reliance upon any warranty or representation except those specifically set forth herein.

4. Training and Professional Services.

- 4.1. **Training.** At least one (1) User must take Company's standard training course on the Software. Such training must occur within ninety (90) days of the Effective Date. Company shall conduct standard user training at Licensee's training facility or Company's training facility. Additional training beyond Company's standard training is available at Company's then current supplemental training fees. If training is to be conducted at a Licensee facility, Licensee shall be responsible for providing all required training infrastructure (including, without limitation, adequate facilities, overhead projector, Internet access and computers for all students) and reimbursement of reasonable travel expenses, if any, for Company trainers.
- 4.2. **Professional Services.** If requested by Licensee, Company shall perform the Professional Services. Any such Professional Services shall be subject to the terms and conditions set forth in a separate Services Agreement between the parties. All resulting work and documentation related thereto shall be deemed to form part of the Software.

5. Proprietary Rights and Confidentiality.

- 5.1. **Ownership.** Company and its suppliers retain all rights, title and interest in and to all intellectual property rights embodied in or associated with the Software, Documentation, derivative works thereof and related materials. Licensee and its suppliers retain all rights, title and interest in and to all intellectual property embodied in or associated with the Licensee Data, and Licensee Marks. There are no implied licenses under this Agreement, and any rights not expressly granted to Licensee hereunder are reserved by Company and/or its suppliers.
- 5.2. **Confidentiality.** Each party agrees that it will not make use of, disseminate, or in any way disclose the other party's Confidential Information to any person, firm or business, except as authorized by this Agreement and to the extent necessary for performance of this Agreement. Each party agrees that it will disclose Confidential Information only to those of its employees and contractors who need to know such information and who have previously agreed to be bound by the nondisclosure terms and conditions of this Agreement. Each party agrees that it will treat all Confidential Information of the other party with the same degree of care as it accords its own confidential information, and each party represents that it exercises at least reasonable care to protect its own confidential information. However, a party bears no responsibility for safeguarding the Confidential Information of the disclosing party that: (a) is or becomes publicly available through no illegal act or omission of the receiving party; (b) is already in the receiving party's lawful possession prior to disclosure, and was not obtained by the receiving party from the disclosing party; (c) is lawfully obtained by the receiving party from a third party without restriction on disclosure; or (d) independently developed by the receiving party without reference to or use of the Confidential Information of the disclosing party. A party may disclose Confidential Information as required to be disclosed by applicable laws or regulations, or by order of a court or other governmental authority, provided that such party: (a) promptly notifies the other party of the

required disclosure; and (b) provides reasonable assistance to the other party in obtaining a protective order against disclosure. Each party shall ensure that any employees or contractors of such party involved in the exercise of its rights or performance of its obligations under this Agreement are bound by a confidentiality agreement at least as restrictive as the terms set forth in this Section 5.2.

6. Payment, Taxes and Audit.

- 6.1. **Payments.** The Software License fees due under this Agreement are set forth in **Exhibit B**. Licensee shall pay Company the foregoing fees, in consideration of the Software license and services provided herein. Company may increase the renewal fees for the Hosting Services to cover any increased cost of the Hosting Services to Company. Reasonable travel expenses incurred by Company consultants and trainers shall be invoiced to Licensee upon completion of travel. Unless otherwise stated, all payments due hereunder shall be paid on the Effective Date. Late fees for all the foregoing payments shall bear interest from the date due at the rate of one and one-half percent (1.5%) per month (prorated for partial periods), or the maximum rate permitted by applicable law, whichever is less. In the event that payment due is collected at law, through an attorney-at-law, or under advice therefrom, or through a collection agency, Licensee agrees to pay all costs of collection, including, without limitation, all court costs and reasonable attorney's fees.
- 6.2. **Taxes.** All fees and payments stated herein are exclusive of all taxes and similar fees now in force or enacted in the future that may be imposed on the Software License and Services. Licensee shall pay any sales, use or any other tax related to the parties' performance of their obligations or the exercise of their rights under this Agreement, exclusive of taxes based on Company's net income.
- 6.3. **Audit.** Licensee shall maintain accurate and complete records as necessary to verify compliance with this Agreement, including the number of Users, and the types of Software components licensed. Company may audit Licensee to verify such compliance with 30 days' notice to Licensee. Audits may be conducted by an independent third party auditing firm during normal business hours. All audits shall be conducted at Company's expense, unless the results establish that Licensee has underpaid Company by more than five percent (5%) of the amount actually due, in which case Licensee shall pay all amounts due and bear the expense of the audit.

7. Term and Termination.

- 7.1. **Term.** This Agreement shall commence upon the Effective Date and shall continue to be in full force and effect, unless terminated earlier in accordance with the below. The term of each license granted hereunder is set forth in **Exhibit A** to this Agreement.
- 7.2. **Termination for Breach.** Either party may immediately terminate this Agreement if the other party materially breaches this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice from the non-defaulting party, specifying the nature of the breach. In addition, Company may immediately terminate this Agreement, or at its option, immediately suspend its efforts hereunder, in the event Licensee is in breach of Section 2.0 and 5.0 of this Agreement.
- 7.3. **Effects of Termination.** Upon termination of this Agreement, all licenses granted hereunder, and services being performed shall terminate immediately, and each party shall return to the disclosing party, or destroy, all Confidential Information. Sections 1.0, 5.0, 6.0, 7.3, 8.0, 9.0 and 10.0, and any obligation to pay any owed but unpaid amounts, shall survive any termination. Company shall not be liable to Licensee for any termination of this Agreement in accordance with its terms.

8. Indemnity.

8.1. **By Company.** Company will defend any claim, suit, or proceeding brought against Licensee based on a claim that the Software directly infringes any third party's U.S. patent, copyright, trademark or trade secret (a "Claim"). Company agrees to pay all damages and costs (including reasonable attorneys' fees) finally awarded by a court of competent jurisdiction. If the Software is held to infringe, and its use is enjoined by a court of competent jurisdiction, or Company reasonably believes such use may become enjoined, Company may, at its own expense and at its option: (a) procure for Licensee the right to continue use of the Software; (b) replace the affected Software with non-infringing software and documentation of substantially equivalent function; or (c) modify the Software so it becomes non-infringing. If none of the foregoing is commercially reasonable, Company may terminate this Agreement and Licensee shall cease use of the Software. Notwithstanding the foregoing, Company shall have no indemnity obligation under this section for any Claim relating to: (i) unauthorized modifications of the Software, if such Claim would not have arisen or such infringement would not have occurred but for such modifications; (ii) the combination or use of the Software with non-Company products, if such Claim would not have arisen or such infringement would not have occurred but for such combination or use; or (iii) Licensee Data or Marks.

8.2. **By Licensee.** Licensee shall defend and indemnify Company and its suppliers against any and all claims, losses, costs and expenses, including reasonable attorneys' fees, which Company and its suppliers may incur as a result of a claim brought by third parties arising from Licensee's or Subsequent Entity's use of the Software or Services, except to the extent Company may be responsible for a claim as set forth in Section 8.1.

8.3. **Procedure.** The foregoing obligations are conditioned on the party seeking indemnification (the "Indemnified Party"): (a) giving the other party (the "Indemnifying Party") prompt written notice of the relevant claim; (b) reasonably cooperating with the Indemnifying Party, at the Indemnifying Party's expense, in the defense of such claim; and (c) giving the Indemnifying Party the right to control the defense and settlement of any such claim. The Indemnified Party shall have the right to participate in the defense at its expense.

8.4. **Sole Remedy.** The foregoing states each party's entire liability, and the other party's sole and exclusive remedy, with respect to any infringement or misappropriation of any intellectual property right of any third party.

9. **Limitation of Liability.** IN NO EVENT SHALL COMPANY OR ITS SUPPLIERS BE LIABLE TO LICENSEE, WHETHER IN CONTRACT OR IN TORT OR UNDER ANY OTHER LEGAL THEORY (INCLUDING, WITHOUT LIMITATION, STRICT LIABILITY AND NEGLIGENCE) FOR LOST PROFITS OR REVENUES, LOSS OR INTERRUPTION OF USE, LOST OR DAMAGED DATA, REPORTS, DOCUMENTATION OR SECURITY, OR SIMILAR ECONOMIC LOSS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR SIMILAR DAMAGES INCURRED BY LICENSEE OR ANY THIRD PARTY (EXCEPT FOR CLAIMS DESCRIBED IN SECTION 8.0), EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH CLAIM, AND IN NO EVENT SHALL COMPANY'S OR ITS SUPPLIERS' LIABILITY UNDER ANY CLAIM MADE BY LICENSEE EXCEED THE TOTAL AMOUNT OF FEES PAID BY LICENSEE TO COMPANY RELATING TO THE AFFECTED SOFTWARE OR SERVICES. NO ACTION, REGARDLESS OF FORM, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT MAY BE BROUGHT BY LICENSEE MORE THAN ONE (1) YEAR AFTER THE FIRST TO OCCUR OF THE TERMINATION OF THIS AGREEMENT, OR THE EVENT GIVING RISE TO SUCH CAUSE OF ACTION.

10. General.

10.1. **Governing Law.** This Agreement will be governed and construed in accordance with the laws of the State of California without giving effect to conflict of laws principles. Both parties submit to

personal jurisdiction in California and further agree that any cause of action arising under this Agreement shall be brought in a court in Santa Clara County, California. This Agreement shall not be governed by the United Nations Convention of Contracts for the International Sale of Goods. Governing Law; Dispute Resolution, Severability; Waiver. Any dispute relating to the terms, interpretation or performance of this Agreement (other than claims for preliminary injunctive relief or other pre-judgment remedies) will be resolved at the request of either party through binding arbitration. Arbitration will be conducted in Santa Clara County, California, under the rules and procedures of the American Arbitration Association ("AAA"). The parties will request that AAA appoint a single arbitrator. In the event any provision of this Agreement is held by a tribunal of competent jurisdiction to be contrary to the law, the remaining provisions of this Agreement will remain in full force and effect. The waiver of any breach or default of this Agreement will not constitute a waiver of any subsequent breach or default, and will not act to amend or negate the rights of the waiving party.

- 10.2. Independent Contractors. The parties are independent contractors, and no agency, partnership, franchise, joint venture, or employment relationship is intended or created by this Agreement. Neither party shall make any warranties or representations on behalf of the other party.
- 10.3. Assignment. Licensee may not assign its rights or delegate its duties hereunder without Company's prior written consent and any purported attempt to do so shall be null and void. Company may assign this Agreement in part and/or delegate the performance of certain parts of the Services to a third party, provided Company remains responsible to Licensee for the delivery of such parts.
- 10.4. U.S. Government End Users. If Licensee is a branch agency or instrumentality of the United States Government, the Software is provided with Restricted Rights. Use, duplication, or disclosure is subject to the restrictions set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 or subparagraphs (c)(1) and (2) of the Commercial Computer Software - Restricted Rights at 48 CFR 52.227-19, as applicable. The manufacturer is Company.
- 10.5. Export Control. Because the Software is subject to the export control laws of the United States and other jurisdictions, Licensee shall not export or re-export the Software without the appropriate United States and foreign government licenses. Licensee shall otherwise comply with all applicable export control laws and shall defend, indemnify and hold Company and its suppliers harmless from any claims arising out of Licensee's violation of such export control laws.
- 10.6. The Software is not fault-tolerant and is not designed, manufactured or intended for use or resale as on-line control equipment in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, or weapons systems, in which the failure of the Software could lead directly to death, personal injury, or severe physical or environmental damage ("High Risk Activities"). Licensee hereby represents and warrants that it will not use the Software for any High Risk Activities. Company and its suppliers specifically disclaim any express or implied warranty of fitness for High Risk Activities and all liability on account of such use.
- 10.7. Marketing. In consideration of the pricing offered for the software license and services fees stated in Exhibit B, Licensee shall reasonably cooperate with Company on publicity and public relations activities. Such cooperation may include the following:
 - 10.7.1. Within thirty (30) days of execution of the Agreement, Licensee shall cooperate with Company to develop a press release to be issued by Company, which announces that (in substantially similar terms) Licensee has selected Company licensed products for its use;
 - 10.7.2. Within sixty (60) days of execution of the Agreement, Licensee shall cooperate with Company to develop a "Customer Success Story" document and ROI study to be included

in Company's sales and marketing materials, describing its business challenges, its evaluation/selection criteria, its expected use of _____, and anticipated return;

- 10.7.3. Upon execution of the Agreement, Licensee shall permit Company to use Licensee's name or logo in Company's sales and marketing materials, including business presentations, customer lists, and Company's company website;
- 10.7.4. Licensee shall participate in a minimum of 4 executive level (VP or above) reference calls with prospective Company customers, media and/or industry analysts, at Company's request, during the first 12 months following execution of the Agreement. Company shall provide Licensee with reasonable advance notification of such request; and
- 10.7.5. Licensee shall participate in up to 2 local speaking engagements with prospective Company customers, media and/or industry analysts, at Company's request, within the first 12 months following execution of the Agreement. Company shall provide Licensee with reasonable advance notification of such request.
- 10.8. No Third Party Beneficiaries. Company and Licensee agree that, except as expressly set forth herein, there shall be no other third party beneficiaries to this Agreement.
- 10.9. Severability. If any provision herein is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision that most closely approximates the intent and economic effect of the invalid provision. Headings are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section.
- 10.10. Force Majeure. Except as otherwise provided, if performance hereunder (other than payment) is prevented, hindered or delayed by elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, rebellions, revolutions, strikes, or labor disputes, the affected party, upon giving prompt notice to the other party, shall be excused from such performance to the extent of such condition. Each party acknowledges that website operations may be affected by numerous factors outside of the party's control.
- 10.11. Non-Solicitation. During the period beginning on the Installation Date and ending on the first anniversary of the termination or expiration of this Agreement in accordance with its terms, Licensee shall not, and shall ensure that its affiliates do not, directly or indirectly, solicit or attempt to solicit for employment any persons employed by Company during such period.
- 10.12. Notice. If installed internally, Licensee must notify Company of any location change in the Production Server within thirty (30) days. Any notice under this Agreement will be in writing and delivered by personal delivery, overnight courier, confirmed facsimile, confirmed email, or certified/registered mail, return receipt requested, and will be deemed given upon personal delivery, one (1) day after deposit with an overnight courier, five (5) days after deposit in the mail, or upon confirmation of receipt of facsimile or email. Notices will be sent to a party at its address set forth above or such other address as that party may specify in writing pursuant to this section.
- 10.13. Entire Agreement; Waiver. This Agreement and its Exhibit(s) set forth the entire understanding and agreement of the parties, and supersede any and all oral or written agreements or understandings between the parties, as to the subject matter of the Agreement. The terms and conditions hereof shall prevail over any written instrument submitted by Licensee, including, but not limited to Licensee purchase orders. This Agreement may be changed only by a writing signed by both parties. The waiver of a breach of any provision of this Agreement will not operate or be interpreted as a waiver of any other or subsequent breach.

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

COMPANY:

CUSTOMER:

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____