

Black Duck Software Inc.
265 Winter Street
Waltham, MA 02451
1-781-891-5100
www.blackducksoftware.com

**Carahsoft Rider to Manufacturer End User License Agreements
(for U.S. Government End Users)**

- 1. Scope.** This Carahsoft Rider and the Manufacturer End User License Agreement (EULA) establish the terms and conditions enabling Carahsoft to provide Software and Services to U.S. Government agencies (the "Client" or "Licensee").
- 2. Applicability.** The terms and conditions in the attached Manufacturer EULA are hereby incorporated by reference to the extent that they are consistent with Federal Law (e.g., the Anti-Deficiency Act (31 U.S.C. § 1341(a)(1)(B)), the Contracts Disputes Act of 1978 (41 U.S.C. § 601-613), the Prompt Payment Act, the Anti-Assignment statutes (31 U.S.C. § 3727 and 41 U.S.C. 15), 28 U.S.C. § 516 (Conduct of Litigation Reserved to Department of Justice (DOJ), and 28 U.S.C. § 1498 (Patent and copyright cases)). To the extent the terms and conditions in the Manufacturer's EULA are inconsistent with the Federal Law (See FAR 12.212(a)), they shall be deemed deleted and unenforceable under any resultant orders under Carahsoft's contract #GS-35F-0119Y, including, but not limited to the following:
 - (a) Contracting Parties.** The Government customer (Licensee) is the "Ordering Activity", "defined as an entity authorized to order under GSA contracts as set forth in GSA ORDER 4800.2G ADM, as may be revised from time to time. The Licensee cannot be an individual because any implication of individual licensing triggers the requirements for legal review by Federal Employee unions. Conversely, because of competition rules, the contractor must be defined as a single entity even if the contractor is part of a corporate group. The Government cannot contract with the group, or in the alternative with a set of contracting parties.
 - (b) Changes to Work and Delays.** Subject to GSAR Clause 552.243-72, Modifications (Federal Supply Schedule) (July 200 0) (Deviation I 2010) (AUG 1987), and 52.212 -4 (f) Excusable delays. (JUN 2010) regarding which the GSAR and the FAR provisions shall take precedence.
 - (c) Contract Formation.** Subject to FAR Sections 1.601(a) and 43.102, the Government Order must be signed by a duly warranted contracting officer, in writing. The same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government.
 - (d) Audit.** During the term of this Agreement: (a) If Ordering Activity's security requirements included in the Order are met, Manufacturer or its designated agent may audit Ordering Activity's facilities and records to verify Ordering Activity's compliance with this Agreement. Any such audit will take place only during Ordering Activity's normal business hours contingent

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upon prior written notice and adherence to any security measures the Ordering Activity deems appropriate, including any requirements for personnel to be cleared prior to accessing sensitive facilities. Carahsoft on behalf of the Manufacturer will give Ordering Activity written notice of any non-compliance, including the number of underreported Units of Software or Services ("Notice"); or (b) If Ordering Activity's security requirements are not met and upon Manufacturer's request, Ordering Activity will run a self assessment with tools provided by and at the direction of Manufacturer ("Self Assessment") to verify Ordering Activity's compliance with this Agreement.

(e) Termination. Clauses in the Manufacturer EULA referencing termination or cancellation the Manufacturer's EULA are hereby deemed to be deleted. Termination shall be governed by the FAR 52.212-4 and the Contract Disputes Act, 41 U.S.C. §§ 601-613, subject to the following exceptions:

Carahsoft may request cancellation or termination of the License Agreement on behalf of the Manufacturer if such remedy is granted to it after conclusion of the Contracts Disputes Act dispute resolutions process referenced in Section Q below or if such remedy is otherwise ordered by a United States Federal Court..

(f) Consent to Government Law / Consent to Jurisdiction. Subject to the Contracts Disputes Act of 1978 (41. U.S.C §§ 7101-7109) and Federal Tort Claims Act (28 U.S.C. §1346(b)). The validity, interpretation and enforcement of this Rider will be governed by and construed in accordance with the laws of the United States. In the event the Uniform Computer Information Transactions Act (UCITA) or any similar federal laws or regulations are enacted, to the extent allowed by law, it will not apply to this Agreement, and the governing law will remain as if such law or regulation had not been enacted. All clauses in the Manufacturer EULA referencing equitable remedies are deemed not applicable to the Government order and are therefore deemed to be deleted.

(g) Force Majeure. Subject to FAR 52.212 -4 (f) Excusable delays. (JUN 2010). Unilateral Termination by the Contractor does not apply to a Government order and all clauses in the Manufacturer EULA referencing unilateral termination rights of the Manufacturer are hereby deemed to be deleted.

(h) Assignment. All clauses regarding Assignment are subject to FAR Clause 52.232-23, Assignment of Claims (JAN 1986) and FAR 42.12 Novation and Change-of-Name Agreements, and all clauses governing Assignment in the Manufacturer EULA are hereby deemed to be deleted.

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- (i) **Waiver of Jury Trial.** All clauses referencing waiver of Jury Trial are subject to FAR Clause 52.233-1, Disputes (JUL. 2002), and all clauses governing waiver of jury trial in the Manufacturer EULA are hereby deemed to be deleted.
- (j) **Customer Indemnities.** All Manufacturer EULA clauses referencing Customer Indemnities are hereby deemed to be deleted.
- (k) **Contractor Indemnities.** All Manufacturer EULA clauses that (1) violate DOJ's right (28 U.S.C. 516) to represent the Government in any case and/or (2) require that the Government give sole control over the litigation and/or settlement, are hereby deemed to be deleted.
- (l) **Renewals.** All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31 U.S.C. 1341, 41 U.S.C. 11) ban on automatic renewal are hereby deemed to be deleted.
- (m) **Future Fees or Penalties.** All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31 U.S.C. 1341, 41 U.S.C. 11), which prohibits the Government from paying any fees or penalties beyond the Contract amount, unless specifically authorized by existing statutes, such as the Prompt Payment Act, or Equal Access To Justice Act 31 U.S.C. 3901, 5 U.S.C. 504 are hereby deemed to be deleted.
- (n) **Taxes.** Taxes are subject to FAR 52.212-4(k), which provides that the contract price includes all federal, state, local taxes and duties.
- (o) **Third Party Terms.** Subject to the actual language agreed to in the Order by the Contracting Officer. Any third party manufacturer will be brought into the negotiation, or the components acquired separately under Federally-compatible agreements, if any. Contractor indemnities do not constitute effective migration.
- (p) **Installation and Use of the Software.** Installation and use of the software shall be in accordance with the Rider and Manufacturer EULA, unless an Ordering Activity determines that it requires different terms of use and Manufacturer agrees in writing to such terms in a valid task order placed pursuant to the Government contract.
- (q) **Dispute Resolution and Venue.** Any disputes relating to the Manufacturer EULA and to this Rider shall be resolved in accordance with the FAR, and the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. The Ordering Activity expressly acknowledges that Carahsoft, on behalf of the Manufacturer, shall have standing to bring such claim under the Contract Disputes Act.
- (r) **Limitation of Liability: Subject to the following:**

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Carahsoft, Manufacturer and Ordering Activity shall not be liable for any indirect, incidental, special, or consequential damages, or any loss of profits, revenue, data, or data use. Further, Carahsoft, Manufacturer and Ordering Activity shall not be liable for punitive damages except to the extent this limitation is prohibited by applicable law. This clause shall not impair the U.S. Government's right to recover for fraud or crimes arising out of or related to this Government Contract under any federal fraud statute, including the False Claims Act, 31 U.S.C. §§ 3729-3733.

- (s) **Advertisements and Endorsements.** Unless specifically authorized by an Ordering Activity in writing, such use of the name or logo of any U.S. Government entity is prohibited.
- (t) **Public Access to Information.** Manufacturer agrees that the EULA and this Rider contain no confidential or proprietary information and acknowledges the EULA and this Rider will be available to the public.
- (u) **Confidentiality.** Any provisions that require the Licensee to keep certain information confidential are subject to the Freedom of Information Act, 5 U.S.C. §552, and any order by a United States Federal Court.



(BLACKDUCK EULA- CARAHSOFT FINAL 3-23-2012)

Master Subscription Agreement
070110

MASTER LICENSE AND SUBSCRIPTION AGREEMENT

This Master License and Subscription Agreement (this "**Agreement**") is made as of _____, 20__

(the "**Effective Date**") by and between Black Duck Software, Inc. ("**Black Duck**"), having a principal place of business at 8 New England Executive Park, Suite 221, Burlington, MA 01803, USA, and _____, having a principal place of business at _____ ("**Customer**").

BACKGROUND

Black Duck is the leading provider of products and services for automating the management, compliance and secure use of open source software in multi-source development at enterprise

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scale. Customer wishes to license certain Black Duck products, and receive certain services, subject to the terms and conditions of this Agreement. This Agreement is structured as a “master” agreement to allow Customer to order products and services over time, if it wishes. In consideration of the foregoing, the parties hereby agree as follows:

GENERAL TERMS AND CONDITIONS

1. DEFINITIONS.

1.1. “**Code Prints**” means representations of specific software code (i.e. representations of the code and not the code itself) that can be used as a proxy for such software.

1.2. “**Confidential Information**” is defined in Section 7.2 (Definition).

1.3. “**Documentation**” means the materials and help text for a Program made available to Customer and updated from time to time, electronically or otherwise.

1.4. “**Knowledgebase**” means the database of Code Prints and component metadata developed and maintained by Black Duck and included in a Program.

1.5. “**Managed Code Base**” means a code base owned or controlled by Customer that is input into a Program by Customer and managed using that Program over the course of the applicable Subscription Period. If applicable, the size of the Managed Code Base equals the aggregate of code added to the Managed Code Base, whether or not any of that code is eventually deleted by Customer; provided that the size of the Managed Code Base does not include code used by Customer for training purposes or that is inadvertently added by Customer and deleted upon discovery.

1.6. “**Operational Data**” means data to be provided (either directly or through the operation of a Program) to evidence Program operation and to evidence compliance with the terms and conditions of this Agreement. “Operational Data” includes the number, location, operational and identifying information of servers on which the Program will operate and the number of Users using the Program. “Operational Data” may also include the number of megabytes of code scanned by the Program during a given period and the size of the Managed Code Base. Other than IP addresses or other server identifying information, “Operational Data” does not include any personally identifiable information.

1.7. “**Program**” means a machine-readable version of a computer software product described in a Supplement, including but not limited to the Knowledgebase, and any and all Documentation, report formats and Updates provided to Customer by Black Duck. “Program” does not include functionality that may be delivered to Customer but to which access is restricted by the issuance of license keys or other access control device (e.g. if Customer orders a limited version of a Program). “Program” does not include any application programming interfaces unless specifically included in a Supplement.

1.8. “**Services**” means installation, training and other services provided by Black Duck to Customer, as further described in the applicable Supplement, but expressly excluding Support.

1.9. “**Subscription Fees**” means the fees to be paid by Customer in connection with the license of a Program for the duration of any Subscription Period, as further described in the applicable Supplement.

1.10. “**Subscription Period**” means each period further described in the applicable Supplement, during which Customer is entitled to use the applicable Program.

1.11. “**Supplement**” means an order form, in the form and format furnished by Black Duck, indicating Customer’s desire to license a Program or acquire Services, pursuant to the terms of this Agreement.

1.12. “**Support**” means the support provided by Black Duck with each Program as described in

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Section 2.5 (Customer Support).

1.13. "**Third Party Software Components**" means those certain open source software components distributed in connection with (or as part of) a Program.

1.14. "**Update**" means corrections, fixes and other updates to a Program, as well as any new version or release of a Program, if and when made generally available by Black Duck to its customers.

1.15. "**User**" means each named individual who is given a unique registered user ID for a Program that is made available by Black Duck.

2. PROGRAM ORDERS AND LICENSE GRANT.

2.1. **Ordering.** Each order of a Program or Service will be set forth in a mutually-agreed Supplement, which will be binding on both parties upon acceptance and execution by authorized representatives of the parties. Each Supplement will be governed by this Agreement, and upon execution by both parties, will automatically become a part of this Agreement. Additional or different terms in any purchase order or similar document provided by Customer will not modify or add to the terms of this Agreement or any Supplement.

2.2. **Deliverables.** Black Duck will deliver each requested Program and Services upon the terms set forth in this Agreement and the applicable Supplement. On a periodic basis, Black Duck will deliver Updates to each Program licensed hereunder, and Customer will implement each Update within a reasonable time.

2.3. **License.** Subject to the terms and conditions of this Agreement and the applicable Supplement, Black Duck hereby grants to Customer the following nonexclusive, nontransferable license, during the applicable Subscription Period:

(a) To install the Program on the number of servers and at the locations designated in the applicable Supplement; and

(b) For the number of Users designated in the applicable Supplement to use the Program internally, solely in accordance with its Documentation and in connection with a Managed Code Base of a size no greater than the megabyte limit set forth in the applicable Supplement.

2.4. **License Restrictions.** This is not a perpetual license, and Customer has no right to retain or to use the Program after termination of the applicable Subscription Period for any reason. Customer may not permit access or use of the Programs for any users other than the Users licensed and paid for by Customer. Customer may make a reasonable number of copies of the Program exclusively for inactive back-up, disaster recovery, failover or archival purposes. Customer has no right to rent, lease, assign, transfer, sublicense, display or otherwise distribute or make the Program available to any third party. Unless otherwise expressly stated in this Agreement or the applicable Supplement, the Program may not be used (a) in the performance of services for or on behalf of any third party or as a service bureau or (b) in connection with the analysis of any code other than the Managed Code Base. Except to the extent Black Duck may, in certain jurisdictions, be required by law to permit reverse engineering, Customer may not modify, disassemble, decompile or otherwise reverse engineer the Program nor permit any third party to do so. Black Duck reserves all rights not expressly granted to Customer under this Agreement. The use of Black Duck's intellectual property beyond the scope of the license expressly granted is acknowledged and agreed to be outside the subject matter of this Agreement.

2.5. **Customer Support.** During the Subscription Period, Black Duck will provide Support to Customer pursuant to its standard support plan then in effect. Any other Services requested

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by Customer will be set forth in a Supplement executed by Black Duck and Customer. In no event will Black Duck be obligated to furnish Support for: (a) any version of a Program that Customer has modified or altered in any way, excluding the setting of parameters as permitted by the Program; or (b) any version of a Program other than the most recent version. With the exception of the Support and Services expressly provided for in this Agreement (including in a Supplement), this Agreement does not apply to other consulting services that Black Duck may offer from time to time.

2.6. Renewal of Subscription. Except as otherwise specified in the applicable Supplement, each Subscription Period will automatically renew for successive 12 month periods at the then current list price for the Program. If Customer does not wish to renew the Subscription Period, Customer must notify Black Duck in writing at least 45 days before the end of the applicable Subscription Period.

3. FEES AND PAYMENT TERMS.

3.1. Fees and Payment Terms. Customer will pay the Subscription Fees, and any fees for Services, in US dollars, as further described in each applicable Supplement. Fees are due within 30 days from the date of the invoice.

3.2. Expenses. If Customer orders Services under this Agreement to be performed at a location other than Black Duck's offices, Customer will reimburse Black Duck for all reasonable travel-related expenses incurred by Black Duck including, without limitation, transportation, lodging, and meal expenses.

3.3. Operational Data and Other Information. Customer acknowledges that the Programs are designed to collect certain Operational Data, which may be used by Black Duck for various business purposes, which may include customer support, verifying the need for and providing Updates to the Programs, market research and product planning, verifying Customer's compliance with the terms and conditions of this Agreement and protecting Black Duck intellectual property. Upon Black Duck's written request, Customer will provide Black Duck with Operational Data that cannot be collected automatically through the Programs. If Customer has used the Program outside the parameters set forth in the applicable Supplement, Customer acknowledges that it will be required to pay additional fees to cover such additional use.

3.4. Taxes. . The fees paid under this Agreement are exclusive of all Taxes, as defined herein. Customer will pay all taxes or other charges levied in connection with the Program and Services, including import duties, sales, services, use and value-added taxes, and withholding taxes (collectively, "Taxes") which are imposed by or under the authority of any government or any political subdivision thereof. All payments due from Customer shall be made without any deduction or withholding on account of any Taxes, charge or penalty, except required by law, in which case the sum payable by Customer from which such deduction or withholding is to be made shall be increased to the extent necessary to ensure that, after making such deduction or withholding, Black Duck receives and retains (free from any liability with respect thereof) a net sum equal to the sum it would have received but for such deduction or withholding being required.

3.5. Late Payment. If Customer fails to pay an invoice in a timely manner, Black Duck will give Customer written notice. If such notice has been provided and payment has not been made within 5 days of the receipt of the notice by Customer, then interest will accrue on all amounts payable from the original date due to the date paid, at the lesser of the rate of 12% per year or the highest rate allowed by applicable law. In addition, if, after receipt of the late payment notice, Customer does not pay the applicable invoice within 5 business days, Black

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Duck may deny access to all or any part of the applicable Program or Service.

4. INSURANCE

4.1. **Insurance limits.** During the term of this Agreement, Black Duck will maintain insurance of the type and in the amounts specified below:

(a) Workers' Compensation and Employers Liability in accordance with all federal, state, and local requirements and coverage with a minimum limit of \$1,000,000 each accident, with a policy limit of not less than \$1,000,000;

(b) Commercial General Liability, including coverage for bodily injury, property damage and personal injury liability, with a minimum limit of \$1,000,000 each occurrence;

(c) Business Automobile Liability covering all vehicles that Black Duck hires or leases in an amount not less than \$1,000,000 combined single limit for bodily injury and property damages;

(d) Commercial Excess Umbrella in an amount not less than \$5,000,000 each occurrence and annual aggregate; and,

(e) Technology Errors and Omissions Liability coverage in an amount not less than \$5,000,000 each occurrence.

4.2. **Insurance certificates.** All insurance obtained by Black Duck will be underwritten by an insurer having a minimum AM Best insurance rating of "A-". Upon request, Black Duck will furnish to Customer certificates of insurance and/or other appropriate documentation (including evidence of renewal of insurance) evidencing all of the coverage described in this Section.

4.3. **Notice of cancellation/termination.** Black Duck will give 10 days notice to Customer prior to cancellation or non-renewal to coverage terms and conditions.

5. PERFORMANCE WARRANTY.

5.1. **Warranty.** Subject to the terms and conditions of this Section 5 (Performance Warranty), Black Duck warrants that each Program will perform substantially as described in its Documentation for the duration of the Subscription Period, provided that it is used in accordance with the Documentation, including in the specified operating environment. This warranty is only for the benefit of Customer.

5.2. **Exclusive Remedy.** Customer's sole and exclusive remedy for breach of the warranty in Section 5.1 will be as follows:

(a) For the period commencing on the 1st day of the Subscription Period and ending 30 days thereafter, if the Program does not operate substantially in conformity with the Documentation, Customer will notify Black Duck no later than 10 days after the expiration of the 30 day period. Black Duck will use reasonable commercial efforts to supply a correction or work-around within 15 days ("**Warranty Cure Period**"). If Black Duck is unable to correct or work around the nonconformity within such Warranty Cure Period, then Customer may elect to terminate the applicable Supplement and, subject to the provisions of Section 9.2 (Customer Obligations on Termination), Customer will be entitled to a full refund of the Subscription Fees paid for such Program. Customer must elect such termination within 15 days of the end of the Warranty Cure Period.

(b) For the period commencing on the 31st day of the Subscription Period and ending on the last day of the Subscription Period, if the Program does not operate substantially in conformity with the Documentation, Customer will notify Black Duck and Black Duck will use reasonable commercial efforts to supply a correction or work-around in accordance with its Support policy as further described in Section 2.5 (Customer Support).

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5.3. Disclaimer. EXCEPT AS EXPRESSLY PROVIDED HEREIN, BLACK DUCK MAKES NO WARRANTIES WITH RESPECT TO THE PROGRAM, KNOWLEDGEBASE, SERVICES, SUPPORT OR ANY OTHER PRODUCT PROVIDED OR SERVICE PROVIDED BY BLACK DUCK AND HEREBY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NONINFRINGEMENT.

NO WARRANTY IS MADE THAT THE PROGRAM WILL OPERATE ERROR-FREE OR REGARDING THE RESULTS TO BE ACHIEVED. NO WARRANTY IS MADE THAT THE PROGRAM, SERVICES OR SUPPORT WILL MEET CUSTOMER'S REQUIREMENTS.

THE PROGRAM, SERVICES AND SUPPORT ARE NOT INTENDED TO PROVIDE LEGAL ADVICE, AND ANY LICENSE ANNOTATIONS OR SIMILAR FEATURES ARE PROVIDED ONLY FOR CONVENIENCE. LICENSE ANNOTATIONS ARE NOT INTENDED TO BE COMPREHENSIVE OR APPLICABLE IN ALL SITUATIONS. BLACK DUCK DOES NOT GUARANTEE THAT THE PROGRAM WILL IDENTIFY ALL INSTANCES OF OPEN SOURCE OR THIRD PARTY CODE, OR ALL POTENTIAL LICENSE CONFLICTS. FOR LEGAL ADVICE, CUSTOMER SHOULD CONSULT WITH ITS ATTORNEYS.

6. INTELLECTUAL PROPERTY INDEMNIFICATION.

6.1. Indemnification. At its sole expense, Black Duck will defend and indemnify Customer against any third party claim arising out of: (a) any personal injury or property damage caused by Black Duck during the performance of the Services; or (b) any allegation that the Program infringes any copyright, trademark or misappropriates any trade secret of a third party. Black Duck will pay all damages awarded or agreed to in settlement of such claim.

6.2. Conditions. As conditions of Black Duck's obligations under this Section 6, Customer must: (a) promptly notify Black Duck in writing of such claim and furnish a copy of each communication or notice relating to the alleged infringement; (b) give Black Duck sole control over the defense and negotiation of any settlement of such claim; and (c) give Black Duck, at Black Duck's expense, all reasonable assistance as requested by Black Duck.

6.3. Exclusions. Black Duck's obligations under this Section 6 do not apply to: (a) any Third Party Software Components; or (b) any Program to the extent that it (i) has been modified by persons or entities other than Black Duck, if the alleged infringement relates to such modification, (ii) has been combined with other products, processes or materials not supplied or recommended by Black Duck, where the alleged infringement relates to such combination, (iii) is the result of Black Duck's compliance with Customer's direction to modify the Program or Documentation, or (iv) continues to be used after Black Duck has made available to Customer a non-infringing release of the Program.

6.4. Other Terms. In the event of any claim brought or threatened against any party that would enjoin or otherwise limit the use of the Program, then Black Duck may, at its option: (a) obtain for Customer the right to continue to use the Program; or (b) replace or modify the Program so it becomes non-infringing. If the resolutions described in sub-sections (a) and (b) are not reasonably available to Black Duck, Black Duck may terminate the applicable Supplement and refund a prorated amount of the Subscription Fees. This Section 6 states the entire liability of Black Duck with respect to any claim concerning infringement of intellectual property.

7. CONFIDENTIALITY.

7.1. Obligations. Each party agrees not to permit access to, nor to disclose or display, the other party's Confidential Information other than to its authorized employees, contractors and advisors who are bound by confidentiality agreements that are similarly restrictive and who

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need to use or have access to the other party's Confidential Information as permitted by this Agreement. Each party will use such Confidential Information solely in connection with the performance the activities described in this Agreement. Each party will use at least the same degree of care in protecting the other party's Confidential Information as such party generally exercises in protecting its own similar proprietary information. Notwithstanding any provision to the contrary, either party may disclose the other party's Confidential Information as required by a court order or other legal demand; provided that such party gives reasonable notice to the other party of such request to allow the other party to seek a protective order or similar legal protection. Each party agrees that, in the event of a threatened or actual unauthorized disclosure of Confidential Information, the disclosing party will be entitled to such equitable or injunctive relief as may be deemed proper by a court of competent jurisdiction.

7.2. Definition. "Confidential Information" includes documents, data, software and information which, when provided by one party to the other, are clearly identified as "Confidential" or "Proprietary", or that a reasonable person would understand to be confidential or proprietary based on the content of the information and the circumstances of its disclosure. "Confidential information" does not include information which: (a) is already known to the receiving party at the time of disclosure; (b) is or subsequently becomes publicly available through no wrongful act of the receiving party; (c) is disclosed to or provided to the receiving party by a third party without restriction; or (d) is developed independently by the receiving party without use of or access to the disclosing party's Confidential Information. Notwithstanding the requirements described in Section 7.1 (Obligations), Customer's Confidential Information expressly includes the Operational Data and Black Duck's Confidential Information expressly includes any Program. In addition, in no event will suggestions for new or enhanced functionality for Black Duck's products or services be considered confidential or proprietary to Customer.

8. LIMITED LIABILITY. EXCEPT IN THE CASE OF BREACH OF THE OBLIGATIONS SET FORTH IN SECTION 7 (CONFIDENTIALITY) OR DISTRIBUTION OR USE OF A PROGRAM OUTSIDE THE SCOPE OF THE LICENSE SET FORTH HEREIN, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES, INCLUDING LOST PROFITS, LOSS OF DATA OR INTERRUPTION OF BUSINESS, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS. EXCEPT WITH RESPECT TO THE INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 6 (INTELLECTUAL PROPERTY INDEMNIFICATION), IN NO EVENT WILL BLACK DUCK'S LIABILITY HEREUNDER EXCEED THE SUBSCRIPTION FEES PAID BY CUSTOMER FOR THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT THAT GAVE RISE TO THE CLAIM. CUSTOMER ACKNOWLEDGES THAT THE PROVISIONS OF THIS SECTION REPRESENT A REASONABLE ALLOCATION OF RISK THAT IS REFLECTED IN THE AMOUNTS PAID BY CUSTOMER HEREUNDER.

9. TERMINATION.

9.1. Termination.

(a) **TERM.** The term of this Agreement will begin on the Effective Date and may be terminated as set forth in this Section 9.1. In any event, this Agreement will continue in full force and effect for the duration of any Subscription Period or period during which Services are provided.

(b) **TERMINATION FOR PROGRAM DISCONTINUATION.** Upon 6 months prior written notice, in the event Black Duck chooses to discontinue a particular Program, Black Duck may terminate this Agreement with respect to such Program; provided that, the effective date of such termination (i.e. the date 6 months from the Program discontinuation notice

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date) will not occur before the end of Customer's then-current Subscription Period.

(c) **Termination for Breach.** In addition to any other termination rights provided in this Agreement, either party may terminate this Agreement immediately upon written notice if the other party materially breaches any provision of this Agreement and fails to cure such breach within 30 days after delivery of a written notice describing the breach.

(d) **Access to Programs.** Upon any termination of this Agreement, Black Duck is entitled to discontinue Customer's access to any Programs in Customer's possession or control, using the authentication mechanisms incorporated into each Program.

9.2. Customer Obligations upon Termination. Upon termination of this Agreement or any Supplement, Customer will: (a) cease use of the applicable Program; and (b) return to Black Duck or destroy all whole or partial copies of the applicable Program. Black Duck may request a certificate signed by an authorized representative of Customer confirming Customer's compliance with the provisions of this Section 9.2.

9.3. Survival. The provisions of the following Sections will survive any termination of this Agreement: Section 2.4 (License Restrictions), Section 3 (Fees and Payments), Section 4 (Insurance), Section 5.3 (Disclaimer), Section 6 (Intellectual Property Indemnification), Section 7 (Confidentiality), Section 8 (Limited Liability), Section 9 (Termination) and Section 10 (General).

10. GENERAL.

10.1. No Third Party Beneficiaries. THERE ARE NO THIRD PARTY BENEFICIARIES OF THIS AGREEMENT. CUSTOMER WILL NOT EXPRESSLY REPRESENT OR IMPLY TO ANY THIRD PARTY THAT BLACK DUCK HAS MADE ANY REPRESENTATION OR WARRANTY REGARDING THE PROGRAM, SERVICES, SUPPORT OR ANY RESULTS THEREOF.

10.2. Trademarks/Publicity. Neither party will use the other party's name or trademarks, or refer to the other party, either directly or indirectly in any advertisement, publication or presentation, or in any manner that might imply endorsement, verification or certification, except as mutually agreed in writing by the parties; provided, however, that Black Duck may include Customer on its list of customers and may display that customer list on its web site and in other publications.

10.3. U.S. Government Restricted Rights. The Programs provided under this Agreement are commercial computer software programs developed exclusively at private expense. Unless otherwise set forth in this Agreement, use, duplication, and disclosure by civilian agencies of the U.S. Government will not exceed those minimum rights set forth in FAR 52.227-19 (c). Use, duplication and disclosure by DOD agencies are subject solely to the terms of a standard software License Agreement as stated in DFARS 227.7202. The manufacturer is Black Duck Software, Inc., 265 Winter Street, Waltham, MA 02451.

10.4. Remedies. Nothing in this Agreement waives or limits remedies or causes of action available to Black Duck to protect its intellectual property rights in the Programs. Customer acknowledges that the Programs contain certain trade secrets and proprietary information owned by Black Duck and its licensors and that, in the event of a threatened or actual unauthorized disclosure of such information, Black Duck will be entitled to such equitable or injunctive relief as may be deemed proper by a court of competent jurisdiction.

10.5. Waiver. If one party fails to enforce any provision of this Agreement, it will not be precluded from enforcing the same provision at another time.

10.6. Severability. In the event that any provision of this Agreement is held by a court or other tribunal of competent jurisdiction to be unenforceable, such provision will be deemed modified the minimum extent necessary to render the provision enforceable in a manner that

Black Duck Software Inc.
265 Winter Street
Waltham, MA 02451
1-781-891-5100
www.blackducksoftware.com

most closely represents the original intent of the parties. In such event, the remaining terms and conditions of this Agreement will remain in full force and effect.

10.7. **Notices.** All notices, requests and demands, and other communications required or permitted under this Agreement will be in writing and will be deemed effective only: (a) upon delivery; if delivered personally to a party; (b) 1 business day after deposit, if delivered to a nationally recognized courier service offering guaranteed overnight delivery; or (c) 3 business days after having been deposited in the United States mails, certified mail, postage prepaid, return receipt requested. All notices for each party will be sent to the addresses set forth in the preamble of this Agreement.

10.8. **Counterparts and Facsimile.** This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original and which together will constitute one and the same instrument. The signature of any of the parties may be evidenced by a facsimile copy of this Agreement bearing such signature and such signature will be valid and binding as if an original executed copy of the Agreement had been delivered.

10.9. **Force Majeure.** Neither party will be responsible for delays or failures in performance resulting from acts beyond its control. Such acts include acts of God, labor conflicts, and acts of war or civil disruption, governmental regulations imposed after the fact, public utility out failures, industry wide shortages of labor or material, or natural disasters.

10.10. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, United States of America without regard to its conflict of law's provisions. The parties consent to jurisdiction and venue of the state and federal courts of the Commonwealth of Massachusetts for any disputes hereunder. The parties expressly disclaim the application of the United Nations Convention on Contracts for the International Sale of Goods and Uniform Computer Information Transactions Act.

10.11. **Export Compliance.** Customer will not export or reexport any Program (in whole or in part) to any country outside the United States without first obtaining the required written approval or export license from the appropriate agency of the U.S. Government or any other government having jurisdiction over such export, reexport, or use, pursuant to any applicable statute, regulation, or governmental order. Customer represents that it will comply with U.S. Government export policy and regulations and undertakes to be and remain in full compliance with such policy and regulations.

10.12. **Assignment.** This Agreement and the rights granted under it may not be assigned or transferred by either party without the written consent of other party, except to a successor in interest in the event of a merger or acquisition of such party. If Customer assigns this Agreement as described in this Section, additional business terms may apply to the acquiring company (e.g. limitations on the size of the Managed Code Base) as further described in the applicable Supplement.

10.13. **Attorneys' Fees.** In the event of any adjudication of any dispute under this Agreement, the prevailing party in such action will be entitled to reimbursement of its attorneys' fees and related costs by the other party.

10.14. **Entire Agreement.** This Agreement constitutes the complete and exclusive statement of the terms and conditions between the parties governing the provision of products and services by Black Duck to Customer. This Agreement supersedes all other agreements and communications, oral or written, with respect to its subject matter. It may be amended only by a written agreement between the parties.