

**BUSINESS APPLICATIONS PERFORMANCE CORPORATION
(BAPCO®)**

LICENSE AGREEMENT FOR BAPCO BENCHMARK PRODUCT

THE MATERIALS PROVIDED IN THIS PACKAGE (THE “MATERIALS”) INCLUDE A DVD-ROM CONTAINING A BAPCO BENCHMARK PROGRAM, ACCOMPANYING DOCUMENTATION, AND PRUNED APPLICATION SOFTWARE PROVIDED BY THIRD PARTY MAKERS OR SUPPLIERS (THE “APPLICATION VENDORS”). THE BENCHMARK PROGRAM AND PRUNED APPLICATION SOFTWARE ARE SOMETIMES REFERRED TO TOGETHER HEREIN AS THE “SOFTWARE.”

READ THE TERMS AND CONDITIONS OF THIS LICENSE AGREEMENT (THIS “AGREEMENT”) CAREFULLY BEFORE OPENING THIS PACKAGE. BY OPENING IT, YOU INDICATE YOUR ACCEPTANCE OF, AND AGREEMENT TO, THE TERMS OF THIS AGREEMENT. IF YOU DO NOT ACCEPT THESE TERMS, YOU MUST PROMPTLY RETURN THE MATERIALS IN UNOPENED FORM, AND YOU WILL RECEIVE A REFUND OF YOUR PURCHASE PRICE. THIS AGREEMENT REPRESENTS THE ENTIRE AGREEMENT BETWEEN YOU AND BAPCO CONCERNING THE MATERIALS. IT SUPERSEDES ANY PRIOR PROPOSAL, REPRESENTATION OR UNDERSTANDING BETWEEN THE PARTIES.

1. Grant. BAPCO hereby grants, and USER hereby accepts, a non-exclusive and (except in the case of the OEM License Level as specified below) non-transferable license to use the Materials subject to the restrictions and conditions set forth below.

2. Copies and Use. USER has entered into an agreement with BAPCO or an authorized BAPCO reseller for purchase of the license herein, specifying USER’s authorized License Level (see descriptions of User License Levels on **Exhibit A** hereto). USER shall not use, duplicate or install and shall not permit any third party to use or copy the Materials or any copy thereof, except (a) as specified in **Exhibit A** according to the applicable License Level, and (b) USER may make one backup copy of the Materials for USER’s archival use, exact and complete without modification or merger with any other software (an unlimited number of such backup copies, in the case of Enterprise Site License Level). USER shall take reasonable precautions to prevent its personnel from otherwise using, duplicating or installing the Materials or permitting any third party to do so. In the event of any unauthorized transfer or copying, USER will pay BAPCO a penalty in the amount of one additional Individual license fee for each instance of any such transfer or copy and any derivative transfers or copies.

3. Scope of Use. USER shall not: (i) modify, translate, reverse engineer, decompile, disassemble, create derivative works based on, or duplicate or copy the Materials, other than as provided in Section 2; (ii) sublicense, loan, rent, transfer or grant any rights in the Materials to any third party; (iii) remove any proprietary notices, labels or marks on the Materials; or (iv) use the Materials for any purpose other than measuring the performance of industry-standard computer hardware platforms.

4. Reports. In order to preserve the integrity of BAPCO’s performance reporting standards, USER shall be bound by and shall comply with the Execution Rules and Result Reporting Rules published by BAPCO for the Materials (see **www.bapco.com**), which are incorporated herein by this reference as though set forth in full. These Rules prohibit execution of the Software on modified software and reporting or publishing of partial results, among other things.

5. Term. This Agreement and the license granted hereunder take effect upon USER downloading or installing this Software, and continue in effect until terminated upon the earlier to occur of: (a) thirty (30) days after BAPCO gives USER written notice of USER’S breach or default of any provision of this Agreement, which USER has not cured prior to the expiration of the thirty (30) day notice period; (b) BAPCO availing USER of a subsequent release of the Materials; or (c) return by USER of the Materials to BAPCO and destruction or permanent removal of all copies thereof from all platforms of USER. USER shall in any case return all copies of the Materials to BAPCO or destroy or permanently remove all copies of them from all of USER’s platforms immediately upon such termination. Sections 3-13 of this Agreement nevertheless shall survive any termination.

6. Use of Name. USER shall not use the Materials in conjunction with the publication of USER’s performance results without the prior written consent of BAPCO, which BAPCO will not unreasonably withhold. BAPCO owns all

trademarks and rights to trade names which includes the mark “BAPCO.” In any publication of performance results generated by the Materials, USER shall acknowledge BAPCO ownership thereof as follows: “**BAPCO® & [MOBILEMARK or SYSMARK or EEcoMark or WEBMARK (as applicable)] are registered trademarks of Business Applications Performance Corporation.**” All other brand and product names appearing in the Materials are trademarks or registered trademarks of the applicable Application Vendors.

7. Indemnity. USER shall indemnify and hold BAPCO and the Application Vendors harmless from any claims, expenses or liabilities caused by USER’s use of the Materials and any publication or use by USER of data arising from its use of the Materials.

8. Disclaimer of Warranties; Limitation of Liability. In the case of any physical defect in the media containing the Materials, at USER’s request and as USER’s sole remedy, BAPCO shall, upon return of the Materials within ninety (90) days after shipment to USER, provide a replacement copy without media defect.

BAPCO AND THE APPLICATION VENDORS DISCLAIM AND EXCLUDE ALL OTHER WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, RELATING TO THE SALE, USE OR PERFORMANCE OF THE MATERIALS, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF NON-INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR USE OR PURPOSE; AND DISCLAIM ALL OTHER LIABILITY WITH RESPECT TO THE MATERIALS, INCLUDING WITHOUT LIMITATION ANY LIABILITY FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OR NEGLIGENCE. EXCEPT AS SET FORTH IN THIS SECTION 8, USER ACCEPTS THE MATERIALS “AS IS.”

IN NO EVENT WILL BAPCO OR ANY APPLICATION VENDOR BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING THE SALE, USE OR PERFORMANCE OF THE MATERIALS, EVEN IF BAPCO SHALL HAVE KNOWLEDGE OF THE POSSIBILITY OF SUCH POTENTIAL. BAPCO’S TOTAL LIABILITY FOR ANY REASON SHALL NOT IN ANY CASE EXCEED THE AMOUNT OF THE PURCHASE PRICE RECEIVED BY BAPCO FOR THE MATERIALS.

9. Notice of Infringement Claims. If USER receives any notice or claim of infringement, USER immediately shall communicate such notice to BAPCO via electronic mail to: support@bapco.com.

10. Resale and Export Restrictions. USER shall not sell, resell, transfer, assign, lease, sublicense or convey this license or the Materials or any right to use them (provided that USER’s rights hereunder may transfer by operation of law in the case of acquisition of USER and all or substantially all of USER’s business assets). USER shall not in any case export or re-export the Materials except in compliance with all applicable U.S. laws and regulations, including without limitation the U.S. Export Administration Regulations, 15 C.F.R., and the regulations promulgated by the U.S. Department of Treasury Office of Foreign Assets Control, the U.S. Department of Commerce Bureau of Industry and Security, and the U.S. Department of State Directorate of Defense Trade Controls.

11. Governing Law. This Agreement shall be construed and governed in accordance with the laws of the State of California. If any term of this Agreement is declared void or not enforceable by any competent court of jurisdiction, all other terms shall remain in effect.

12. No Waiver. The failure of a party to take action to enforce a right hereunder shall not be deemed a waiver by that party as to the subsequent enforcement of that right or any other rights hereunder.

13. Benchmark Disclaimer. BAPCO disclaims any assurance that the benchmark measurement generated by the Software will reflect USER’s system values, preferences or priorities although BAPCO has strived to make the Software a relevant and impartial measure for comparing general system performance and/or battery life on widely used business applications.

■■■■■■■■

EXHIBIT A TO
BAPCO LICENSE AGREEMENT

USER LEVELS

[Refer to Purchase Agreement for Applicable Specified User Level]

For Products Released Prior to 2010:

□ Individual: USER shall not permit use of the Software on more than one single computer workstation at any given time. USER may install the Software on more than one computer workstation provided that all are located at a single physical address of USER.

□ Small Business: USER may install and simultaneously use the Software on more than one (but not more than 10) computer workstation(s) provided that all are located at a single physical address of USER.

□ Business Site: USER may install and simultaneously use the Software on more than one computer workstation(s) provided that all are located at a single physical address of USER.

□ Enterprise: USER may install and simultaneously use the Software on an unlimited number of computer workstations of personnel of USER and its wholly- (but not less than wholly-) owned subsidiary entities, and across USER's internal local- or wide-area network within a single country, but only for use on the business premises of USER and its wholly-owned subsidiaries.

For Products Released After 2009:

□ Small Business or Educational Organizations: USER may install and simultaneously use the Software on more than one (but not more than 10) computer workstation(s) provided that all are located at a single physical address of USER. For this purpose, an "Educational Organization" means a User whose primary organizational mission and operational function is to provide bona fide educational services.

□ Medium Business or Government Agency: USER may install and simultaneously use the Software on more than one computer workstation(s) provided that all are located at a single physical address of USER.

□ Enterprise: USER may install and simultaneously use the Software on an unlimited number of computer workstations of personnel of USER and its wholly- (but not less than wholly-) owned subsidiary entities, and across USER's internal local- or wide-area network within a single country, but only for use on the business premises of USER and its wholly-owned subsidiaries.

□ Enterprise Global: USER may install and simultaneously use the Software on an unlimited number of computer workstations of personnel of USER and its wholly- (but not less than wholly-) owned subsidiary entities, and across USER's internal local- or wide-area network, but only for use on the business premises of USER and its wholly-owned subsidiaries.

□ OEM (Validation): The Software is attached to, or pre-installed in, a specified computer workstation by the maker or vendor thereof ("OEM"). USER includes both the OEM and its customer to whom the OEM provides the computer workstation ("Customer"). USER (OEM and Customer) may use the Software on the business premises of USER and its wholly-owned subsidiaries but only on the associated computer workstation.