



Software License and Support Agreement

1. SCOPE: This Software License and Support Agreement (the "Agreement") establishes the terms and conditions to which the undersigned SMA and LICENSEE (the "Parties") have agreed for the licensing of SMA's distributed systems software products, support and accompanying documentation (the "Product(s)"). This Agreement contemplates the contemporaneous and future execution by the Parties of one or more ordering documents (the "Product Order Form(s)"), which shall be attached hereto and incorporated herein by reference. Each Product Order Form shall be considered a separate license ("License") conferring upon LICENSEE permission to use the Product(s) as specified herein. SMA shall be under no obligation to issue or accept any Product Order Form under this Agreement. No Product(s) shall be furnished to LICENSEE by virtue of this Agreement alone but shall require the issuance of a Product Order Form or acknowledged Purchase Order. Product Order Form(s) or Purchase Orders shall reference this Agreement and contain, among other items, the: (1) Product Description; (2) Unit Classification; (3) Unit Cost; (4) Designated Core, Instance, Socket, or Site information; (5) Product Effective Date; (6) Location of Cores, Instances, Sockets or Sites; and (7) signatures of authorized representatives of both Parties.

2. GRANT: SMA grants to LICENSEE a perpetual, non-exclusive, nontransferable license (the "License") to use each Product(s) described in a fully executed Product Order Form on the physical or virtual server (collectively referred herein as "Designated SYSTEM") designated in the Product Order Form and which Designated SYSTEM or Socket must be owned or leased by LICENSEE.

3. TERM: Upon acceptance by SMA, this Agreement shall be effective on the date first written above. Each Product License shall become effective on the date set forth in the Product Order Form (the "Product License Effective Date"), or if not provided, the date of execution of the Product Order Form and shall continue for the term(s) set forth in the Product Order Form.

4. TERMINATION: Either Party may terminate this Agreement upon thirty (30) days written notice to the other Party. SMA may immediately terminate all Licenses without further obligation or liability: (a) if LICENSEE fails to pay an amount due hereunder and continues to be delinquent for a period of thirty (30) days after the last day on which payment is due; or (b) if a petition alleging insolvency is filed by or against LICENSEE, or a receiver is appointed for any part of LICENSEE'S business, or its assets are assigned for the benefit of creditors; or (c) if LICENSEE commits any other breach of this Agreement and fails to remedy such breach within thirty (30) days after written notice by SMA of such breach; or (d) if LICENSEE violates Section 6 herein. The termination of this Agreement shall not affect: (i) the obligation of either Party pursuant to any License which has not been terminated, and which shall remain in effect; or (ii) the survival of the representations, warranties and covenants contained herein. Upon the termination of any License, LICENSEE shall return to SMA the terminated Product(s) and all related documentation, and copies thereof, but may retain all other licensed Product(s) not terminated. LICENSEE shall promptly certify in writing to SMA that all copies of the Product(s) have been removed from each CPU upon which the Product(s) was installed, and that any copies not returned have been destroyed. Termination of this Agreement, any License granted hereunder or the support plan shall not release LICENSEE from the obligations of Section 6 herein.



Software License and Support Agreement

5. CHANGE IN DESIGNATED SYSTEM: LICENSEE may use the Product(s) only on the Designated SYSTEM; provided, however, that the Product(s) may be transferred temporarily to another computer if the Designated SYSTEM is inoperable due to malfunction, initiation of a disaster recovery program or for routine maintenance. LICENSEE'S right to transfer the Product(s) to another Designated SYSTEM, as granted herein, shall not entitle LICENSEE to transfer such Product(s) to multiple production CPU's to perform monitoring or recovery functions on such multiple production CPU's on a temporary or scheduled basis. By written notice to SMA, LICENSEE may designate, as the Designated SYSTEM, another computer owned or leased by LICENSEE and located within the same country as the original Designated SYSTEM. If the new Designated SYSTEM is of a higher CPU Classification than the previous Designated SYSTEM, both Parties agree to execute a new Product Order Form reflecting the changes. Upon such change in CPU Classification, LICENSEE agrees to pay an upgrade fee based upon the difference between the then current SMA price list for the new CPU Classification and the then current price list for the original CPU Classification, less the applicable discount granted for such License. At the next Support Anniversary Date as defined in 8.1 herein, LICENSEE shall pay the applicable support charge based upon the new CPU Classification. If the new Designated SYSTEM is of a lower CPU Classification, both Parties agree to execute a new Product Order Form with support charges based upon the new lower CPU Classification, effective on the next Support Anniversary Date. If LICENSEE changes CPUs, the original Support Anniversary Date shall remain unchanged.

6. TITLE AND PROPRIETARY INFORMATION:

6.1 TITLE AND COPYRIGHT: SMA has the full rights to license the Product(s) to LICENSEE and to perform its obligations under this Agreement. All title and copyrights and other industrial, intellectual and marketing rights in and to the Product(s), including but not limited to all modifications thereto made by or for any person, are owned by SMA and/or its affiliates and licensors, and are protected by both United States copyright law and applicable international copyright treaties. LICENSEE agrees not to claim or assert title to or ownership of the Product(s). To the extent expressly permitted by applicable law or treaty notwithstanding this limitation, LICENSEE may copy the Product(s) only for backup or archival purposes, or as an essential step in utilizing the Product(s), but for no other purpose. LICENSEE will not remove or alter any copyright or proprietary notice from copies of the Product(s), and copies made by or for LICENSEE shall bear all copyright, trade secret, trademark and any other intellectual property right notices on the original copies.

6.2 RESTRICTIONS: LICENSEE acknowledges that the Product(s) contain valuable trade secrets of SMA and/or its affiliates and licensors, and that this Agreement establishes a confidential relationship between the Parties with respect to this information. Except in accordance with the terms of this Agreement, LICENSEE agrees (a) not to decompile, disassemble, reverse engineer or otherwise attempt to derive the Product(s) source code from object code except to the extent expressly permitted by applicable law or treaty despite this limitation; (b) not to sell, rent, lease, license, sublicense, display, modify, time share, outsource or otherwise transfer the Product(s) to, or permit the use of the Product(s) by, any third party; and (c) to preserve the confidential nature of the proprietary and trade secret information by retaining and using the Product(s) in trust and confidence, solely for its own internal use, and using reasonable care and protection to prevent the unauthorized use, copying, publication or dissemination of the Product and SMA confidential information learned from LICENSEE'S use of the Product. LICENSEE will not export or re-export any Product(s) without both the written consent of SMA and the appropriate U.S. and/or foreign government license(s) or license exception(s). LICENSEE agrees not to modify the Product(s) without the prior written approval of SMA. Unapproved alterations to the Product(s) shall void any obligation by SMA to provide support for the Product(s), pursuant to Section 7, during the warranty period and any subsequent period in which LICENSEE is enrolled in the Support, Maintenance and Enhancement Plan. No changes, additions or alterations to the Product(s), however extensive, shall reduce or



Software License and Support Agreement

impair SMA's right and title to any Product, including such changes, additions or alterations to the Product.

Foglight Cartridges, Integration Modules and utilities licensed under this Agreement, and derivatives thereof, are subject to these restrictions, and shall not be used by, or licensed or transferred in any manner to any Third Party except as provided in this Agreement. (Foglight is a registered trademark of Quest Software, Inc.) SMA shall have the right to obtain injunctive relief against unauthorized copying or use of the Product(s), in addition to any other rights to which it may be entitled. LICENSEE agrees to promptly report to SMA any violations of these provisions by LICENSEE'S employees, consultants or agents of which LICENSEE is aware.

Third Party Use. If Customer contracts with a third party who performs Software implementation, configuration, consulting or outsourcing services ("**Service Provider**"), the Service Provider may use the Software and Documentation Licensed by 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 accordance with the terms of this Agreement, (ii) the use of the Software and Documentation by the Service Provider will not violate the terms of the export restrictions set forth herein, and (iii) the Service Provider is not a Quest competitor. Customer shall be jointly and severally liable to Quest for the acts and omissions of its Service Providers in connection with their permitted use of the Software and Documentation.

7. SUPPORT, MAINTENANCE AND ENHANCEMENTS ("Support"): LICENSEE is hereby enrolled in Basic Support and is entitled to the Support options as defined below:

7.1 ELECTRONIC SERVICES: To the extent that Electronic Services is available to the Product(s), LICENSEE may electronically access, at no charge, services which will be available 24 hours a day, 7 days per week. Such electronic services may include, but are not limited to:

- Bug fix retrieval via the Internet or World Wide Web access.
- Product maintenance and demonstration code retrieval via a WAN-accessible FTP server.

7.2 FREE SUPPORT PERIOD: For a period of one year (365 days) from the Product License Effective Date of a licensed Product(s), Support equivalent to that of Basic Support, as defined below, will be provided to the LICENSEE at no charge ("Free Support Period"), unless otherwise indicated as part of Product information publicly published and distributed on such Product.

7.3 BASIC SUPPORT: Basic Support shall be provided twenty-four (24) hours per day, seven (7) days per week, including holidays. Response time for all incidents shall be no greater than eight (8) business hours. Basic Support shall entitle LICENSEE to the following support, maintenance and enhancement functions, therefore SMA shall:

- (a) Supply telephone or other electronic support to LICENSEE in order to help LICENSEE locate and, on its own, correct problems with the Product(s). At SMA's sole discretion, SMA shall (i) supply code corrections to LICENSEE to correct Product malfunctions in order to bring such Product into substantial conformity with the operating specifications for the most current version of the Product, unless LICENSEE'S unauthorized modifications prohibits or hampers such corrections or causes the malfunction; or (ii) supply code corrections to correct such non-substantial problems at the next general Release of the Product;
- (b) Supply, so long as is technically and economically feasible, at SMA's sole discretion, updated Product(s) as required to operate under new releases of the operating system and other system software with which the Product(s) is designed to operate and which SMA furnishes, without charge, to all other LICENSEES of the Product(s) who are enrolled in Basic Support;
- (c) Supply all extensions, enhancements and other changes that SMA, at its sole discretion, makes or adds



Software License and Support Agreement

to the Product(s) and which SMA furnishes, without charge, to all other LICENSEES of the Product(s) who are enrolled in Basic Support; and

(d) Replace the Product(s) at no charge if the media becomes destroyed or damaged so that the Product(s) becomes unusable.

7.3.5 PLATINUM SUPPORT: Platinum Support shall be provided twenty-four (24) hours per day, seven (7) days per week, including holidays. Cases will be answered responded to in no more than four (4) hours. Platinum support shall also include five (5) days of SMA Professional services annually. Customers with Platinum Support shall also be entitled to four (4) registered support contacts.

7.4 SUPPORT CONTACTS: During LICENSEE'S enrollment in Support (Free or Basic), LICENSEE shall be entitled, at no additional charge, to designate in writing, two (2) authorized contacts of LICENSEE ("Support Contacts"), who shall be permitted to report problems and receive Support from SMA. A duly authorized representative of LICENSEE must submit a change to the authorized Support Contacts of LICENSEE in writing to SMA.

8. PAYMENT SCHEDULE AND FEES:

8.1 PAYMENT SCHEDULE: Payment for all license and support fees shall be due thirty (30) days after receipt by LICENSEE of an invoice from SMA or SMA Authorized Reseller specifying the amounts due. The charge for Support shall be due upon the expiration of the Free Support Period for the initial order of the licensed Product(s) (the "Support Anniversary Date"). The charge for Support for subsequent licenses of the Product(s) shall be due upon the expiration of the Free Support Period for such licensed Product(s). For the subsequently licensed Product(s), SMA shall invoice LICENSEE a pro-rated amount of the Support fee to establish a coterminous Support Anniversary Date, the same as that established in the initial order. Thirty (30) days prior to each annual Support Anniversary Date of the licensed Product(s), unless terminated in writing thirty (30) days prior to the next Support Anniversary Date, SMA shall invoice LICENSEE the then current charge for the next year of Support. LICENSEE must pay the invoice in accordance with the payment schedule herein to remain enrolled in Support.

8.2 BASIC SUPPORT FEE: The annual fee for Basic Support will be calculated at twenty percent (25%) ("Basic Support Percentage Rate") of the Net Purchase Price of the licensed Product(s), based upon the then current Designated SYSTEM Classification upon which the Product(s) is installed. The annual fee for Basic Support shall be subject to SMA's then current minimum annual Basic Support fee.

8.3 ADDITIONAL SUPPORT CONTACT FEE: In the event LICENSEE desires to register additional Support Contacts to those authorized (Free or Basic), LICENSEE may register such additional authorized Support Contacts at the rate of US \$2,000 per additional Support Contact per Support year. The charge for the first year of additional Support Contacts may be prorated to coincide with the Product's Support Anniversary Date. A duly authorized representative of LICENSEE must submit such additional Support Contact(s) of LICENSEE in writing to SMA.

8.4 TERMINATION OF SUPPORT: Either party may cancel enrollment in Support upon written notice to the other at least thirty (30) days prior to the next Support Anniversary Date. If LICENSEE has terminated its enrollment in Support, LICENSEE may re-enroll by paying a reinstatement fee calculated as follows: the then current support percentage rate multiplied by the then current applicable List Price divided by six (6), then multiplied by the number of months during which LICENSEE was not enrolled in Support. In addition, LICENSEE must pay the annual charge for Support for the next year in advance. Such reinstatement date shall then be considered the Support Anniversary Date. LICENSEE agrees not to modify the Product(s) without the prior written approval of SMA. Unapproved alterations to the Product(s) shall void any obligation by SMA to provide support for the Product(s), pursuant to Section 7, during the warranty period and any subsequent period



Software License and Support Agreement

in which LICENSEE is enrolled in Support.

8.5 CHANGE OF SUPPORT FEES: SMA reserves the right to change its then current published list prices for the Product(s) and its charge for Support at any time upon thirty (30) days written notice to LICENSEE; provided, however, that the charge is calculated consistently with the amounts regularly charged by SMA to other licensed users of the Product(s). Any such change to Support shall not take effect until the completion of the current support term.

9. TAXES: Except for franchise taxes and taxes based upon the net income of SMA, all taxes imposed by government agencies either based upon the Product(s), its use or this Agreement (including Sales and Use taxes), are the obligation of the LICENSEE, whether such taxes are now or hereafter imposed.

10. LIMITED WARRANTY AND CONDITIONS: SMA warrants and conditions that the media on which the Product(s) is furnished will be, under normal use, free from defects in materials and workmanship. SMA also warrants that the Product(s) will perform in substantial accordance with the operating specifications contained in the accompanying Product(s) documentation which is most current at the time of the acceptance of any Product Order Form ordering such Product(s), for a period of ninety (90) days from the Product License Effective Date. SMA's entire liability and LICENSEE'S exclusive remedy under this provision will be for SMA to use reasonable best efforts to remedy defects covered by this warranty and condition within a reasonable period of time or, at SMA's option, either to replace the defective Product(s) or to refund the amount paid by LICENSEE to license the use of the Product(s), pro-rated over the 90 day warranty period. SMA does not warrant or condition that the operation of the Product(s) will be uninterrupted or error free, or that all software defects can be corrected. This warranty and condition shall not apply if: (a) the Product(s) is not used in accordance with SMA's instructions; (b) a Product(s) defect has been caused by any of LICENSEE'S malfunctioning equipment; (c) any other cause within the control of LICENSEE causes the Product(s) to malfunction; or (d) LICENSEE has made modifications to the Product(s) not expressly authorized in writing by SMA. No employee, agent or representative of SMA has authority to bind SMA to any oral representations, warranties or conditions concerning the Product(s). Any written representation, warranty or condition not expressly contained in this Agreement shall not be enforceable. **THIS SECTION 10 SHALL NOT APPLY TO A TRIAL LICENSE UNDER SECTION 13.**

THIS WARRANTY AND CONDITION IS IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS. THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, INCLUDING THOSE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, REGARDING THIS AGREEMENT OR ANY PRODUCT(S) LICENSED HEREUNDER.

11. LIMITATION OF LIABILITY: In no event shall SMA be liable to any party for any damages caused by LICENSEE'S failure to perform its responsibilities under this Agreement. Nor shall SMA be liable to any party for loss of profits, goodwill, lost computer time, destruction, damage or loss of data, or any other indirect, incidental or consequential damages from any cause arising out of or in any way connected with the design, manufacture, sale, support or use of the Product(s). Except as provided in Section 12 below, in no event shall SMA's liability for direct damages resulting from the use of a Product(s) exceed the amount paid by the LICENSEE to license the use of that Product(s). **SOME COUNTRIES, TERRITORIES, STATES, PROVINCES OR SOVEREIGNTIES DO NOT ALLOW THE LIMITATION OR EXCLUSION OF CONSEQUENTIAL DAMAGES SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO LICENSEE.**

THE COLLECTIVE LIABILITIES OF SMA AND ITS THIRD PARTY SUPPLIERS ARE SUBJECT TO THE LIMITATION OF LIABILITIES DESCRIBED IN THIS AGREEMENT. THIRD PARTY SUPPLIERS DISCLAIM ALL LIABILITY FOR CONSEQUENTIAL OR OTHER INDIRECT DAMAGES. THE THIRD PARTY SUPPLIER IS AN INTENDED BENEFICIARY OF THESE LIMITATIONS AND DISCLAIMERS, AND THE LIMITATIONS OF LIABILITIES FOR SMA AND ITS SUPPLIERS ARE NOT CUMULATIVE.



Software License and Support Agreement

12. INDEMNIFICATION FOR INFRINGEMENT: SMA maintains that, to the best of its knowledge, the Product(s) will not infringe upon or violate any patent, copyright, trademark, trade secret, or other proprietary right of any third party. SMA will defend or settle, at its own expense, any claim against LICENSEE asserting a patent, copyright, trademark, trade secret or proprietary right violation which concerns any Product(s) used within the scope of the License hereunder. SMA shall indemnify LICENSEE against any loss, expense or liability from any damages finally awarded against LICENSEE. However, LICENSEE must promptly notify SMA in writing after LICENSEE first receives notice of any such claim, action or allegation of infringement and, SMA shall have sole control of the defense of any action and all negotiations for its settlement or compromise, with the reasonable assistance of LICENSEE. SMA shall not be liable for any costs or expenditures incurred by LICENSEE without SMA's prior written consent. If an injunction or order is obtained against LICENSEE'S use of any Product(s) by reason of the allegations of infringement, or if in SMA's opinion the Product(s) is likely to become the subject of a claim of infringement, SMA shall, at its expense:

- (a) Procure for LICENSEE the right to continue using the Product(s); or
- (b) Modify or replace the Product(s) with a compatible, functionally equivalent, non-infringing Product(s); or
- (c) If neither (a) nor (b) is practical, remove the Product(s) and issue LICENSEE a pro-rata credit based on the Perpetual License fees paid for the Product(s) pro-rated over a thirty-six (36) month period from the Original Product Effective Date. Thereafter, termination shall proceed in accordance with the terms of Section 4.

13. TRIAL OF PRODUCT: From time to time, LICENSEE may accept copies of SMA's Product(s) for trial use without the execution of any Product Order Form hereunder. For such Product(s), (a) this License consists of a non-exclusive evaluation license ("Trial License") to use the Product(s) for a limited time ("Trial Period") only for evaluation; (b) during the Trial Period, LICENSEE may not use the Product(s) for development, commercial production, database management or other non-trial purposes, and (c) LICENSEE accepts the Product(s) on an **AS IS** basis and agrees that **SMA, ITS RESELLERS AND LICENSORS GRANT NO WARRANTIES OR CONDITIONS (INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE) TO LICENSEE AND ACCEPT NO LIABILITY WHATSOEVER RESULTING FROM THE USE OF SUCH PRODUCT(S) UNDER THIS TRIAL LICENSE.** Notwithstanding the foregoing, the provision of Section 12 shall apply to the Trial License. LICENSEE shall have no obligation regarding the Product(s) during or following the trial period, except to exercise the duties specified in Section 6 herein. Either Party upon written notice to the other may cancel the Trial Period. Upon termination or expiration of the trial period, LICENSEE shall either execute a Product Order Form covering the trialed Product(s) or return to SMA the Product(s) in accordance with the terms of Section 4.

14. ASSIGNMENTS AND TRANSFERS: LICENSEE'S right to use the Product(s), as a result of this License, may not be assigned, sublicensed, or otherwise transferred, voluntarily or otherwise, without prior written approval of SMA. LICENSEE may assign a License to a parent or a majority owned subsidiary of LICENSEE, provided said Assignee is not a direct competitor of SMA. LICENSEE agrees to notify SMA in writing no more than thirty (30) days after such transfer, provide SMA with the address where the Product(s) will be in operation, and certify to SMA that all copies of the Product(s) at the previous address have been destroyed or transferred to such parent or subsidiary, except for a reasonable number of copies for internal archival purposes.

15. VERIFICATION: On SMA's written requests, LICENSEE shall furnish SMA with a signed certification (a) verifying that the Product(s) is being used pursuant to the terms of this Agreement, including any user limitations; and (b) listing the locations, types, model and serial numbers of the Designated SYSTEM(S) on which the Product(s) is run. SMA may, at its expense, audit the number of copies of the Product(s) in use by LICENSEE and the Designated SYSTEM(s) on which the Product(s) is installed. Any such audit shall be conducted during regular business hours at LICENSEE'S facilities and shall not unreasonably interfere with LICENSEE'S business activities. If an audit reveals that LICENSEE has underpaid fees to SMA, LICENSEE shall be invoiced for such underpaid fees



Software License and Support Agreement

based on the Price List in effect at the time the audit is completed; if the underpaid fees exceed 5% of the license fees paid, then LICENSEE shall also pay SMA's reasonable costs of conducting the audit.

16. SEVERABILITY: Should any provision of this Agreement be invalid, ineffective, or unenforceable, under present or future laws, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

17. NOTICE: Notices to either Party shall be in writing to the address indicated in this Agreement (or as later amended) and deemed effective when received, or 24 hours following the date of the postmark, if sent by prepaid certified mail, return receipt requested.

18. REFERENCING: LICENSEE agrees that SMA (including its parent company and affiliates) may refer to the corporate name of LICENSEE as a customer of SMA, both internally and in externally published media. LICENSEE also agrees to instruct appropriate personnel within its organization (for example System Administrators and Systems Programmers) that LICENSEE has agreed to receive and participate in calls, from time to time, with potential customers of SMA who wish to evaluate the technical specifications of SMA's Product.

19. ENTIRE AGREEMENT: LICENSEE acknowledges it has read this Agreement and agrees that it is the complete and exclusive statement of the agreement between the Parties, and supersedes all prior proposals and understandings, oral and written, relating to the subject matter of this Agreement. This Agreement shall not be modified or rescinded except in writing signed by the Parties. The terms and conditions of any present or future documents submitted by LICENSEE which conflicts with, or in any way purports to amend this Agreement, are specifically objected to by SMA and shall be of no force or effect.

This Agreement shall be governed by the laws of the state of New York without regard to conflicts of law principles. The parties hereby agree that any and all claims or controversies arising from this Agreement shall be brought exclusively in any federal or state court of competent jurisdiction located in the City of New York, the borough of Manhattan. Each of the parties, by its execution and delivery of this Agreement, expressly and irrevocably consents and submits to the exclusive personal jurisdiction of any such courts in connection with any such claim or controversy, and hereby waive any claim or defense of inconvenient forum.