

EXHIBIT 12

END-USER SOFTWARE LICENSE AGREEMENT

between
BURST.COM, INC.
500 Sansome Street, Suite 500
San Francisco, California 94111
and
LICENSEE

Company Name: CEQUENT, INC.
Principal Address: 777 Convention Way, Suite 100
Anaheim, CA 92802
Contact Person: Paul R. King
Phone Number: (714) 740-4736
Facsimile Number: (714) 740-4711

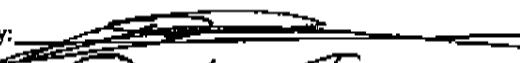
By executing this Agreement, BURST.COM, INC. ("Burst.Com") and CEQUENT, INC. ("Licensee") are agreeing to a license of certain computer programs in accordance with the terms and conditions contained in this Agreement.

This Agreement consists of (1) this cover page; (2) the attached Terms and Conditions; (3) the Program Order attached as Exhibit A, as well as additional Program Orders accepted from time to time with respect to this Agreement; (4) a listing of Burst.Com Trademarks attached as Exhibit B; and (5) a description of Training available attached as Exhibit C.

Licensee has read, understands and agrees to the terms and conditions of this Agreement and has duly authorized the individual signing this Agreement on its behalf to do so.

BURST.COM, INC.

CEQUENT, INC.

By: 

By: 

Name: Douglas Glass
(Print Name)

Name: Paul R. King
(Print Name)

Title: CEO

Title: President

Date: 30 JAN 01

Date: January 26, 2001

TERMS AND CONDITIONS

1. DEFINITIONS

- 1.1 "Burstware Conductor[™]" means the computer program included among the Licensed Software that is designed to operate on a hardware server and that manages the distribution of audio and/or video content from one or more hardware servers on which the Burstware Server software has been installed to Burstware Players installed on client computers. Each Burstware Conductor requires a Burstware[®] License Key configured for the host name or IP address of the computer on which the Burstware Conductor is installed.
- 1.2 "Burstware License Key" means the unique, encrypted software program provided by Burst.Com (only upon payment of the applicable license fees) that is designed to prevent use of the Licensed Software beyond the scope of the license paid for by Licensee by limiting, as appropriate, and in addition to other limits, the number of Concurrent Burstware Player Connections, the amount of Managed Bandwidth, and the number of Burstware Servers that the Burstware Conductor can manage and the number of copies of the Burstware Conductor that can be used.
- 1.3 "Burstware Player[™]" means the computer program included among the Licensed Software that operates on a single-user client computer, permitting that computer to receive and play audio and/or video content delivered by the Burstware Server software.
- 1.4 "Burstware Server[™]" means the computer program included among the Licensed Software that stores audio and/or video content and delivers it to client computers for viewing with the Burstware Player.
- 1.5 "Concurrent Burstware Player Connections" means the number of simultaneous connections between Burstware Players installed on client computers and Burstware Servers installed on hardware servers that the Burstware License Key enables the Burstware Conductor to manage simultaneously.
- 1.6 "Documentation" means all materials in written, computer readable or other form containing information about the Licensed Software that accompany the Licensed Software or that Burst.Com may provide during the term of this Agreement.
- 1.7 "Licensed Software" means the Burst.Com Burstware Conductor, Burstware Server and Burstware Player software for which Licensee is granted a license under this Agreement.
- 1.8 "Managed Bandwidth" means the total bandwidth, measured in megabits per second, used by the Burstware Server software to deliver audio and/or video content to Burstware Players.

2. GRANT OF LICENSE

On the terms and conditions of this Agreement, and upon payment of all applicable license fees, Burst.Com grants to Licensee and Licensee accepts the non-exclusive licenses and the restrictions set forth below.

- 2.1 **Software License.** Burst.Com grants to Licensee a non-exclusive license to install and use the Licensed Software in machine-readable object code form only in the configuration and to the scope identified in the Program Order attached as Exhibit A, or such other Program Order(s) as Burst.Com might accept at a later date.
- 2.2 **Documentation.** Burst.Com grants to Licensee a non-exclusive license to use the Documentation in connection with Licensee's use of the Licensed Software.

- 2.3 **Limitation on Use.** Licensee understands and acknowledges that use of the Licensed Software is controlled by the Burstware License Key. Licensee may not use the Licensed Software beyond the scope enabled by the Burstware License Key provided by Burst.Com to Licensee upon payment of the applicable license fee. The Licensed Software functions as three separate programs, the Burstware Conductor, Burstware Server, and Burstware Player, that operate cooperatively. Licensee may install and use only the number of copies of the Burstware Conductor and Burstware Server software specifically enabled by the Burstware License Key provided to Licensee by Burst.Com. Licensee may install an unlimited number of copies of the Burstware Player software for use by Licensee, provided Licensee does not receive any direct payment for doing so, but may simultaneously use only the number of copies of the Burstware Player specifically enabled by the Burstware License Key provided to Licensee by Burst.Com. Licensee may not modify or alter the Licensed Software or Burstware License Key to increase the scope of its use of the Licensed Software. Further, Licensee may not use any device, process or computer program that increases, directly or indirectly, the scope of use of the Licensed Software enabled by the Burstware License Key provided to Licensee by Burst.Com. If Licensee wishes to increase the scope of its licensed use of the Licensed Software, Licensee must purchase an additional Burstware License Key from Burst.Com.
- 2.4 **Back-Up Copies.** Licensee may make one copy of the Licensed Software solely for the back-up or archival purposes, provided that such copy must contain all proprietary notices affixed to or appearing in the original copy.
- 2.5 **Sun Microsystems Java™ Runtime Environment Provisions.** Licensee may not modify the Java Platform Interface ("JPI", identified as classes contained with the "java" package or any subpackages of the "java" package), by creating additional classes within the JPI or otherwise causing the addition to or modification of the classes in the JPI. In the event that Licensee creates any Java-related API and distributes such API to others for application development, Licensee must promptly publish broadly, an accurate specification for such API for free use by all developers of Java-based software.
- 2.6 **Hazardous Environments.** The Licensed Software is not designed or intended for use in online control equipment in environments requiring fail-safe performance, such as the operation of nuclear facilities, aircraft communication or control systems or life support systems, in which software failure could lead to personal injury or severe property or environmental damage. Licensee warrants that it will not use or allow the use of the Licensed Software for such purposes
- 2.7 **Notification of Errors.** In the event that Licensee discovers any errors, bugs or other irregularity in the Licensed Software, Licensee shall promptly notify Burst.Com of each such error, bug or irregularity. For the one (1) year period following the Effective Date, Burst.Com will provide Licensee with all bug fixes and error corrections that may be developed by Burst.Com for the Licensed Software.

3. OWNERSHIP AND USE RESTRICTIONS

- 3.1 **Ownership.** Licensee acknowledges that the Licensed Software, all enhancements, corrections and modifications to the Licensed Software (regardless whether made by Burst.Com, Licensee or anyone else), all copyrights, patents, trade secrets, or trademarks or other intellectual property rights protecting or pertaining to any aspect of the Licensed Software (or any enhancements, corrections or modifications) and the Documentation, are and shall remain the sole and exclusive property of Burst.Com and, where applicable, Burst.Com's suppliers. This Agreement does not convey title or ownership to Licensee, but instead gives Licensee only the limited rights set forth in Section 2. Burst.Com reserves all rights not expressly granted by this Agreement.
- 3.2 **Restrictions.** Except as expressly set forth in this Agreement, Licensee has no right to use, make, sublicense, modify, transfer, rent, lease, sell, display, distribute or copy originals or copies of any Licensed Software or Documentation, or to permit anyone else to do so.

- 3.3 **Transfer.** Neither party may assign or transfer its rights under this Agreement or its rights to the Licensed Software without the prior written consent of the other party. Upon any such transfer or assignment on the part of Licensee, Licensee must transfer all copies of the Licensed Software and Documentation and assignee must agree in writing to all the terms of this Agreement. Upon any such transfer or assignment on the part of Burst.Com, the Transferee shall honor all the terms of this Agreement. Notwithstanding the foregoing, each party may transfer its rights under this Agreement without the consent of the other party in connection with a Sale (as defined below) or change of control of such party; provided however, that the acquiring party shall be bound by the terms of this Agreement.
- 3.4 "Sale" shall mean a merger, acquisition or consolidation of either party with, into or by any other corporation or corporations, or a sale of all or substantially all of the assets of such party, resulting in the stockholders of such party immediately prior to such transaction holding less than a majority of the outstanding voting equity securities of the surviving corporation in such merger, consolidation, acquisition or sale of assets reorganization (other than a bona fide equity financing resulting in proceeds to such party's capital accounts).
- 3.5 **Proprietary Notices.** Licensee shall not remove any patent, copyright or trademark or other intellectual property notices that may appear on any part of the Licensed Software or the Documentation.
- 3.6 **Trade Secrets.** Licensee acknowledges that the Licensed Software, in its source code form, contains valuable trade secrets belonging to Burst.Com. Licensee may not reverse engineer, unencrypt, decompile, disassemble or otherwise translate the Licensed Software or allow anyone else to do so.
- 3.7 **Audit Rights.** Licensee authorizes Burst.Com or its designee, to audit, during normal business hours, Licensee's records solely to the extent necessary to monitor compliance with this Agreement and only upon reasonable prior notice to Licensee.
- 3.8 **Notice to Employees and Agents.** Licensee will use commercially reasonable efforts to inform its employees, agents and others using the Licensed Software under this Agreement that it may not be used, copied or transferred in violation of this Agreement.
- 3.9 **Irreparable Harm.** Licensee acknowledges that money damages may not be an adequate remedy for any breach or violation of any requirement set forth in Section 3 of this Agreement and that any such breach or violation may leave Burst.Com without an adequate remedy at law. Licensee therefore agrees that, in addition to any other remedies available at law, in equity or under this Agreement, Burst.Com shall be entitled to obtain temporary, preliminary and permanent injunctive relief, without bond, from a court of competent jurisdiction to restrain any such breach or violation.

4. SHIPMENT AND PAYMENT

- 4.1 **Shipment of Licensed Software.** Burst.Com shall ship all Licensed Software ordered under this Agreement F.O.B. from Burst.Com's San Francisco facility, or other point of shipment within the United States designated by Burst.Com. Risk of loss or damage to copies of the Licensed Software shall pass to Licensee at the point of shipment. All shipping and in transit insurance charges shall be paid by Licensee. Licensee shall specify in its Program Order the mode of shipment and/or carrier for each order. In the absence of written instructions from Licensee, Burst.Com shall determine the carrier and/or mode of shipment.
- 4.2 **Burst.Com Product Delivery Schedule and Delays.** Although Burst.Com shall use reasonable efforts to meet Licensee's requested delivery schedules for Licensed Software, Burst.Com shall not be liable for any loss, damage or expense due to late delivery.

- 4.3 **Payment.** Licensee shall pay for all Licensed Software within thirty (30) days after the date of Licensee's receipt for such products. In addition to all other available rights or remedies, Burst.Com reserves the right to declare all sums immediately due and payable upon written notice to Licensee if Licensee fails to pay when due any amounts due under this Agreement or any invoice. Interest shall accrue on any amounts not paid when due at an annual rate of the lower of ten (10) percent or the maximum rate permissible by law.
- 4.4 With the sole exception of taxes based on Burst.Com's net income, Licensee shall pay all sales, use, excise, value added or other taxes that may arise out of Licensee's installation or use of the Licensed Software.

5. NO PRODUCT MAINTENANCE AND SUPPORT

Licensee is not entitled to any maintenance or support for the Licensed Software or any upgrades or enhancements under this Agreement. Licensee may purchase from Burst.Com maintenance and support pursuant to the terms, conditions and pricing of Burst.Com's maintenance and support agreement as in effect on the date of Licensee's purchase. All upgrades and enhancements made available to Licensee shall become part of the Licensed Software and become subject to this Agreement.

6. LIMITED WARRANTY

- 6.1 **Ownership.** Burst.Com warrants that it owns or has the right and authority to license the Licensed Software and Documentation to Licensee on the terms and conditions of this Agreement and to the best of its knowledge the Licensed Software does not infringe the intellectual property rights of any third party.
- 6.2 **Media and Documentation.** Burst.Com warrants that if the Licensed Software's media or Documentation is in a damaged or physically defective condition at the time it is delivered to Licensee, and if it is returned to Burst.Com, at Burst.Com's expense, within ninety (90) days of delivery, Burst.Com will provide Licensee with replacements at no charge.
- 6.3 **Licensed Software.** Burst.Com warrants that, in the form delivered to Licensee by Burst.Com, the Licensed Software shall perform substantially in accordance with the Documentation for ninety (90) days after delivery to Licensee. Burst.Com's warranty is conditioned upon: (a) the use of the Licensed Software in accordance with the Documentation and other instructions provided by Burst.Com and shall be null and void if Licensee alters or modifies the Licensed Software without Burst.Com's prior written approval, does not use the Licensed Software in accordance with the Documentation and Burst.Com's instructions, or if the Licensed Software fails because of any accident, abuse or misapplication; and (b) Licensee notifying Burst.Com in writing of the claimed nonconformity within ninety (90) days after delivery of the Licensed Software to Licensee. As Burst.Com's sole liability and Licensee's sole remedy respecting the Licensed Software's nonconformance with the limited warranty set forth in this Section 6.3, Burst.Com may at its option: (i) use reasonable efforts to correct the Licensed Software to make it conform substantially with the specifications set forth in the Documentation; (ii) replace the Licensed Software; or (iii) upon return of the Licensed Software and Documentation to Burst.Com, refund the license fees paid by Licensee under this Agreement and terminate this Agreement. Burst.Com DOES NOT REPRESENT OR WARRANT THAT THE LICENSED SOFTWARE WILL OPERATE PROPERLY WITH OTHER HARDWARE OR SOFTWARE, THAT THE LICENSED SOFTWARE WILL MEET LICENSEE'S REQUIREMENTS OR EXPECTATIONS OR THAT OPERATION OF THE LICENSED SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE.

7. NO OTHER WARRANTY

EXCEPT AS SET FORTH IN SECTION 6, BURST.COM IS PROVIDING THE LICENSED SOFTWARE AND THE DOCUMENTATION "AS IS," AND, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, BURST.COM SPECIFICALLY DISCLAIMS ANY AND ALL OTHER WARRANTIES, CONDITIONS OR REPRESENTATIONS (WHETHER EXPRESS, IMPLIED OR STATUTORY, OR ORAL OR WRITTEN) WITH RESPECT TO THE LICENSED SOFTWARE OR DOCUMENTATION INCLUDING WITHOUT LIMITATION ANY AND ALL WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE (WHETHER OR NOT BURST.COM KNOWS, HAS REASON TO KNOW, HAS BEEN ADVISED OR IS OTHERWISE IN FACT AWARE OF ANY SUCH PURPOSE) WHETHER ALLEGED TO ARISE BY OPERATION OF LAW, BY REASON OF CUSTOM OR USAGE IN THE TRADE OR BY COURSE OF DEALING. BURST.COM ALSO EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY OR REPRESENTATION TO ANY PERSON OTHER THAN LICENSEE. THIS LIMITED WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS. YOU MAY HAVE OTHERS, WHICH VARY FROM STATE/JURISDICTION TO STATE/JURISDICTION.

8. LIMITATION OF LIABILITY

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT WITH RESPECT TO BURST.COM'S OBLIGATIONS UNDER SECTION 10, THE CUMULATIVE LIABILITY OF BURST.COM FOR ALL CLAIMS OF ANY NATURE RELATED TO THE LICENSED SOFTWARE OR DOCUMENTATION OR OTHERWISE ARISING FROM THIS AGREEMENT, INCLUDING ANY CAUSE OF ACTION BASED ON WARRANTY, CONTRACT OR TORT, STRICT LIABILITY PATENT OR COPYRIGHT INFRINGEMENT OR MISAPPROPRIATION OF INTELLECTUAL PROPERTY, SHALL NOT EXCEED THE TOTAL AMOUNT OF ALL LICENSE FEES THAT LICENSEE HAS ACTUALLY PAID UNDER THIS AGREEMENT. NEITHER BURST.COM NOR ANY OF ITS RESELLERS, SUPPLIERS OR LICENSORS SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES, WHETHER IN CONTRACT, IN TORT ~~(INCLUDING NEGLIGENCE) OR OTHERWISE~~, OR FOR ANY LOSS OF PROFITS, LOSS OF SAVINGS, LOSS OF DATA OR LOSS OF USER DAMAGES ARISING OUT OF THIS AGREEMENT OR THE USE (OR INABILITY TO USE) OF THE LICENSED SOFTWARE EVEN IF BURST.COM OR RESELLER, SUPPLIER OR LICENSOR HAS BEEN AWARE OF THE POSSIBILITY OF SUCH POTENTIAL LOSS OR DAMAGE. IN NO EVENT WILL BURST.COM BE LIABLE FOR ANY CLAIM BROUGHT MORE THAN ONE (1) YEAR AFTER THE CAUSE OF ACTION AROSE OR SHOULD REASONABLY HAVE BEEN DISCOVERED. BECAUSE SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE ABOVE LIMITATION MAY NOT APPLY. BECAUSE SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU.

9. TERMINATION

Without prejudice to any other rights it may have under this Agreement or at law or equity, Burst.Com may terminate this Agreement if Licensee commits a material breach of this Agreement and such breach is not cured within 30 days of written notice thereof. Licensee may terminate this agreement for any reason upon 30 days written notice to Burst.Com. Upon termination of this Agreement for any reason, Licensee will immediately discontinue use of the Licensed Software, destroy or return to Burst.Com all copies of the Licensed Software and Documentation in whatever form they exist, including all back-up copies, and certify in writing to Burst.Com that all copies have been destroyed.

10. INDEMNIFICATION

The Licensed Software is intended for use only with properly licensed media, content, and content creation tools. It is Licensee's responsibility to ascertain whether any copyright, patent or other licenses are necessary and to obtain any such licenses to serve and/or create or compress such media and content. Licensee agrees to transmit and/or compress only those materials for which it has the necessary patent, copyright or other permissions, licenses and/or clearances. Licensee agrees to hold harmless, indemnify and defend Burst.Com, its officers, directors and

employees, from and against any losses, damages, fines and expenses (including attorneys' fees and costs) arising out of or relating to any claims that Licensee has encoded, compressed, copied or transmitted any materials (other than materials provided by Burst.Com) in connection with the Licensed Software in violation of another party's rights or in violation of any law. If Licensee is importing the Licensed Software from the United States, it shall indemnify and hold Burst.Com harmless from and against any import and export duties or other claims arising from such importation. Burst.Com shall indemnify, defend and hold harmless Licensee from any and all liability, loss, claim, lawsuit, cost, damage or expense whatsoever (including reasonable attorneys' fees and court costs) arising out of, incident to or in any manner occasioned by Burst.Com's breach of the representations and warranties contained in Section 6.1.

If Burst.Com receives notice that the Licensed Software allegedly infringes any third party intellectual property rights, Burst.Com shall, at its option: (i) obtain a license permitting continued use of the such infringing element; (ii) modify the infringing element to perform its intended function without infringing such third party intellectual property rights; (iii) substitute software of comparable functionality and performance; and/or (iv) contest such allegation. In the event Burst.Com is unable within a reasonable period of time to obtain a license, make such modification or substitution, elects not to contest, or is unsuccessful in contesting, such allegation, this Agreement will terminate and Licensee shall destroy the Licensed Software or return the Licensed Software, as well as any copies to Burst.Com and Burst.Com shall pay to Licensee the net book value for the Licensed Software determined in accordance with generally accepted accounting principles. Notwithstanding anything to the contrary herein, Burst.Com shall indemnify, defend and hold harmless Licensee from any and all liability, loss, claim, lawsuit, cost, damage or expense whatsoever (including reasonable attorneys' fees and court costs) arising out of or in connection with any third party claim that the Licensed Software infringes third party intellectual property rights.

11. CONFIDENTIALITY

- 11.1 Confidential Information.** "Confidential Information" shall include the terms of this Agreement and all business, financial, technical and other information of a party marked or designated by such party as "confidential" or "proprietary", or information which, by the nature of the circumstances surrounding the disclosure, ought in good faith to be treated as confidential; provided that information shall not be considered Confidential Information of a party if it can be shown that such information: (i) is known to the recipient on the date indicated on the cover page of this Agreement directly or indirectly from a source other than one having an obligation of confidentiality to the providing party; (ii) hereafter becomes known (independently of disclosure by the providing party) to the recipient directly or indirectly from a source other than one having an obligation of confidentiality to the providing party; (iii) becomes publicly known or otherwise ceases to be confidential, except through a breach of this Agreement by the recipient; or (iv) was independently developed by the recipient without use of Confidential Information.
- 11.2 Protection of Confidential Information.** The parties recognize that, in connection with the performance of this Agreement, each of them may disclose to the other certain of its Confidential Information, including the creation of materials and the development of technology and techniques that are not generally known in the industry. The party receiving any Confidential Information of the other party agrees to maintain the confidential status of such Confidential Information and not to use any such Confidential Information for any purpose other than the purposes for which it was originally disclosed to the receiving party and not to disclose any of such Confidential Information to any third party, except as otherwise expressly authorized hereunder.
- 11.3 Permitted Disclosure.** The parties acknowledge and agree that each may disclose any given Confidential Information: (i) as required by law or generally accepted accounting practices; (ii) on a "need-to-know" basis to their respective directors, officers, employees, attorneys, accountants and other advisors or independent contractors, who have entered into a written agreement containing prohibitions against disclosure at least as stringent as those set forth in this Agreement; or (iii) in connection with disputes or litigation between the parties that relates to such Confidential Information and each party shall endeavor to limit disclosure to that purpose. The terms of this Agreement may be disclosed by either party under an obligation of confidence to a third party solely in connection with a bona fide acquisition, financing, merger or similar

transaction involving such party and such third party.

- 11.4 **Applicability.** The foregoing obligations shall apply to directors, employees and representatives of the parties and any other person to whom the parties have delivered copies of, or permitted access to, such Confidential Information, and each party shall advise each of the above of the obligations set forth in this Section 11.

12. GENERAL TERMS

- 12.1 **Export Regulations.** The Licensed Software and Documentation, including technical data, is subject to U.S. export control laws, including the U.S. Export Administration Act and its associated regulations, and may be subject to export or import regulations in other countries. Licensee agrees to comply strictly with all such regulations and acknowledges that it has the responsibility to obtain licenses to export, re-export, or import the Licensed Software or Documentation. Neither the Software nor Documentation may be downloaded, or otherwise exported or re-exported (i) into, or to a national or resident of Cuba, Iraq, Iran, North Korea, Libya, Sudan, Syria or any country to which the U.S. has embargoed goods; or (ii) to anyone on the U.S. Treasury Department's list of Specially Designated Nations or the U.S. Commerce Department's Table of Denial Orders. By installing or using the Licensed Software, Licensee is warranting that it is not located in or under the control of, or a national or resident of any such country or on any such list.
- 12.2 **U.S. Government Restrictions.** The use, duplication or disclosure by the United States Government of the Licensed Software and Documentation is subject to the restrictions as set forth in the Rights in Technical Data and Computer Software Clauses in DFARs 252.227-7013(c)(1)(ii) and FAR 52.227-19(c)
- ~~12.3 **Governing Law and Forum.** This Agreement shall be governed by and construed in accordance with the laws of the State of California and the United States without reference to conflicts of laws principles. Both parties consent to the exclusive jurisdiction and venue of the federal and state courts in Los Angeles County, California for resolution of any disputes concerning this Agreement.~~
- 12.4 **Attorneys' Fees.** If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to recover from the losing party its reasonable attorney's fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.
- 12.5 **Complete Understanding.** This Agreement constitutes the entire agreement between the parties with respect to its subject matter and supersedes and replaces all prior or contemporaneous understandings or agreements, written or oral, regarding its subject matter. No amendment to or modification of this Agreement will be binding unless in writing and signed by duly authorized representatives of both Burst.Com and Licensee.
- 12.6 **Survival.** The following provisions of this Agreement shall survive termination of this Agreement, along with any other terms which by their nature require survival: Sections 1, 3 and 6-12.
- 12.7 **Absence of Third Party Beneficiaries.** Unless otherwise expressly provided, no provisions of this Agreement are intended or shall be construed to confer upon or give to any person other than Burst.Com and Licensee any rights, remedies or other benefits under or by reason of this Agreement.
- 12.8 **Disclaimer of Agency.** The sole relationship between the parties pursuant to this Agreement shall be that of licensor and licensee. Neither party is authorized or empowered to act as agent or legal

employees, from and against any losses, damages, fines and expenses (including attorneys' fees and costs) arising out of or relating to any claims that Licensee has encoded, compressed, copied or transmitted any materials (other than materials provided by Burst.Com) in connection with the Licensed Software in violation of another party's rights or in violation of any law. If Licensee is importing the Licensed Software from the United States, it shall indemnify and hold Burst.Com harmless from and against any import and export duties or other claims arising from such importation. Burst.Com shall indemnify, defend and hold harmless Licensee from any and all liability, loss, claim, lawsuit, cost, damage or expense whatsoever (including reasonable attorneys' fees and court costs) arising out of, incident to or in any manner occasioned by Burst.Com's breach of the representations and warranties contained in Section 6.1.

If Burst.Com receives notice that the Licensed Software allegedly infringes any third party intellectual property rights, Burst.Com shall, at its option: (i) obtain a license permitting continued use of the such infringing element; (ii) modify the infringing element to perform its intended function without infringing such third party intellectual property rights; (iii) substitute software of comparable functionality and performance; and/or (iv) contest such allegation. In the event Burst.Com is unable within a reasonable period of time to obtain a license, make such modification or substitution, elects not to contest, or is unsuccessful in contesting, such allegation, this Agreement will terminate and Licensee shall destroy the Licensed Software or return the Licensed Software, as well as any copies to Burst.Com and Burst.Com shall pay to Licensee the net book value for the Licensed Software determined in accordance with generally accepted accounting principles. Notwithstanding anything to the contrary herein, Burst.Com shall indemnify, defend and hold harmless Licensee from any and all liability, loss, claim, lawsuit, cost, damage or expense whatsoever (including reasonable attorneys' fees and court costs) arising out of or in connection with any third party claim that the Licensed Software infringes third party intellectual property rights.

11. CONFIDENTIALITY

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- 11.2 Protection of Confidential Information.** The parties recognize that, in connection with the performance of this Agreement, each of them may disclose to the other certain of its Confidential Information, including the creation of materials and the development of technology and techniques that are not generally known in the industry. The party receiving any Confidential Information of the other party agrees to maintain the confidential status of such Confidential Information and not to use any such Confidential Information for any purpose other than the purposes for which it was originally disclosed to the receiving party and not to disclose any of such Confidential Information to any third party, except as otherwise expressly authorized hereunder.
- 11.3 Permitted Disclosure.** The parties acknowledge and agree that each may disclose any given Confidential Information: (i) as required by law or generally accepted accounting practices; (ii) on a "need-to-know" basis to their respective directors, officers, employees, attorneys, accountants and other advisors or independent contractors, who have entered into a written agreement containing prohibitions against disclosure at least as stringent as those set forth in this Agreement; or (iii) in connection with disputes or litigation between the parties that relates to such Confidential Information and each party shall endeavor to limit disclosure to that purpose. The terms of this Agreement may be disclosed by either party under an obligation of confidence to a third party solely in connection with a bona fide acquisition, financing, merger or similar

transaction involving such party and such third party.

- 11.4 **Applicability.** The foregoing obligations shall apply to directors, employees and representatives of the parties and any other person to whom the parties have delivered copies of, or permitted access to, such Confidential Information, and each party shall advise each of the above of the obligations set forth in this Section 11.

12. GENERAL TERMS

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- 12.2 **U.S. Government Restrictions.** The use, duplication or disclosure by the United States Government of the Licensed Software and Documentation is subject to the restrictions as set forth in the Rights in Technical Data and Computer Software Clauses in DFARS 252.227-7013(c)(1)(ii) and FAR 52.227-19(c)
- ~~12.3 **Governing Law and Forum.** This Agreement shall be governed by and construed in accordance with the laws of the State of California and the United States without reference to conflicts of laws principles. Both parties consent to the exclusive jurisdiction and venue of the federal and state courts in Los Angeles County, California for resolution of any disputes concerning this Agreement.~~
- 12.4 **Attorneys' Fees.** If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to recover from the losing party its reasonable attorney's fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.
- 12.5 **Complete Understanding.** This Agreement constitutes the entire agreement between the parties with respect to its subject matter and supersedes and replaces all prior or contemporaneous understandings or agreements, written or oral, regarding its subject matter. No amendment to or modification of this Agreement will be binding unless in writing and signed by duly authorized representatives of both Burst.Com and Licensee.
- 12.6 **Survival.** The following provisions of this Agreement shall survive termination of this Agreement, along with any other terms which by their nature require survival: Sections 1, 3 and 6-12.
- 12.7 **Absence of Third Party Beneficiaries.** Unless otherwise expressly provided, no provisions of this Agreement are intended or shall be construed to confer upon or give to any person other than Burst.Com and Licensee any rights, remedies or other benefits under or by reason of this Agreement.
- 12.8 **Disclaimer of Agency.** The sole relationship between the parties pursuant to this Agreement shall be that of licensor and licensee. Neither party is authorized or empowered to act as agent or legal

representative for the other for any purpose and shall not on behalf of the other enter into any contract, warranty or representation as to any matter. Neither party shall be bound by the acts or conduct of the other, or its agents, and nothing herein shall be construed as creating a partnership or joint venture.

12.9 No Waiver. Neither party shall be deemed, by any act or omission, to have waived any of its rights or remedies hereunder unless such waiver is in writing and signed by the waiving party, and then only to the extent specifically set forth in such writing. A waiver with reference to one event shall not be construed as continuing or as a bar to or waiver of any right or remedy as to a subsequent event.

12.10 Headings. The section headings used in this Agreement are intended for convenience only and shall not be deemed to modify, limit or supersede any provision.

12.11 Severability. In the event that any provision of this Agreement is found to be invalid, illegal or unenforceable pursuant to judicial decree or decision, the remainder of this Agreement shall remain valid and enforceable according to its terms.

12.12 Notices. Any notice or other communication to be given hereunder shall be in writing and shall be (as elected by the party giving such notice) (i) personally delivered; (ii) sent by postage prepaid registered airmail, return receipt requested; (iii) sent by facsimile with confirmed receipt; or (iv) deposited prepaid with an internationally recognized overnight delivery service. Notices shall be directed to the respective addresses set forth above and shall be effective upon receipt. Either party may change its address for purposes hereof on not less than five (5) days prior notice to the other party.

12.13 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and together shall constitute one and the same instrument.

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EXHIBIT A

Pricing Schedule

Initial License Fee: \$50,000.00 (includes a license for 1,500 clients)

Initial License Fee Payment Schedule:

\$10,000 upon signing of this document by both parties

\$20,000 60 after the date of signing of this document by both parties.

\$20,000 90 after the date of signing of this document by both parties.

Price for Additional Clients:

| <u>No. of Clients</u> | <u>Per Client Price</u> |
|-----------------------|-------------------------|
| 1,500 - 5,000 | \$25.00/ per client |
| 5,000 - 10,000 | \$20.00/ per client |
| 10,000 - 15,000 | \$15.00/per client |
| 15,000 - 20,000 | \$10.00/per client |

Software Maintenance and Technical Support: 18% of the purchase price of the clients annually
(ie. \$50,000 x18% = \$9,000.00/per year.

The purchased client licenses may be spread across multiple servers and multiple locations.

Burst.com will issue the license keys based upon notification by Cequent of the deployment location and number of clients.

EXHIBIT B

BURST.COM TRADEMARKS

Instant Video®

Burstware®

Burstware Conductor™

Burstware Server™

Burstware Player™

"Faster Than Real Time"™

"Why Stream When You Can Burst?"™

Burst Enabled™

Burst Hosting™

burst.com™

burst.com & Design™

Burstware & Design™

Burstware Bridge™

Empowered by Burstware™