



SUNSM PARTNER ADVANTAGE PROGRAM INDEPENDENT SOFTWARE VENDORS AGREEMENT

PLEASE READ THE TERMS AND CONDITIONS OF THIS SUNSM PARTNER ADVANTAGE PROGRAM, FOR INDEPENDENT SOFTWARE VENDORS AGREEMENT CAREFULLY. BY CLICKING ON THE "ACCEPT" BUTTON, BELOW, COMPANY ACCEPTS THE TERMS AND CONDITIONS OF THIS AGREEMENT AS OF THE DATE COMPANY CLICKS THE "ACCEPT" BUTTON. IF YOU DO NOT AGREE TO ALL THESE TERMS, SELECT THE "DECLINE" BUTTON AT THE END OF THIS AGREEMENT.

This SUN PARTNER ADVANTAGE PROGRAM, FOR INDEPENDENT SOFTWARE VENDORS AGREEMENT ("Agreement") is made between SUN MICROSYSTEMS, INC., a Delaware corporation with its address at 4150 Network Circle, Santa Clara, CA 95054 USA and its Affiliated Companies ("Sun") and the company ("Company" or "Partner") listed in the "Sun Partner Advantage Program Registration Form" that appears on Sun's website at <http://sun.com/partners/isv/apply/>, and is made as of the date (following Company's acceptance) that Sun notifies Company by email of Sun's acceptance of this Agreement ("Effective Date").

I. GENERAL TERMS

1. INTERPRETATION

- 1.1 The purpose of the General Terms is to create a single mechanism under which Sun and Company may form Agreements.
- 1.2 In the General Terms:
- "Affiliated Company" means, in relation to either party, any entity: (a) which is owned 50% or more by that party; or (b) over which that party exercises management control; or (c) which is under common control with that party; or (d) which owns 50% or more of that party;
- "Agreement" means each agreement that is comprised of the General Terms and an Exhibit executed by the parties;
- "Confidential Information" means any information disclosed by one party to another under each Agreement which is, prior to or at the time of disclosure, identified in writing as confidential or proprietary;
- "Equipment" means the hardware (including components), software media and spare parts listed in Sun's standard product price lists published from time to time. Sun Equipment, or parts or components of Sun Equipment may be new or used. Regardless, Sun warranty terms apply;
- "Exhibit" means any exhibit to the General Terms as executed by the parties from time to time;
- "Products" means Equipment or Software;
- "Services" means any offering in Sun's Service List (each offering, a "Service Listing") which is located at <http://www.sun.com/service/servicelist> (a hard copy of each of which will be made available to Company on request), together with such other service offerings as the parties may agree on, including services described in any statement of

work ("SOW");

"Software" means (i) any binary software programs listed in Sun's standard price lists published from time to time, (ii) any Updates, and (iii) any related user manuals or other documentation;

"Sun Trademarks" means all names, marks, logos, designs, trade dress and other brand designations used by Sun in connection with Products and Services;

"Technology" means any technology identified in an Exhibit and provided to Sun for use in the development or distribution of Products or Services.

"Updates" means subsequent releases and error corrections for Software previously licensed, as listed in the standard price lists published by Sun from time to time.

2. CONFIDENTIAL INFORMATION

A party receiving Confidential Information ("the Recipient") must keep it confidential using the same degree of care that it exercises with respect to its own information of like importance but in no event less than reasonable care, and may use it only for the purposes for which it was provided under the Agreement. Confidential Information may be disclosed only to employees, contractors and third party providers performing services in furtherance of this Agreement and/or each party's internal activities, that are obligated to the Recipient under similar confidentiality restrictions; and only for the purposes for which it was provided under the relevant Agreement.

The obligations do not apply to information which:

- (a) is rightfully obtained by the Recipient without breach of any obligation to maintain its

- confidentiality;
- (b) is or becomes known to the public through no act or omission of the Recipient;
- (c) the Recipient develops independently without using Confidential Information of the other party; or
- (d) is disclosed in response to a valid court or governmental order, if the Recipient has given the other party prior written notice and provides reasonable assistance so as to afford it the opportunity to object.

3. EXPORT LAWS

Products, Services, Technology, materials, tools, and technical data delivered by Sun may be subject to US export controls or the trade laws of other countries. Company and Sun agree to comply with all export control regulations and acknowledge that they have the responsibility to obtain such licenses to export, re-export or import as may be required. Company and Sun agree not to export or re-export to entities on the most current U.S. export exclusion lists or to any country subject to U.S. embargo or terrorist controls as specified in the U.S. export laws. Company and Sun will not use or provide Products, Services, Technology, materials, tools, and technical data for nuclear, missile, or chemical and biological weapon end uses.

4. SUN TRADEMARKS

- 4.1 Company may refer to Products and Services by their associated names, provided that such reference is not misleading and complies with Sun's Trademark and Logo Policies, which are found at <http://www.sun.com/policies/trademarks>.
- 4.2 Company may not remove or alter any Sun Trademarks, nor may it co-logo Products or Services. Company agrees that any use of Sun Trademarks by Company will inure to the sole benefit of Sun.
- 4.3 Company agrees not to incorporate any Sun Trademarks into Company's trademarks, service marks, company names, Internet addresses, domain names, or any other similar designations.

5. LIMITATION OF LIABILITY

- 5.1 Each party acknowledges the full extent of its own liability to the other, arising from: death or personal injury resulting from negligent acts or omissions; or claims for non payment; or the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability).
- 5.2 Subject to 5.1 above, and the exceptions identified in any Exhibit and to the extent not prohibited by applicable law:
 - (a) each party's maximum aggregate liability for all

claims relating to each Agreement, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to two million US dollars (U.S. \$2,000,000) per Agreement or, in the case of purchases, to the amount paid to the other party during the previous twelve (12) months for the product or service which is the subject matter of the claim up to a maximum of two million US dollars (\$2,000,000); and

- (b) neither party will be liable for any indirect, punitive, special, incidental or consequential damages in connection with or arising out of the General Terms or any Agreement (including, without limitation, loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, or other economic advantage), however they arise, whether in breach of contract, breach of warranty or in tort, including negligence, and even if that party has previously been advised of the possibility of such damages.

5.3 Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Agreement fails of its essential purpose.

6. TERMINATION AND EXPIRATION

- 6.1 Either party may terminate the General Terms or any Exhibit immediately by written notice:
 - (a) if the other party commits a non-remediable material breach; or
 - (b) if the other party fails to cure any remediable material breach within thirty (30) days of being notified in writing of such breach.
- 6.2 Either party may terminate the General Terms immediately by written notice if no Exhibit is in effect.
- 6.3 On termination or expiration of the General Terms, all Exhibits shall automatically terminate with immediate effect. Following termination or expiration of an Exhibit, each party will deliver to the other any property of the other in its possession or control relating to that Exhibit, in good condition, reasonable wear and tear excepted. Notwithstanding the immediately preceding sentence, neither party shall be obligated to return any property to which it has continuing rights, including the right of possession.

7. ASSIGNMENT AND SUBCONTRACTING

The General Terms and any Exhibit may only be assigned by either party as described in the applicable Exhibit.

8. DISPUTE RESOLUTION

The parties will use reasonable efforts to resolve any dispute arising out of the General Terms or any Exhibit through a meeting of appropriate managers from each party. If the parties are unable to resolve the dispute, either party may escalate the dispute to its executives. If an executive level meeting fails to resolve the dispute within thirty (30) days after escalation, either party may seek any available legal relief. This provision will not affect either party's right to seek injunctive or other provisional relief at any time.

9. GENERAL

All disputes will be governed by the laws of California. The venue for litigation will be the appropriate courts located in Santa Clara County, California.

Choice of law rules of any jurisdiction and the United Nations Convention on Contracts for the International Sale of Goods will not apply to any dispute under the Agreement.

- 9.1 A party is not liable under any Agreement for non-performance caused by events or conditions beyond that party's reasonable control, if the party makes reasonable efforts to perform. This provision does not relieve either party of its obligation to make payments then owing.
- 9.2 All written notices, including by electronic mail or facsimile, required by the General Terms or any Exhibit must be delivered in person or by means evidenced by a delivery receipt or acknowledgment and will be effective upon receipt.
- 9.3 Neither the General Terms nor any Agreement is intended to create a partnership, franchise, joint venture, agency, or a fiduciary or employment

relationship. Neither party may bind the other party or act in a manner which expresses or implies a relationship other than that of independent contractor.

- 9.4 If any provision of the General Terms or any Agreement is held invalid by any law or regulation of any government or by any court or arbitrator, such invalidity will not affect the enforceability of other provisions.
- 9.5 Rights and obligations under the General Terms and any Exhibit which by their nature should survive, will remain in effect after termination or expiration of the General Terms or the relevant Exhibit.
- 9.6 Any express waiver or failure to exercise promptly any right under the General Terms or any Exhibit will not create a continuing waiver or any expectation of non-enforcement.
- 9.7 No modification to the General Terms or any Exhibit will be binding, unless in writing and manually signed by an authorized representative of each party.
- 9.8 Each Agreement constitutes the parties' entire agreement relating to its subject matter. It cancels and supersedes all prior or contemporaneous oral or written communications, proposals, conditions, representations and warranties and prevails over any conflicting or additional terms contained in any quote, purchase order, acknowledgment, or other communication between the parties relating to its subject matter.

II. SUN PARTNER ADVANTAGE PROGRAM EXHIBIT

THIS EXHIBIT ("Exhibit") together with the "General Terms", above, constitute the "Program Agreement," with an Effective Date as defined in the preamble to the General Terms, above ("Exhibit Effective Date"). The General Terms are an integral part of this Exhibit and are incorporated herein by reference.

1. INTERPRETATION

- 1.1 In this Exhibit:
 - "Appendix" means any Appendix to this Exhibit;
 - "The Program" means the "Sun Partner Advantage Program, for Independent Software Vendors," Sun's program of benefits for developers.
 - "The Program Reference Guide" means Sun's program manual that describes the current benefits, policies, and processes of the Program.
 - "Sun Platform" means the combination of Sun hardware and software which comprise an operating system on which Company's products or services are designed to operate.
- 1.2 Capitalized terms used but not defined in this Exhibit have the meanings set out in the General Terms.
- 1.3 In the event of any inconsistency between the elements of this Program Agreement, the following order of precedence will apply (in descending order):
 - (a) an Appendix to this Exhibit;
 - (b) this Exhibit
 - (c) The Program Reference Guide
 - (d) the General Terms;
 - (e) applicable purchasing terms re Products.

2. **MEMBERSHIP LEVEL.** Sun may assign to Company the appropriate membership level and category name based on Company's qualifications and as defined in the Program Reference Guide. Benefits in the Program may vary according to such levels.
3. **PRIMARY CONTACT.** Company agrees to maintain a primary contact ("Primary Contact") for the Program in order to facilitate communications between Sun and Company regarding the Program. The Primary Contact will receive all communications regarding the Program, and Company may not choose to be excluded from such communications.
4. **REGISTRATION FORM.** Prior to Company's acceptance of the Program Agreement, Company must complete the Program Registration Form which appears on Sun's website at <http://sun.com/partners/isv/apply/>, and which is hereby made a part of this Program Agreement. Company's duties regarding the Program Registration Form, e.g., updating responsibility, are set forth in the Program Reference Guide.
5. **RIGHT TO PUBLISH; DATA PROTECTION.**
 - 5.1 Sun may use Company's name in promotional materials, including press releases, presentations and customer references regarding the sale of Products or Services. These permissions are free of charge for worldwide use in any medium. Sun will obtain Company's prior written approval for publicity that contains claims, quotes, endorsements or attributions by Company, such approval not to be unreasonably withheld.
 - 5.2 Except for Company Confidential Information, all Company materials and information provided by Company to Sun through the Program may be used in Sun publications via any media and distributed at the sole discretion of Sun. If Company has non-confidential materials it does not want Sun to use and distribute in this manner, it must not submit them to Sun through the Program. By submitting any materials and information to Sun, Company thereby warrants and represents that it has obtained all necessary consent from its customers, employees, or third parties mentioned in such materials, for such use of those materials and information.
 - 5.3 In the event Company elects to purchase Products indirectly through an Authorized Sun Reseller Partner (resellers), Company warrants and represents that it has obtained its Primary Contact's informed consent to allow Sun to share the Primary Contact's personal information with such potential channel partners, to effect the purposes of this Program Agreement.
 - 5.4 In processing the materials and information described in Sections 5.2 and 5.5, Company shall: (i) comply with the provisions and principles of applicable data protection legislation; (ii) have in place adequate technical and organizational security measures to ensure the confidentiality of such processing; and (iii) act only on instruction from Sun in relation to the delivery of such materials and information to Sun.
 - 5.5 Company acknowledges that Company data supplied by Company to Sun, including the personal information of the Primary Contact and other Company contacts, will be stored in the United States of America, and Company warrants and represents that it has permission from its employees to allow Sun to use such personal information in order to contact those Company employees regarding the Program.
6. **DISCOUNTED PRODUCTS.** In the event Company is qualified by Sun to purchase discounted Products under the Program, and Company elects to participate in such purchasing, the following terms shall apply:
 - 6.1 Discounts and Purchase Limits. The relevant discounts (which apply to direct purchases from Sun only) and purchase limits for such Products shall be set forth in the Program Reference Guide, and may vary according to membership level.
 - 6.2 Purposes allowed for use of Products: Company must use the Products only for the purposes and according to the limitations set forth in the Program Reference Guide. Company grants Sun the right to confirm that the Products are being utilized only for such purposes and grants Sun access to its facilities upon reasonable notice to confirm such use.
 - 6.3 Company Products Developed or Ported: Any Company products which Company lists in the Program Registration Form for development or porting on the Products must:
 - (a) comply with the Sun Platform compatibility commitment relevant to Company's membership category and level, as set forth in the Program Reference Guide;
 - (b) be made available for sale, lease or license to end users according to the relevant timetable set forth in the Program Reference Guide; and
 - (c) be supported by Company to end users, including the provision of updates and bug fixes.
 - 6.4 Indemnification Regarding Company products. Company shall indemnify, defend and hold Sun harmless against any loss, liability, damage, cost or expense including reasonable attorney's fees

and all consequential and incidental damages, arising out of any claim or action brought against Sun alleging liability on the basis of the manufacture, marketing, advertising, distribution, export, sale or use by any person of Company's products and/or services marketed and/or developed pursuant to this Program Agreement, or regarding Company's website which Sun links viewers to pursuant to Article 9 of this Exhibit, and including, but not limited to, any of Company's products and/or services marketed with any of the Program logos, or any use of such logos by Company; provided, however, that Company shall not be obligated to indemnify or defend Sun on account of any claim of trademark infringement regarding Sun Trademarks and such logos to the extent that Company is in compliance with this Program Agreement.

6.5 Direct vs. Indirect Purchasing Method. Company may elect to purchase Products either directly from Sun, or indirectly through Authorized Sun Reseller Partner (resellers), depending on which method(s) are made available by Sun in a particular geographic area and according to any guidelines in the Program Reference Guide. Company must choose one of such methods for purchases from Sun through the Program.

6.6 Purchasing Terms. The purchasing terms governing the Products are as follows:

(a) if Company's location is in a country in which Sun allows **direct** sales, and Company chooses to buy from Sun directly, the purchasing terms are the Sun standard "Purchasing Exhibit" for such country, which must be executed prior to purchasing (and which is viewable at: <http://www.sun.com/sales/salesterms/>), or is otherwise available from Sun upon request).

(b) if Company's location is in a country in which Sun allows **indirect** sales, and Company chooses to buy from Sun indirectly, the purchasing terms are those agreed to between Company and the applicable Sun Authorized Reseller Partner (reseller).

6.7 License for Software. All Sun or third party computer software products acquired through the Program shall be licensed and governed by the terms of the end user binary code license accompanying such products when delivered to Company, subject to the limitations of Section 6.2, herein.

6.8 Resale; Transferability of Software License(s).

(a) Company may transfer any operating system Software license with its related Equipment, if:

(i) the transfer occurs at least one (1) year after Sun's delivery of the Equipment; and

(ii) Company notifies Sun and obtains a written undertaking from its transferee to comply with the applicable licensing terms.

(b) In the event that Company resells a Product in violation of this provision, Sun shall invoice Company for, and Company agrees to pay Sun, the difference between the net price of the Equipment package and the list price of the package components, or for Products purchased at a discount, the amount of the discount provided.

6.9 Exclusions. Except as expressly provided in the applicable license governing the Software:

(a) no licenses, immunities or other rights are granted under any Sun copyright, trade secret, or know-how by implication, estoppel or otherwise; and

(b) no rights, licenses or immunities are granted under any Sun patent (including but not limited to any patent claims reading upon combinations of any Company product in combination with any Sun product) or any third party intellectual property, directly or by implication, estoppel or otherwise.

6.10 Other Sun Discount Programs. Any purchase by Company of Products through the Program constitutes a waiver of any right to buy discounted development products under any other Sun agreement.

7. WARRANTY DISCLAIMER. EXCEPT FOR: (1) ANY WARRANTY ACCOMPANYING DOCUMENTATION FOR ANY SUN PRODUCT PURCHASED UNDER THE PROGRAM, AND (II) ANY WARRANTIES CONTAINED HEREIN OR IN AN EXHIBIT, ALL EXPRESS OR IMPLIED CONDITIONS, REPRESENTATIONS AND WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT, ARE DISCLAIMED, EXCEPT TO THE EXTENT THAT SUCH DISCLAIMERS ARE HELD TO BE LEGALLY INVALID.

8. USE OF SUN TRADEMARKS AND LOGOS

8.1 Sun Trademark Rights. Company agrees that as between Company and Sun, Sun is the sole owner of all right, title and interest in and to the Sun Trademarks and all associated goodwill. Company is granted no right, title or license to, or interest in, any Sun Trademark. Company agrees not to challenge Sun's ownership or use, or the validity, of the Sun Trademarks, or attempt to adopt or register any mark identical or confusingly similar to any of the Sun Trademarks. Should

Company acquire (by operation of law or otherwise) any rights in any Sun Trademark, it shall immediately at no expense to Sun assign to Sun all such rights and associated goodwill, applications and registrations. Company will cooperate with Sun and take all reasonable actions required to assist Sun to secure, protect and maintain ownership rights in the Sun Trademarks worldwide, at Sun's cost, including giving prompt notice to Sun of any potential infringement thereof and cooperating with Sun in the preparation, execution and recording of legal documents necessary to register or otherwise protect the Sun Trademarks.

- 8.2 Logo Usage. Sun grants to Company a limited, non-exclusive, non-transferable, royalty-free, worldwide permission to use an applicable Sun logo (the "Logo"), if any, to refer or relate to Sun's program for Company's Partner Type(s) and only:
- (a) in the exact form provided by Sun;
 - (b) in pre-sale advertising and marketing materials that prominently display Company's own corporate name and logo, but not on product, packaging, documentation, shipping containers, or other materials distributed with Products or the rendering of Services;
 - (c) on Company's web site, as a link to the Sun Microsystems home page (www.sun.com) or to an Internet URL to be provided by Sun's program manager;
 - (d) in a manner less prominent than Company's own corporate name and logo;
 - (e) in accordance with the Sun Trademark & Logo Usage Requirements and with any graphics standards distributed by Sun;
 - (f) in a manner that is truthful and not misleading, and that does not use the Logo to imply any relationship with, or endorsement or sponsorship by, Sun that is not true;
 - (g) in a manner that avoids disparaging statements or implications about Sun or its products or services;
 - (h) on materials that are in compliance with all applicable laws and governmental regulations; and
 - (i) with the following trademark legend on the page where the Logo appears (unless Company is required to use a more specific legend by any other agreement Company may have with Sun): "Sun, Sun Microsystems, the Sun logo and the Sun Partner Advantage Program are trademarks or registered trademarks of Sun Microsystems, Inc. in the U.S. and other countries and are used with permission. <Company> and its products/services are independent of Sun

Microsystems, Inc."

Company shall promptly modify any use of the Logo that does not comply with this Agreement upon notice from Sun specifying the non-compliance, which noncompliance shall be determined in Sun's discretion. Sun may change the Logo, or create new logos to replace the Logo currently in use. Upon reasonable notice from Sun, Company shall promptly modify its use of the Logo to conform to any such changed or new logo.

- 8.3 Injunctive Relief. Company agrees that a material breach of the obligations in this Article 8 is likely to cause irreparable harm to Sun for which damages would not be an adequate remedy. Therefore, in addition to its rights and remedies otherwise available at law, including, without limitation, the recovery of damages for breach of this Agreement, Sun shall be entitled to: (a) immediate equitable relief, specifically including, but not limited to, both interim and permanent restraining orders and injunctions; and (b) to such other and further equitable relief as the court may deem proper under the circumstances.

9. WEBLINK TO COMPANY'S WEBSITE. Company agrees to allow Sun to link viewers from Company's information (as supplied by Company) on Sun's website to a mutually acceptable webpage on Company's website.

10. THE PROGRAM REFERENCE GUIDE. Company agrees to remain at all times during the term of this Program Agreement in compliance with the policies set forth in the Program Reference Guide (viewable by link from < https://partneradvantage.sun.com/partners/apply_docs/tnc40/guides/ >). Notwithstanding anything to the contrary in General Terms Section 9.2 ("Notices"), Sun may revise the Program Reference Guide upon thirty (30) days notice by email to Company's Primary Contact. Such changes will not affect fulfillment of either party's responsibilities or order in process before receipt of notice of change.

11. TERM. The term of this Agreement runs from the Effective Date until the last day of the anniversary month of the Effective Date, following which this Agreement shall renew automatically for successive one year terms, unless terminated as set forth below.

12. TERMINATION. In addition to the termination options under General Terms, Sec. 6:

12.1 The Program. Sun may terminate the Program at any time by written notice to Company;

12.2 Termination with cause. Either party may terminate the Program Exhibit immediately by

written notice (leaving in effect the parties' "General Terms" and any remaining Exhibit(s) attached thereto):

- (a) if the other party commits a non-remediable material breach of this Agreement; or
- (b) if the other party fails to cure any remediable material breach within thirty (30) days of being notified in writing of such breach.

12.3 Termination without cause. Upon the expiration of ninety (90) days' written notice, either party may terminate the Program Exhibit (leaving in effect the parties' "General Terms" and any remaining Exhibit(s) attached thereto).

13. NOTICES. Notwithstanding anything to the contrary in General Terms, Section 9.2 ("Notices"), the Program

Reference Guide may identify certain instances when email notices by either party are acceptable between the Program and the Primary Contact. Regarding written notices, the parties' respective addresses for such notices are: (a) for Sun: as listed in the Program Reference Guide under section entitled, "Notices"; (b) for Company: the address listed in the Program Registration Form.

14. MODIFICATION. Notwithstanding anything to the contrary in General Terms Section 9.7 ("Modification"), if Sun and company have executed the Program Agreement electronically ("click agreement"), Sun may post standard addenda on Sun's website, for which Sun provides the means for Company to show its acceptance through a "click" below such addenda.

BY CLICKING ON THE "ACCEPT" BUTTON, BELOW, COMPANY ACCEPTS THE TERMS AND CONDITIONS OF THE PROGRAM AGREEMENT, WHICH ARE SET FORTH ABOVE IN THE GENERAL TERMS AND THE PROGRAM EXHIBIT.

IF COMPANY IS NOT WILLING TO BE BOUND BY THESE TERMS, SELECT THE "DECLINE" BUTTON AT THE BOTTOM OF THIS PAGE AND COMPANY WILL NOT BE ACCEPTED BY SUN INTO THE SUN PARTNER ADVANTAGE PROGRAM.

(FOR HARD COPY VERSIONS WHERE CLICK NOT ALLOWED BY SUN, OR WHERE PARTNER CHOOSES TO PRINT/SIGN ANYWAY (NOTE: US & CANADA ARE "CLICK" ONLY)

IN WITNESS WHEREOF THE DULY AUTHORISED REPRESENTATIVES OF THE PARTIES HAVE EXECUTED THIS SUN PARTNER ADVANTAGE PROGRAM EXHIBIT AS OF THE EXHIBIT EFFECTIVE DATE.

[Insert Sun entity's name:]

COMPANY:

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____