Software Transaction Agreement

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE USING THIS PRODUCT. BY DOWNLOADING, INSTALLING OR USING THIS PRODUCT, YOU ACCEPT AND AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT DO NOT DOWNLOAD, INSTALL OR USE THIS PRODUCT. IF YOU HAVE A SIGNED AGREEMENT WITH QUEST SOFTARE PUBLIC SECTOR INC. THAT IS SPECIFICALLY REFERENCED IN AN ORDER THAT IS EXECUTED BETWEEN YOU AND QUEST, THEN THAT SIGNED AGREEMENT WILL SUPERSEDE THIS AGREEMENT.

This Software Transaction Agreement (the ***"Agreement"***) is made between you, the customer (***"Customer"*** or ***"you"***) and Quest, as defined below.

1. Definitions. Capitalized terms not defined in context shall have the meanings assigned to them below:

(a) ***"Affiliate"*** means any legal entity controlling, controlled by, or under common control with a party to this Agreement, for so long as such control relationship exists.

(b) ***"Appliance"*** means a computer hardware product upon which the Software is delivered.

(c) ***"Documentation"*** means the user manuals and documentation that Quest makes available for the Software, and all copies of the foregoing.

(d) ***"eStore"*** means Quest's online Software ordering system located at http://estore.quest.com.

(e) ***"License Type"*** means the model by which the Software is licensed (e.g., by server, by mailbox, by managed user) as indicated in the applicable Order.

(f) ***"Maintenance Services"*** means Quest's maintenance and support offering for the Products as identified in the *Maintenance Services* Section below.

(g) ***"Order"*** means the document by which Customer orders the Product(s) or, if Customer orders the Product(s) from the eStore, the process by which Customer orders the Product(s). Orders that are executed by both Customer and Quest shall be governed solely by the terms of this Agreement and the applicable Order. Orders placed with a Customer purchase order only, Orders placed through the eStore and all Orders placed through a Partner shall be governed solely by the terms of this Agreement. Any conflicting or additional terms in or accompanying an Order will not be binding on Quest unless Quest accepts such terms in writing. Each Order shall be subject to approval by Quest and shall represent the Customer's irrevocable commitment to purchase and pay for the Products and/or Maintenance Services stated in the Order.

(h) ***"Partner"*** means a reseller or distributor that is under contract with Quest or another Partner and is authorized via such contract to resell the Products and/or Maintenance Services.

(i) ***"Product Guide"*** means the document located at http://quest.com/Product_Guide.pdf that contains the Product Terms.

(j) ***"Product Terms"*** means the terms associated with each License Type and any other terms associated with an individual Product. The Product Terms for Products that are identified in an Order that is signed by both Customer and Quest shall be as stated in the Order. If no Product Terms are stated in the Order, if the Order is placed with a Customer purchase order only, if the Order is placed through the eStore, or if the Order is placed through a Partner, then the Product Terms for such Products shall be as stated in the Product Guide as of the date of the Order.

(k) ***"Products"*** means the Software and Appliance(s) provided to Customer under this Agreement.

(l) ***"Quest"*** means either (i) Dell Software Inc. (***"DSI"***), with its principal place of business located at 5 Polaris Way, Aliso Viejo, CA 92656, or (ii) the Affiliate of DSI that delivers the Software, or (iii) if the Software is provided pursuant to a fully executed Order, the Affiliate of DSI that signed the Order.

(m) ***"Software"*** means the object code version of the software that is provided or made available to Customer pursuant to an Order as well as any corrections, enhancements, and upgrades to such software that are made available to Customer pursuant to this Agreement, and all copies of the foregoing. Software includes On-Premise Software and SaaS Software (as defined in Section 2), along with software that is delivered on an Appliance.

2. Software License.

(a) **General.** Subject to the terms of this Agreement, Quest grants to Customer, and Customer accepts from Quest, a non-exclusive, non-transferable (except as otherwise set forth herein) and non-sublicensable license to access and use the quantities of each item of Software identified in the applicable Order within the parameters of the Product Terms associated with the applicable Software and License Type (the ***"License"***). Except for MSP Licenses (as defined below), Customer shall only use the Software to support the internal business operations of itself and its worldwide Affiliates.

(b) **On-Premise Software.** If Software is delivered to Customer for Customer's installation and use on its own equipment (***"On-Premise Software"***), the License shall be perpetual (unless otherwise stated on the Order) and shall also include the right to (i) make a reasonable number of additional copies of the On-Premise Software to be used solely for non-productive archival or passive disaster recovery purposes, provided such copies are kept in a secure location and are not used for production purposes unless the primary copy of the On-Premise Software is not being used for production purposes, and (ii) make and use copies of the Documentation as reasonably necessary to support Customer's authorized users in their use of the On-Premise Software. Each License for On-Premise Software shall only be used by Customer in the country in which the On-Premise Software is initially delivered to Customer.

(c) **Software as a Service.** If an Order provides Customer with a right to access and use Software installed on equipment operated by Quest or its suppliers (***"SaaS Software"***), (i) the License for such SaaS Software shall be granted for the duration of the term stated in the Order (the ***"SaaS Term"***), as such SaaS Term may be extended by automatic or agreed upon renewals, and (ii) the SaaS Provisions set forth in Section 16 of this Agreement shall apply to all use of such Software. If any On-Premise Software is provided in connection with SaaS Software, the License term for such On-Premise Software shall be for the corresponding SaaS Term, and Customer shall promptly install any updates to the On-Premise Software provided by Quest.

(d) **MSP License.** If an Order indicates that Software is to be used by Customer as a managed service provider, Customer shall be granted a License to use such Software and the associated Documentation to provide Management Services (an ***"MSP License"***). ***"Management Services"*** include, without limitation, application, operating system, and database implementation, performance tuning, and maintenance services provided by Customer for the benefit of the client(s) stated in the Order (each, a ***"Client"***). Each MSP License is governed by the terms of this Agreement and the MSP terms in the Product Guide.

(e) **Evaluation License.** If an Order indicates that Software is to be used by Customer for evaluation purposes, or if Software is otherwise obtained from Quest for evaluation purposes, Customer shall be granted a License to use such Software and the associated Documentation solely for Customer's own non-production, internal evaluation purposes (an ***"Evaluation License"***). Each Evaluation License shall be granted for an evaluation period of up to thirty (30) days from the date of delivery of the On-Premise Software or from the date that access is granted to the SaaS Software, plus any extensions granted by Quest in writing (the ***"Evaluation Period"***). There is no fee for an Evaluation License during the Evaluation Period, however, Customer is responsible for any applicable shipping charges or taxes which may be incurred, and any fees which may be associated with usage beyond the scope permitted herein. Customer will only be granted one Evaluation License per release of any item of Software. Notwithstanding anything otherwise set forth in this Agreement, Customer understands and agrees that Evaluation Licenses are provided "AS IS" and that Quest does not provide warranties or Maintenance Services for Evaluation Licenses.

(f) **Freeware License.** If a freeware version of Software is downloaded by Customer from a Quest website, the terms of use of such Software shall be governed by the applicable Freeware definition set forth in the Product Guide (a ***"Freeware License"***). Notwithstanding anything otherwise set forth in this Agreement, Customer understands and agrees that Freeware Licenses are provided "AS IS" and that Quest does not provide warranties or Maintenance Services for Freeware Licenses.

(g) **Third Party Use.** If Customer contracts with a third party who performs Software implementation, configuration, consulting or outsourcing services (a ***"Service Provider"***), the Service Provider may use the Software License(s) and Documentation provided to Customer hereunder solely for purposes of providing such services to Customer, provided that (i) Customer ensures that the Service Provider uses the Software and Documentation in strict compliance with the terms of this Agreement and cooperates with Quest during any compliance review that may be conducted by Quest or its designated agent, and (ii) the use of the Software and Documentation by the Service Provider will not violate the terms of the export restrictions set forth herein. Customer shall be jointly and severally liable to Quest for the acts and omissions of its Service Providers in connection with their use of the Software and Documentation.

3. Restrictions. Except and only to the extent where such exclusions and limits are prohibited by applicable law, Customer may not reverse engineer, decompile, disassemble, or attempt to discover or modify in any way the underlying source code of the Software, or any part thereof. In addition, Customer may not (i) modify, translate, localize, adapt, rent, lease, loan, create or prepare derivative works of, or create a patent based on the Products, Documentation or any part thereof, (ii) resell, sublicense or distribute the Products or Documentation, (iii) provide, make available to, or permit use of the Products, in whole or in part, by any third party (except as expressly set forth herein) without Quest's prior written consent, (iv) use the Products or Documentation to create or enhance a competitive offering or for any other purpose which is competitive to Quest, or (v) perform or fail to perform any act which would result in a misappropriation or infringement of Quest's intellectual property rights in the Products or Documentation. Each permitted copy of the Software and Documentation made by Customer hereunder must contain all titles, trademarks, copyrights and restricted rights notices as in the original. Customer understands and agrees that the Products may work in conjunction with third party products and Customer agrees to be responsible for ensuring that it is properly licensed to use such third party products. Notwithstanding anything otherwise set forth in this Agreement, the terms and restrictions set forth herein shall not prevent or restrict Customer from exercising additional or different rights to any open source software that may be contained in or provided with the Products in accordance with the applicable open source licenses. Customer may not use any license keys or other license access devices not provided by Quest, including but not limited to "pirate keys", to install or access the Software.

4. Proprietary Rights. Customer understands and agrees that (i) the Products are protected by copyright and other intellectual property laws and treaties, (ii) Quest, its Affiliates and/or its suppliers own the copyright, and other intellectual property rights in the Products, (iii) the Software is licensed, and not sold, (iv) this Agreement does not grant Customer any rights to Quest's trademarks or service marks, and (v) Quest reserves any and all rights, implied or otherwise, which are not expressly granted to Customer in this Agreement.

5. Title, Risk of Loss and Delivery. Quest, its Affiliates and/or its suppliers own the title to all Software. Title and risk of loss to an Appliance shall pass from Quest to Customer upon shipment (unless the Appliance is rented, leased or loaned to Customer). Delivery of Products shall be by electronic download or FOB Shipping Point.

6. Payment. Customer agrees to pay to Quest (or, if applicable, the Partner) the fees specified in each Order, including any applicable shipping fees. Customer will be invoiced promptly following delivery of the Products or prior to the commencement of any Renewal Maintenance Period and Customer shall make all payments due to Quest in full within thirty (30) days from the date of each invoice or such other period (if any) stated in an Order signed by Quest. Any amounts payable to Quest by Customer that remain unpaid after the due date shall be subject to a late charge of 1.5% of the invoice amount per month from the due date until such amount is paid, or the maximum rate permitted by law if less.

7. Taxes. The fees stated in an Order may not include taxes. If Quest is required to pay sales, use, property, value-added or other taxes based on the Products or Maintenance Services provided under this Agreement or on Customer's use of Products or Maintenance Services, then such taxes shall be billed to and paid by Customer. This Section does not apply to taxes based on Quest's income.

8. Termination. This Agreement or the Licenses granted hereunder may be terminated (i) by mutual agreement of Quest and Customer, or (ii) by either party if the other party or a Service Provider commits a material breach of this Agreement or an Order and, if such breach is reasonably capable of being cured, fails to cure the breach to the other party's reasonable satisfaction within thirty (30) days following its receipt of notice of the breach.

Upon termination of this Agreement or expiration or termination of a License for any reason, all rights granted to Customer for the applicable Software shall immediately cease and Customer shall immediately: (i) cease using the applicable Software and Documentation, (ii) remove all copies, installations, and instances of the applicable Software from all Customer computers and any other devices on which the Software was installed, and ensure that all applicable Service Providers do the same, (iii) return the applicable Software to Quest together with all Documentation and other materials associated with the Software and all copies of any of the foregoing, or destroy such items, (iv) cease using the Maintenance Services associated with the applicable Software, (v) pay Quest or the applicable Partner all amounts due and payable up to the date of termination, and (vi) give Quest a written certification, within ten (10) days, that Customer and its Service Providers, as applicable, have complied with all of the foregoing obligations. Termination of this Agreement or a License shall be without prejudice to any other remedies that the terminating party may have under law, subject to the limitations and exclusions set forth in this Agreement.

Any provision of this Agreement that requires or contemplates execution after termination of this Agreement or expiration or termination of a License is enforceable against the other party and their respective successors and assignees notwithstanding termination or expiration, including, without limitation, the "*Restrictions*," "*Payment*," "*Taxes*," "*Termination*," "*Warranty Disclaimer,"* "*Infringement*" "*Limitation of Liability*," "*Confidential Information*," "*Compliance Verification*," and "*General*" Sections of this Agreement.

9. Export. Customer acknowledges that the Products and Maintenance Services are subject to the export control laws, rules, regulations, restrictions and national security controls of the United States and other applicable foreign agencies (the ***"Export Controls"***) and agrees to abide by the Export Controls. Customer hereby agrees to use the Products in accordance with the Export Controls, and shall not export, re-export, sell, lease or otherwise transfer the Products or any copy, portion or direct product of the foregoing in violation of the Export Controls. Customer is solely responsible for obtaining all necessary licenses or authorizations relating to the export, re-export, sale, lease or transfer of the Products and for ensuring compliance with the requirements of such licenses or authorizations. Customer hereby (i) represents that Customer is not an entity or person to which shipment of Products, or provision of Maintenance Services, is prohibited by the Export Controls; and (ii) agrees that it shall not export, re-export or otherwise transfer the Products to (a) any country subject to a United States trade embargo, (b) a national or resident of any country subject to a United States trade embargo, (c) any person or entity to which shipment of Products is prohibited by the Export Controls, or (d) anyone who is engaged in activities related to the design, development, production, or use of nuclear materials, nuclear facilities, nuclear weapons, missiles or chemical or biological weapons. Customer shall, at its expense, defend Quest and its Affiliates from any third party claim or action arising out of any inaccurate representation made by Customer regarding the existence of an export license, Customer's failure to provide information to Quest to obtain an export license or any allegation made against Quest due to Customer's violation or alleged violation of the Export Controls (an ***"Export Claim"***) and shall pay any judgments or settlements reached in connection with the Export Claim as well as Quest's costs of responding to the Export Claim.

10. Maintenance Services.

(a) **Description.** During any Maintenance Period and for the applicable fees, Quest shall make available to Customer the following Maintenance Services:

(i) Quest shall make available to Customer new versions and releases of the Software, including Software corrections, enhancements and upgrades, if and when Quest makes them generally available without charge as part of Maintenance Services.

(ii) Quest shall respond to communications from Customer that report Software failures not previously reported to Quest by Customer. Nothing in the foregoing shall operate to limit or restrict follow up communication by Customer regarding Software failures.

(iii) Quest shall respond to requests from Customer's technical coordinators for assistance with the operational/technical aspects of the Software unrelated to a Software failure. Quest shall have the right to limit such responses if Quest reasonably determines that the volume of such non-error related requests for assistance is excessive or overly repetitive in nature.

(iv) Customer shall have access to Quest's software support web site at http://support.quest.com (the ***"Support Site"***).

Maintenance Services are available during standard support hours (***"Business Hours"***) as indicated on the Support Site, unless Customer has purchased Business Critical Support (i.e. 24x7 Severity Level 1 support). The list of Software for which Business Critical Support is available and/or required is listed in the Global Support Guide on the Support Site.

The Maintenance Services for Software that Quest has obtained through an acquisition or merger may, for a period of time following the effective date of the acquisition or merger, be governed by terms other than those in this Section. The applicable different terms, if any, shall be stated on the Support Site.

(b) **Maintenance Period.** For On-Premise Software, the first period for which Customer is entitled to receive Maintenance Services begins on the date of the initial delivery of the Software following an Order and ends twelve (12) months thereafter unless otherwise set forth in the applicable Order (the ***"Initial Maintenance Period"***). Following the Initial Maintenance Period, Maintenance Services for On-Premise Software shall automatically renew for additional terms of twelve (12) months (each, a ***"Renewal Maintenance Period"***) unless the renewal has been cancelled by either party giving written notice, by email or otherwise, to the other at least sixty (60) days prior to the first day of the applicable Renewal Maintenance Period. For purposes of this Agreement, the Initial Maintenance Period and each Renewal Maintenance Period shall be considered a ***"Maintenance* Period."** Cancellation of Maintenance Services for On-Premise Software will not terminate Customer's rights to continue to use the On-Premise Software. Maintenance fees shall be due in advance of each Renewal Maintenance Period and shall be subject to the payment requirements set forth in this Agreement. The procedure for reinstating Maintenance Services for On-Premise Software after it has lapsed is posted at http://support.quest.com/Maintenance_Service.asp.

For SaaS Software, the Maintenance Period is equal to the duration of the applicable SaaS Term.

(c) **Appliance Replacement Policy.** For Appliances on which Total Privileged Access Management Software (***"TPAM"***) is delivered (as such Software may be renamed by Quest in its sole discretion) (the ***"TPAM Appliance"***), if the Customer has purchased Maintenance Services for TPAM continuously since the purchase of licenses for TPAM, the Appliance Replacement Policy shall be included as part of Maintenance Services for TPAM. The ***"Appliance Replacement Policy"*** is as follows: on the business day following Quest's determination that replacement Appliance is required, Quest will either ship a replacement for the Appliance (a ***"Replacement Appliance"***) or, at its discretion, ship a replacement part for the Appliance to be installed by Customer (a ***"Replacement Part"***). Any Replacement Parts shall be externally replaceable, not requiring the Appliance case to be opened. Replacement Appliances or Replacement Parts may be previously used, but shall not be of lesser capacity or specification than the Appliance or part being replaced. If Customer cannot permanently delete the data from the Appliance's data storage device and Customer's information security policy does not permit return of the Appliance with the sensitive data on it, Customer may remove any data storage device that does not require the Appliance case to be opened and return the Appliance without the device.

11. Warranties and Remedies.

(a) **Software Warranties.** Quest warrants that, during the applicable Warranty Period (as defined in Section 11(c) below),

(i) the operation of the Software, as provided by Quest, will substantially conform to its Documentation (the ***"Operational Warranty"***);

(ii) the Software, as provided by Quest, will not contain any viruses, worms, Trojan Horses, or other malicious or destructive code designed by Quest to allow unauthorized intrusion upon, disabling of, or erasure of the Software, except that the Software may contain a key limiting its use to the scope of the License granted, and license keys issued by Quest for temporary use are time-sensitive (the ***"Virus Warranty"***);

(iii) the media provided by Quest, if any, on which the On-Premise Software is recorded will be free from material defects in materials and workmanship under normal use (the ***"Media Warranty"***); and

(iv) it will make commercially reasonable efforts to make the SaaS Software available twenty four hours a day, seven days a week except for scheduled maintenance, the installation of updates, those factors that are beyond the reasonable control of Quest, Customer's failure to meet any minimum system requirements communicated to Customer by Quest, and any breach of this Agreement by Customer that impacts the availability of the SaaS Software (the ***"SaaS Availability Warranty"***).

(b) **Appliance Warranties.** Except for the TPAM Appliance, Appliances are warranted in accordance with the warranty document delivered with the Appliance and/or included on the hardware manufacturers' website. For the TPAM Appliance, Quest warrants that, during the applicable Warranty Period, the TPAM Appliance will operate in a manner which allows TPAM to be used in substantial conformance with the Documentation (the ***"TPAM Appliance Warranty"***).

(c) **Warranty Periods**. The ***"Warranty Period"*** for each of the above warranties shall be as follows: for the Operational Warranty as it applies to On-Premise Software, the Virus Warranty and the Media Warranty, thirty (30) days following the initial delivery of the Software following an approved Order; for the Operational Warranty as it applies to SaaS Software and the SaaS Availability Warranty, the duration of the SaaS Term; and for the TPAM Appliance Warranty, one (1) year following the initial delivery of the TPAM Appliance following an approved Order.

(d) **Remedies**. Any breach of the foregoing warranties must be reported by Customer to Quest during the applicable Warranty Period. Customer's sole and exclusive remedy and Quest's sole obligation for any such breach shall be as follows:

(i) For a breach of the *Operational Warranty* that impacts the use of On-Premise Software, Quest shall correct or provide a workaround for reproducible errors in the Software that caused the breach within a reasonable time considering the severity of the error and its effect on Customer or, at Quest's option, refund the license fees paid for the nonconforming Software upon return of such Software to Quest and termination of the related License(s) hereunder.

(ii) For a breach of the *Operational Warranty* that impacts the use of SaaS Software, Quest shall correct or provide a workaround for reproducible errors in the Software that caused the breach and provide a credit or refund of the fees allocable to the period during which the Software was not operating in substantial conformance with the applicable Documentation.

(iii) For a breach of the *Virus Warranty*, Quest shall replace the Software with a copy that is in conformance with the Virus Warranty.

(iv) For a breach of the *Media Warranty*, Quest shall, at its expense, replace the defective media.

(v) For a breach of the *SaaS Availability Warranty*, Quest shall provide a credit or refund of the fees allocable to the period during which the Software was not available for use.

(vi) For a breach of the *TPAM Appliance Warranty*, Quest shall fulfill its obligations under the Appliance Replacement Policy.

Additional Product-specific warranties and remedies may be stated in an Order that is signed by both parties.

(e) **Warranty Exclusions**. The warranties set forth in this Section shall not apply to any non-conformance (i) that Quest cannot recreate after exercising commercially reasonable efforts to attempt to do so; (ii) caused by misuse of the applicable Product or by using the Product in a manner that is inconsistent with this Agreement or the Documentation; or (iii) arising from the modification of the Product by anyone other than Quest.

(f) **Third Party Products**. Certain Software may contain features designed to interoperate with third-party products. If the third-party product is no longer made available by the applicable provider, Quest may stop providing the related product feature, and Customer will not be entitled to any refund, credit or other compensation. In such event, Quest will provide reasonable notice to Customer.

(g) **Warranty Disclaimer.** THE EXPRESS WARRANTIES AND REMEDIES SET FORTH IN THIS SECTION OR IN AN ORDER ARE THE ONLY WARRANTIES AND REMEDIES PROVIDED BY QUEST HEREUNDER. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, ALL OTHER WARRANTIES OR REMEDIES ARE EXCLUDED, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, NON-INFRINGEMENT, SATISFACTORY QUALITY, AND ANY WARRANTIES ARISING FROM USAGE OF TRADE OR COURSE OF DEALING OR PERFORMANCE. QUEST DOES NOT WARRANT UNINTERRUPTED OR ERROR-FREE OPERATION OF THE PRODUCTS.

(h) **High-Risk Disclaimer.** CUSTOMER UNDERSTANDS AND AGREES THAT THE PRODUCTS ARE NOT FAULT-TOLERANT AND ARE NOT DESIGNED OR INTENDED FOR USE IN ANY HIGH-RISK OR HAZARDOUS ENVIRONMENT, INCLUDING WITHOUT LIMITATION, THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION, AIR TRAFFIC CONTROL, EMERGENCY COMMUNICATIONS SYSTEMS, LIFE SUPPORT MACHINES, WEAPONS SYSTEMS, OR ANY OTHER APPLICATION WHERE THE FAILURE OR MALFUNCTION OF ANY PRODUCT CAN REASONABLY BE EXPECTED TO RESULT IN DEATH, PERSONAL INJURY, SEVERE PROPERTY DAMAGE OR SEVERE ENVIRONMENTAL HARM (A ***"HIGH RISK ENVIRONMENT"***). ACCORDINGLY, (I) CUSTOMER SHOULD NOT USE THE PRODUCTS IN A HIGH RISK ENVIRONMENT, (II) ANY USE OF THE PRODUCTS BY CUSTOMER IN A HIGH RISK ENVIRONMENT IS AT CUSTOMERS OWN RISK, (III) QUEST, ITS AFFILIATES AND SUPPLIERS SHALL NOT BE LIABLE TO CUSTOMER IN ANY WAY FOR USE OF THE PRODUCTS IN A HIGH RISK ENVIRONMENT, AND (IV) QUEST MAKES NO WARRANTIES OR ASSURANCES, EXPRESS OR IMPLIED, REGARDING USE OF THE PRODUCTS IN A HIGH RISK ENVIRONMENT.

12. Infringement. Quest will at its own expense defend or settle any claim, suit, action, or proceeding brought against Customer by a third party to the extent it is based on an allegation that the Software directly infringes any patent, copyright, trademark, or other proprietary right enforceable in the country in which the Software is delivered to Customer, or misappropriates a trade secret in such country (a ***"Claim"***). Additionally, Quest shall pay any judgments finally awarded against Customer under a Claim or any amounts assessed against Customer in any settlements of a Claim, and reasonable administrative costs or expenses, including without limitation reasonable attorneys' fees, necessarily incurred by Customer in responding to the Claim. Quest's obligations under this Section are conditioned upon Customer (i) giving prompt written notice of the Claim to Quest; (ii) permitting Quest to retain sole control of the investigation, defense or settlement of the Claim, and (iii) providing Quest with such cooperation and assistance as Quest may reasonably request from time to time in connection with the investigation, defense or settlement of the Claim. Quest shall have no obligation hereunder to defend Customer against any Claim (a) resulting from use of the Software other than as authorized in this Agreement, (b) resulting from a modification of the Software other than by Quest, or (c) based on Customer's use of the Software after Quest recommends discontinuation because of possible or actual infringement, (d) based on Customer's use of a superseded or altered release of Software if the infringement would have been avoided by use of a current or unaltered release of the Software made available to Customer, or (e) to the extent the Claim arises from or is based on the use of the Software with other products, services, or data not supplied by Quest if the infringement would not have occurred but for such use. If Customer's use of the Software is enjoined as a result of a Claim, Quest shall, at its expense and option either (1) obtain for Customer the right to continue using the Software, (2) replace the Software with a functionally equivalent non-infringing product, (3) modify the Software so that it is non-infringing, or (4) terminate the License for the infringing Software and (A) for On-Premise Software, accept the return of the infringing Software and refund the license fee paid for the infringing Software, pro-rated over a sixty (60) month period from the date of initial delivery of the Software following an Order, or, (B) for SaaS Software, discontinue Customer's right to access and use the infringing Software and refund the unused pro-rated portion of any license fees pre-paid by Customer for the infringing Software. This Section states the entire liability of Quest, and Customer's sole and exclusive remedy, with respect to a Claim.

13. Limitation of Liability. EXCEPT FOR (A) ANY BREACH OF THE "*RESTRICTIONS*" OR "*CONFIDENTIAL INFORMATION*" SECTIONS OF THIS AGREEMENT, (B) AMOUNTS CONTAINED IN JUDGMENTS OR SETTLEMENTS WHICH QUEST IS LIABLE TO PAY ON BEHALF OF CUSTOMER UNDER THE "*INFRINGEMENT*" SECTION OF THIS AGREEMENT AND CUSTOMER IS LIABLE TO PAY ON BEHALF OF QUEST UNDER THE *"CONDUCT"* AND *"EXPORT"* SECTIONS OF THIS AGREEMENT, OR (C) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF APPLICABLE LAW, IN NO EVENT SHALL QUEST, ITS AFFILIATES, OR SUPPLIERS, OR CUSTOMER BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE OF ANY KIND, INCLUDING BUT NOT LIMITED TO LOSS OF REVENUE, LOSS OF ACTUAL OR ANTICIPATED PROFITS, LOSS OF BUSINESS, LOSS OF CONTRACTS, LOSS OF GOODWILL OR REPUTATION, LOSS OF ANTICIPATED SAVINGS, LOSS OF, DAMAGE TO

OR CORRUPTION OF DATA, HOWSOEVER ARISING, WHETHER SUCH LOSS OR DAMAGE WAS FORESEEABLE OR IN THE CONTEMPLATION OF THE PARTIES AND WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE.

EXCEPT FOR (A) ANY BREACH OF THE "*SOFTWARE LICENSE,*" "*RESTRICTIONS,*" OR "*CONFIDENTIAL INFORMATION*" SECTIONS OF THIS AGREEMENT, OR ANY OTHER VIOLATION OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS; (B) QUEST'S EXPRESS OBLIGATIONS UNDER THE *"INFRINGEMENT"* SECTION OF THIS AGREEMENT AND CUSTOMER'S EXPRESS OBLIGATIONS UNDER THE *"CONDUCT"* AND *"EXPORT"* SECTIONS OF THIS AGREEMENT, (C) QUEST'S COSTS OF COLLECTING DELINQUENT AMOUNTS WHICH ARE NOT THE SUBJECT OF A GOOD FAITH DISPUTE; (D) A PREVAILING PARTY'S LEGAL FEES PURSUANT TO THE "*LEGAL FEES*" SECTION OF THIS AGREEMENT; OR (E) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF APPLICABLE LAW, THE MAXIMUM AGGREGATE AND CUMULATIVE LIABILITY OF QUEST, ITS AFFILIATES AND SUPPLIERS, AND CUSTOMER UNDER THIS AGREEMENT, WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE, SHALL NOT EXCEED THE GREATER OF THE FEES PAID AND/OR OWED (AS APPLICABLE) BY CUSTOMER FOR THE PRODUCTS THAT ARE THE SUBJECT OF THE BREACH OR FIVE HUNDRED DOLLARS ($500.00). FOR MAINTENANCE SERVICES OR A PRODUCT SUBJECT TO RECURRING FEES, THE LIABILITY SHALL NOT EXCEED THE GREATER OF THE AMOUNT PAID AND/OR OWED (AS APPLICABLE) FOR SUCH MAINTENANCE SERVICE OR PRODUCT DURING THE TWELVE (12) MONTHS PRECEDING THE BREACH OR FIVE HUNDRED DOLLARS ($500.00). THE PARTIES AGREE THAT THESE LIMITATIONS OF LIABILITY ARE AGREED ALLOCATIONS OF RISK CONSTITUTING IN PART THE CONSIDERATION FOR QUEST PROVIDING PRODUCTS AND SERVICES TO CUSTOMER, AND SUCH LIMITATIONS WILL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY AND EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LIABILITIES OR FAILURES.

Quest's Affiliates and suppliers shall be beneficiaries of this "*Limitation of Liability"* Section and Customer's Service Providers are entitled to the rights granted under the "*Third Party Use"* Section of this Agreement; otherwise, no third party beneficiaries exist under this Agreement. Quest expressly excludes any and all liability to Customer's Service Providers, Clients and to any other third party.

14. Confidential Information.

(a) **Definition**. ***"Confidential Information"*** means information or materials disclosed by one party (the ***"Disclosing Party"***) to the other party (the ***"Receiving Party"***) that are not generally available to the public and which, due to their character and nature, a reasonable person under like circumstances would treat as confidential, including, without limitation, personal data, financial, marketing, and pricing information, trade secrets, know-how, proprietary tools, knowledge and methodologies, the Software (in source code and/or object code form), information or benchmark test results regarding the functionality and performance of the Software, any Software license keys provided to Customer, and the terms and conditions of this Agreement. Personal data includes "Individually Identifiable Health Information" (as that term is defined in 45 CFR § 164.501) or "Nonpublic Personal Information" (as that term is defined in Title V of the Gramm-Leach-Bliley Act of 1999).

Confidential Information shall not include information or materials that (i) are generally known to the public, other than as a result of an unpermitted disclosure by the Receiving Party after the date that Customer accepts this Agreement; (ii) were known to the Receiving Party without an obligation of confidentiality prior to receipt from the Disclosing Party; (iii) the Receiving Party lawfully received from a third party without that third party's breach of agreement or obligation of trust; or (iv) are or were independently developed by the Receiving Party without access to or use of the Disclosing Party's Confidential Information.

(b) **Obligations.** The Receiving Party shall (i) not disclose or permit disclosure of the Disclosing Party's Confidential Information to any third party, except as permitted in Sections 14(c) and 17(e) below, (ii) only use the Disclosing Party's Confidential Information to exercise the rights granted to it under this Agreement, and (iii) protect the Disclosing Party's Confidential Information from unauthorized use or disclosure by exercising at least the same degree of care it uses to protect its own similar information, but in no event less than a reasonable degree of care. The Receiving Party shall promptly notify the Disclosing Party of any known unauthorized use or disclosure of the Disclosing Party's Confidential Information and will cooperate with the Disclosing Party in any litigation brought by the Disclosing Party against third parties to protect its proprietary rights. For the avoidance of doubt, this Section shall apply to all disclosures of the parties' Confidential Information as of the date that Customer accepts this Agreement, whether or not specifically arising from a party's performance under this Agreement.

(c) **Permitted Disclosures**. Notwithstanding the foregoing, the Receiving Party may disclose the Disclosing Party's Confidential Information without the Disclosing Party's prior written consent to any of its Affiliates, directors, officers, employees, consultants or representatives (collectively, the ***"Representatives"***), but only to those Representatives that (i) have a "need to know" in order to carry out the purposes of this Agreement or to provide professional advice in connection with this Agreement, (ii) are legally bound to the Receiving Party to protect information such as the Confidential Information under terms at least as restrictive as those provided herein, and (iii) have been informed by the Receiving Party of the confidential nature of the Confidential Information and the requirements regarding restrictions on disclosure and use as set forth in this Section. The Receiving Party shall be liable to the Disclosing Party for the acts or omissions of any Representatives to which it discloses Confidential Information which, if done by the Receiving Party, would be a breach of this Agreement.

Additionally, it shall not be a breach of this Section for the Receiving Party to disclose the Disclosing Party's Confidential Information as may be required by operation of law or legal process, provided that the Receiving Party provides prior notice of such disclosure to the Disclosing Party unless expressly prohibited from doing so by a court, arbitration panel or other legal authority of competent jurisdiction.

15. Compliance Verification. Customer agrees to maintain and use systems and procedures to accurately track, document, and report its installations, acquisitions and usage of the Software. Such systems and procedures shall be sufficient to determine if Customer's deployment of the Software or, if applicable, use of the SaaS Software is within the quantities, Product Terms, and maintenance releases to which it is entitled. Quest or its designated auditing agent shall have the right to audit Customer's deployment of the Software or, if applicable, use of the SaaS Software for compliance with the terms and conditions of this Agreement and the applicable Order(s). Any such audits shall be scheduled

at least ten (10) days in advance and shall be conducted during normal business hours at Customer's facilities. Customer shall provide its full cooperation and assistance with such audit and provide access to the applicable records and computers. Without limiting the generality of the foregoing, as part of the audit, Quest may request, and Customer agrees to provide, a written report, signed by an authorized representative, listing Customer's then current deployment of On-Premise Software and/or the number of individuals that have accessed and used SaaS Software. If Customer's deployment of the Software or, if applicable, use of the SaaS Software is found to be greater than its purchased entitlement to such Software, Customer will be invoiced for the over-deployed quantities at Quest's then current list price plus the applicable Maintenance Services and applicable over-deployment fees. All such amounts shall be payable in accordance with this Agreement. Additionally, if the unpaid fees exceed five percent (5%) of the fees paid for the applicable Software, then Customer shall also pay Quest's reasonable costs of conducting the audit. The requirements of this Section shall survive for two (2) years following the termination of the last License governed by this Agreement.

16. SaaS Provisions.

(a) **Data.** Customer may store data on the systems to which it is provided access in connection with its use of the SaaS Software (the ***"SaaS Environment"***). Quest may periodically make back-up copies of Customer data, however such back-ups are not intended to replace Customer's obligation to maintain regular data backups or redundant data archives. Customer is solely responsible for collecting, inputting and updating all Customer data stored in the SaaS Environment, and for ensuring that the data does not (i) include anything that actually or potentially infringes or misappropriates the copyright, trade secret, trademark or other intellectual property right of any third party, or (ii) contain anything that is obscene, defamatory, harassing, offensive or malicious. If the Order states where Customer data is to be stored, Quest will not move the data from the specified region without notifying Customer, except if Quest is required to do so by law or legal process. Quest shall have the right to delete all Customer data stored in connection with the use of the SaaS Software thirty (30) days following any termination of this Agreement or any License to SaaS Software granted hereunder. Upon Customer's request, Quest shall assist Customer with making copies of such data prior to the effective date of the termination.

Customer represents and warrants that it has obtained all rights, permissions and consents necessary to use and transfer all Customer and/or third party data within and outside of the country in which Customer or the applicable Customer Affiliate is located (including providing adequate disclosures and obtaining legally sufficient consents from Customer's employees, customers, agents, and contractors). If Customer transmits data to a third-party website or other provider that is linked to or made accessible by the SaaS Software, Customer will be deemed to have given its consent to Quest enabling such transmission and Quest shall have no liability to Customer in connection with any claims by a third party in connection with such transmission.

(b) **Conduct.** In connection with the use of SaaS Software, Customer may not (i) attempt to use or gain unauthorized access to Quest's or to any third-party's networks or equipment; (ii) permit other individuals or entities to copy the SaaS Software; (iii) provide unauthorized access to or use of any SaaS Software or the associated access credentials; (iv) attempt to probe, scan or test the vulnerability of the SaaS Software, the SaaS Environment, or a system, account or network of Quest or any of Quest's customers or suppliers; (v) interfere or attempt to interfere with service to any user, host or network; (vi) engage in fraudulent, offensive or illegal activity of any nature or intentionally engage in any activity that infringes the intellectual property rights or privacy rights of any individual or third-party; (vii) transmit unsolicited bulk or commercial messages; (viii) intentionally distribute worms, Trojan horses, viruses, corrupted files or any similar items; (ix) restrict, inhibit, or otherwise interfere with the ability of any other person, regardless of intent, purpose or knowledge, to use or enjoy the SaaS Software (except for tools with safety and security functions); or (x) restrict, inhibit, interfere with or otherwise disrupt or cause a performance degradation to any Quest (or Quest supplier) facilities used to provide the SaaS Environment. Customer shall cooperate with Quest's reasonable investigation of SaaS Environment outages, security issues, and any suspected breach of this Section, and shall, at its expense, defend Quest and its Affiliates from any claim, suit, or action by a third party (a ***"Third Party Claim"***) alleging harm to such third party caused by Customer's breach of any of the provisions of this Section. Additionally, Customer shall pay any judgments or settlements reached in connection with the Third Party Claim as well as Quest's costs of responding to the Third Party Claim.

(c) **Suspension.** Quest may suspend Customer's use of SaaS Software (a) if so required by law enforcement or legal process, (b) in the event of an imminent security risk to Quest or its customers, or (c) if continued use would subject Quest to material liability. Quest shall make commercially reasonable efforts under the circumstances to provide prior notice to Customer of any such suspension.

17. General.

(a) **Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without giving effect to any conflict of laws principles that would require the application of laws of a different state. Any action seeking enforcement of this Agreement or any provision hereof shall be brought exclusively in the state or federal courts located in Travis or Williamson County, Texas. Each party hereby agrees to submit to the jurisdiction of such courts.

The parties agree that neither the United Nations Convention on Contracts for the International Sale of Goods, nor the Uniform Computer Information Transaction Act (UCITA) shall apply to this Agreement, regardless of the states in which the parties do business or are incorporated.

(b) **Assignment.** Except as otherwise set forth herein, Customer shall not, in whole or part, assign or transfer any part of this Agreement, the Licenses granted under this Agreement or any other rights, interest or obligations hereunder, whether voluntarily, by contract, by operation of law or by merger (whether that party is the surviving or disappearing entity), stock or asset sale, consolidation, dissolution, through government action or order, or otherwise without the prior written consent of Quest. Any attempted transfer or assignment by Customer that is not permitted by this Agreement shall be null and void.

(c) **Severability.** If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, such provision will be enforced to the maximum extent permissible and the remaining provisions of this Agreement will remain in full force and effect.

Notwithstanding the foregoing, the terms of this Agreement that limit, disclaim, or exclude warranties, remedies or damages are intended by the parties to be independent and remain in effect despite the failure or unenforceability of an agreed remedy. The parties have relied on the limitations and exclusions set forth in this Agreement in determining whether to enter into it.

(d) **Use by U.S. Government.** The Software is a "commercial item" under FAR 12.201. Consistent with FAR section 12.212 and DFARS section 227.7202, any use, modification, reproduction, release, performance, display, disclosure or distribution of the Software or Documentation by the U.S. government is prohibited except as expressly permitted by the terms of this Agreement. In addition, when Customer is a U.S. government entity, the language in Subsection 12 (ii) of this Agreement and Section 17 (i) of this Agreement shall not be applicable.

(e) **Contact Information.** In the course of the business relationship between Customer and Quest, Customer may provide to Quest the business contact information of Customer, its employees, and its Affiliates (some of which may be considered to be personally identifiable information of the personnel of Customer and its Affiliates). Additionally, Customer may elect to send data to Quest for diagnostic purposes as part of Maintenance Services. Customer hereby (i) acknowledges that it has the right to provide such information and data to Quest, (ii) consents for Quest to store and use all such information and data for the purposes of managing its business relationship with Customer and performing Maintenance Services, (iii) agrees that the information and data may be transferred to, accessed and used by Quest and its contractors worldwide in the course of performing Quest's standard business operations and sent to third party service providers for market research purposes (such as customer satisfaction surveys). All data and information that is Confidential Information will be subject to the *Confidential Information* Section of this Agreement. Quest hereby affirms to Customer that Dell Software Inc. currently abides by the safe harbor framework as set forth by the U.S. Department of Commerce regarding the collection, use and retention of data from the European Union.

(f) **Notices.** All notices provided hereunder shall be in writing and addressed to the legal department of the respective party or to such other address as may be specified in an Order or in writing by either of the parties to the other in accordance with this Section. Except as may be expressly permitted herein, notices may be delivered personally, sent via a nationally recognized courier or overnight delivery service, or mailed by first class mail, postage prepaid. All notices, requests, demands or communications shall be deemed effective upon personal delivery or, if sent by mail, four (4) days following deposit in the mail in accordance with this paragraph.

(g) **Disclosure of Customer Status.** Quest may include Customer in its listing of customers and, upon written consent by Customer, announce Customer's selection of Quest in its marketing communications.

(h) **Waiver.** Performance of any obligation required by a party hereunder may be waived only by a written waiver signed by an authorized representative of the other party, which waiver shall be effective only with respect to the specific obligation described therein. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

(i) **Injunctive Relief.** Each party acknowledges and agrees that in the event of a material breach of this Agreement, including but not limited to a breach of the "*Software License,*" "*Restrictions*" or "*Confidential Information*" Sections of this Agreement, the non-breaching party shall be entitled to seek immediate injunctive relief, without limiting its other rights and remedies.

(j) **Force Majeure.** Each party will be excused from performance for any period during which, and to the extent that, it is prevented from performing any obligation or service as a result of causes beyond its reasonable control, and without its fault or negligence, including without limitation, acts of God, strikes, lockouts, riots, acts of war, epidemics, communication line failures, and power failures. For the avoidance of doubt, an excuse of the obligation to pay fees due hereunder during the pendency of a force majeure event shall not operate to relieve Customer or its Affiliates of its contractual obligations to pay such fees.

(k) **Equal Opportunity.** Dell Software Inc. is a federal contractor and Affirmative Action employer (M/F/D/V) as required by the Equal Opportunity clause C.F.R. § 60-741.5(a).

(l) **Headings.** Headings in this Agreement are for convenience only and do not affect the meaning or interpretation of this Agreement. This Agreement will not be construed either in favor of or against one party or the other, but rather in accordance with its fair meaning. When the term "including" is used in this Agreement it will be construed in each case to mean "including, but not limited to."

(m) **Legal Fees**. If any legal action is brought to enforce any rights or obligations under this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, court costs and other collection expenses, in addition to any other relief it may be awarded.

(n) **Entire Agreement.** This Agreement is intended by the parties as a final expression of their agreement with respect to the subject matter hereof and may not be contradicted by evidence of any prior or contemporaneous agreement unless such agreement is signed by both parties. In the absence of such an agreement, this Agreement and the applicable Order shall constitute the complete and exclusive statement of the terms and conditions and no extrinsic evidence whatsoever may be introduced in any judicial proceeding that may involve the Agreement. Each party acknowledges that in entering into the Agreement it has not relied on, and shall have no right or remedy in respect of, any statement, representation, assurance or warranty (whether made negligently or innocently) other than as expressly set out in the Agreement. In those jurisdictions where an original (non-electronic) signature on agreements such as this Agreement or an Order is required by law or regulation, the parties hereby agree that, notwithstanding any such law or regulation, a certified electronic signature on this Agreement or any Order shall be sufficient to create an enforceable and valid agreement. In the event of a conflict between the terms of this Agreement and the terms contained in an Order, the terms in the Order shall only control if the Order is signed by both Quest and Customer; otherwise, the terms of this Agreement shall control. Neither this Agreement, nor an Order, may be modified or amended except by a writing executed by a duly authorized representative of each party. No other act, document, usage or custom shall be deemed to amend or modify this Agreement or an Order.