

ORIGINAL



SOFTWARE LICENSE AND SERVICES AGREEMENT

This Software License and Services Agreement (this "Agreement") is entered into and made effective as of Oct 29, 1998 199_ (the "Effective Date"), by and between Edify Corporation, with corporate offices at 2840 San Tomas Expressway, Santa Clara, CA 95051 ("Edify") and 1st Financial Bank South Dakota, with an office at 363 West Anchor Drive, Dakota Dunes, South Dakota 57049 ("Customer").

1. DEFINITIONS.

1.1 "Intellectual Property Rights" means patent rights (including patent applications and disclosures), copyrights, trade secrets, know-how and any other intellectual property rights recognized in any country or jurisdiction in the world.

1.2 "Order Schedule" means the document by which Customer orders Product licenses and Services, and may be the Edify document titled Order Schedule and/or Customer's purchase order. Customer may acquire either Product licenses or Services separately.

1.3 "Products" means Edify's software development tools and application products ("Application Products") in object code form and related documentation specified in an Order Schedule issued pursuant to this Agreement, including any error corrections and updates thereto provided by Edify to Customer under this Agreement.

1.4 "Services" means the maintenance and support services, consulting services, installation services, and/or training services specified in an Order Schedule issued by Customer pursuant to this Agreement.

2. LICENSE.

2.1 *Grant of License.* Subject to the terms and conditions of this Agreement, Edify grants to Customer a nonexclusive, nontransferable, perpetual license to use each copy of the Products specified in an Order Schedule accepted by Edify on a single computer system, only for Customer's internal use in the United States. In the event Edify has granted Customer a site license, the terms and conditions of such site license shall be set forth in an Exhibit to this Agreement.

2.2 *License Restrictions.* Customer has no right to transfer, sublicense or otherwise distribute the Products to any third party. Customer may not: (a) modify, disassemble, decompile or reverse engineer the object code of the Products nor permit any third party to do so; (b) copy the Products, except for a reasonable number of backup copies; or (c) use the Products in any manner to provide service bureau, time-sharing or other computer services to third parties.

2.3 *Development Kit Restrictions.* If Customer purchases a Product license for any Edify development kit ("Development Kit"), then Customer may use the Development Kit for application development only and Customer expressly agrees not to use the Development Kit or any component thereof in a production application. In addition, Customer's use of the Development Kit is limited to a maximum of three (3) Edify Software Agent Products.

2.4 *Limited Rights.* Customer's rights in the Products will be limited to those expressly granted in this Section 2.

Edify reserves all rights and licenses in and to the Products not expressly granted to Customer under this Agreement.

3. OWNERSHIP.

Edify and its licensors presently own and will continue to own all worldwide right, title, and interest in and to the Products and all worldwide Intellectual Property Rights therein, whether or not the Products, in whole or in part, are incorporated in or combined with any other product. Customer will not delete or in any manner alter the copyright, trademark, and other proprietary rights notices of Edify and its licensors appearing on the Products as delivered to Customer. Customer will reproduce such notices on all copies it makes of the Products.

4. SERVICES.

4.1 *Maintenance and Support Services.* Edify will perform the maintenance and support services specified in an accepted Order Schedule in accordance with Edify's standard Software Maintenance Program as described in the Edify Customer Support Handbook, incorporated in this Agreement by reference, which Edify publishes from time to time. Edify may modify its Software Maintenance Program upon written notice to Customer. Edify will be obligated to provide maintenance and support services only for Products installed at the Customer sites designated in an Order Schedule accepted by Edify.

4.2 *Term of Maintenance and Support Services.* Edify will provide maintenance and support services for each Product specified in an accepted Order Schedule for an initial period of fifteen (15) months from the date of receipt by Customer of such Product and for additional twelve (12) month periods thereafter, provided that Customer pays Edify's then-current annual maintenance and support service fees in accordance with the terms of Section 6.1. Either party may elect to terminate maintenance and support services for a Product by notifying the other in writing at least forty-five (45) days prior to the expiration of such initial fifteen (15) month period or of any twelve (12) month renewal period thereafter. Customer may elect to renew maintenance and support services with respect to some, but not all, of the Products or Customer sites. Reinstatement of lapsed maintenance and support services is subject to payment by Customer of Edify's reinstatement fees in effect on the date Customer re-orders maintenance and support services.

4.3 *Exclusions to Maintenance and Support Services.* Edify shall have no obligation of any kind to provide maintenance and support services for problems in the operation or performance of the Products caused by any of the following (each, "Customer-Generated Error"): (a) non-Edify software or hardware products; (b) Customer's failure to properly maintain Customer's site and equipment

on which the Products are installed; or (c) alterations to Customer's site or equipment made by Customer or a third party after Edify's completion of installation services pursuant to Section 4.4. If Edify determines that it is necessary to perform maintenance and support services for a problem caused by a Customer-Generated Error, Edify will notify Customer thereof as soon as Edify is aware of such Customer-Generated Error and Edify will have the right to invoice Customer at Edify's then-current published time and materials rates for all such maintenance and support services performed by Edify.

4.4 Installation Services. Edify will perform the installation services specified in an accepted Order Schedule to install the Products on Customer's equipment at Customer's site. Customer will be solely responsible for completing all tasks that are required to prepare Customer's site and equipment for the performance of such services by Edify, including without limitation all items identified on Edify's Site Preparation Checklist, the terms of which are incorporated into this Agreement by reference.

4.5 Other Services. Edify will perform for Customer the consulting services and training services specified in an accepted Order Schedule in accordance with the terms and conditions of this Agreement.

4.6 Customer Security Procedures. Edify personnel who perform Services at Customer's site will comply with Customer's reasonable security procedures, provided that Customer furnishes Edify with such procedures in writing prior to the date any Edify personnel begin performing such Services.

4.7 Year 2000. The Products delivered to Customer under this Agreement are Year 2000 compliant. "Year 2000" compliant means that the Products will be capable of recording, maintaining and processing accurate dates for all dates including and following January 1, 2000, provided that all other products used by Customer in connection or combination with the Products, including without limitation hardware, software and firmware, properly exchange date data with the Products. This warranty does not cover third party products that Edify resells; any compliance warranties for such third party products are as agreed upon between Customer and the applicable vendor. Edify's sole and exclusive obligation, and Customer's sole and exclusive remedy, for breach of this warranty is for Edify, at its sole option and expense, either to make the Products Year 2000 compliant or to provide Customer with other functionally-similar products which are Year 2000 compliant, provided that the Product at issue is under Edify's then-current maintenance program.

4.8 Source Code Escrow. For a one-time fee of five hundred dollars (\$500), Customer may participate as a Licensee of Record under the Software Deposit Agreement dated September 22, 1993, by and between Edify Corporation and Brumley NSD, Inc. ("Escrow Agreement"). In the event the Product source code is released pursuant to the Escrow Agreement, Edify hereby grants Customer the right and license to use the Product source code solely for internal support and maintenance purposes of Products properly licensed from Edify prior to the release of such source code. Notwithstanding anything to the contrary in this

Agreement, Customer agrees that the Product source code for the Products is Confidential Information of Edify and shall be protected perpetually until and unless one or more of the confidentiality exclusions set forth in Section 9.2 occur. Further, Customer agrees (i) to use the Product source code under secure conditions with no less degree of care than it uses to secure its own information of like nature; (ii) to limit access to the Product source code to those employees and contractors (who have signed confidentiality agreements with Customer) of Customer who have a need to know; and (iii) to use the Product source code only in one (1) location at a time in the United States.

5. ORDERING AND DELIVERY.

5.1 Ordering. Customer may submit Order Schedules to Edify for the purchase of Product licenses and Services. Each such Order Schedule must reference this Agreement and must be signed by Customer. No Order Schedule will be deemed accepted by Edify unless and until Edify accepts such Order Schedule in writing, or unless Edify ships such order to Customer. Any terms and conditions of any Order Schedule that are inconsistent with or in addition to the terms and conditions of this Agreement will be deemed stricken from such Order Schedule, even if Edify accepts any such Order Schedule.

5.2 Delivery. All Products will be shipped FOB Edify's site. Shipping and handling charges will be invoiced with shipment.

6. PAYMENT.

6.1 License and Services Fees. Except for the payment of training services fees pursuant to Sections 6.2, Customer will pay Edify the total fees and expenses for all Products and Services specified in an accepted Order Schedule within thirty (30) days after the date of Edify's invoice for such fees and expenses. However, in the event that Edify performs installation services for particular Products at Customer's site, the total fees for any such installation and applicable Product(s) shall be paid for by Customer as follows:

- (A) Fifty percent (50%) shall be due and payable within thirty (30) days after the date of Edify's invoice for such fees and expenses;
- (B) Fifty percent (50%) shall be due and payable upon the earlier of either (i) installation of the applicable Product(s) or (ii) within sixty (60) days after Customer's receipt of the Product(s), provided that any installation delay is not due to an act or omission by Edify.

6.2 Training Fees. Customer will pay Edify the training services fees specified in an accepted Order Schedule when Customer enrolls in such training services, but in no event later than two (2) weeks prior to the scheduled date for such training services. Edify's then-current cancellation policy will apply to any cancellation by Customer of such training services.

6.3 Travel and Incidental Expenses. Customer will reimburse Edify for any reasonable out-of-pocket expenses

incurred by Edify in connection with performing any Services at Customer's site.

6.4 Payment Terms and Taxes. Customer will pay all amounts due under this Agreement in U.S. currency. All past due amounts will incur interest at a rate equal to the lower of 1.5% per month or the highest rate permitted by law, beginning as of ten (10) days after the applicable due date. Customer will be responsible for, and will promptly pay, all taxes of any kind (including but not limited to sales and use taxes) associated with this Agreement or Customer's receipt or use of the Products and Services, except for taxes based on Edify's net income.

7. WARRANTY.

7.1 Limited Product Warranty. Edify warrants that for a period of ninety (90) days after the shipment date: (a) the medium on which each copy of the Products is furnished will be free from defects in materials and workmanship under normal use; and (b) the Products will function substantially in accordance with the published documentation. As Customer's sole and exclusive remedy and Edify's entire liability for any breach of the foregoing warranty, Edify will, at its sole option and expense, promptly repair or replace any medium or Products which fail to meet this limited warranty or, if Edify is unable to repair or replace the medium or the Products, refund to Customer the applicable license fees paid upon return of the nonconforming item to Edify.

7.2 Disclaimer of Warranties. THE LIMITED WARRANTIES SET FORTH IN THIS SECTION 7 ARE IN LIEU OF AND EDIFY DISCLAIMS, ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO THOSE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

8. INDEMNIFICATION.

8.1 Infringement Indemnity. Edify will defend any action brought against Customer to the extent that it is based upon a claim that the Products, as provided by Edify to Customer under this Agreement and used within the scope of this Agreement, infringe any U.S. patent or copyright, and will pay any costs, damages and reasonable attorneys' fees attributable to such claim that are awarded against Customer, provided that Customer: (a) promptly notifies Edify in writing of the claim; (b) grants Edify sole control of the defense and settlement of the claim; and (c) provides Edify with all assistance, information and authority required for the defense and settlement of the claim.

8.2 Injunctions. If Customer's use of any of the Products hereunder is, or in Edify's opinion is likely to be, enjoined due to the type of infringement specified in Section 8.1 above, Edify may, at its sole option and expense: (a) procure for Customer the right to continue using such Products under the terms of this Agreement; (b) replace or modify such Products so that they are non-infringing and substantially equivalent in function to the enjoined Products; or (c) if options (a) and (b) above cannot be accomplished despite Edify's reasonable efforts, then Edify may terminate Customer's rights and Edify's obligations hereunder with respect to such Products and refund to Customer the

unamortized portion of the license fees paid hereunder, based upon a straight-line five (5) year depreciation commencing as of the date of receipt by Customer of such Products.

8.3 Exclusions. Notwithstanding the terms of Section 8.1, Edify will have no liability for any infringement claim of any kind to the extent it results from: (a) modification of the Products made other than by Edify; (b) the combination, operation or use of any Product supplied hereunder with equipment, devices or software not supplied by Edify to the extent such a claim would have been avoided if the Products were not used in such combination; (c) failure of Customer to use updated or modified Products provided by Edify to avoid infringement; or (d) compliance by Edify with designs, plans or specifications furnished by or on behalf of Customer. Customer shall defend and hold Edify harmless against any expense, judgment or loss for alleged infringement of any patents or copyrights or misappropriation of trade secrets which result from Edify's compliance with Customer's designs, specifications or instructions.

8.4 Sole Remedy. THE PROVISIONS OF THIS SECTION 8 SET FORTH EDIFY'S SOLE AND EXCLUSIVE OBLIGATIONS, AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES, WITH RESPECT TO INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF ANY KIND.

9. CONFIDENTIALITY.

9.1 Definition. "Confidential Information" means: (a) the Products; and (b) any business or technical information of Edify or Customer, including but not limited to any information relating to Edify's or Customer's product plans, designs, costs, product prices and names, finances, marketing plans, business opportunities, personnel, research, development or know-how that is either designated by the disclosing party as "confidential" or "proprietary" or reasonably known by the recipient under the circumstances and, if orally disclosed, reduced to writing by the disclosing party within thirty (30) days of such disclosure.

9.2 Exclusions. Confidential Information does not include information that: (a) is or becomes generally known to the public through no fault or breach of this Agreement by the receiving party; (b) is known to the receiving party at the time of disclosure without an obligation of confidentiality; (c) is independently developed by the receiving party without use of the disclosing party's Confidential Information; (d) the receiving party rightfully obtains from a third party without restriction on use or disclosure; or (e) is disclosed with the prior written approval of the disclosing party.

9.3 Use and Disclosure Restrictions. During the term of this Agreement, and for a period of five (5) years after any termination of this Agreement, each party will not use the other party's Confidential Information except as permitted herein, and will not disclose such Confidential Information to any third party except to employees and consultants as is reasonably required in connection with the exercise of its rights and obligations under this Agreement (and only subject to binding use and disclosure restrictions at least as protective as those set forth herein executed in writing by such employees and consultants). However, each party may disclose Confidential Information of the other

party: (a) pursuant to the order or requirement of a court, administrative agency, or other governmental body, provided that the disclosing party gives reasonable notice to the other party to contest such order or requirement; and (b) on a confidential basis to legal or financial advisors.

10. LIMITATION OF LIABILITY.

10.1 Total liability. EXCEPT FOR EDIFY'S OBLIGATIONS UNDER SECTION 8.1, EDIFY'S AND ITS LICENSORS' CUMULATIVE LIABILITY TO CUSTOMER, FROM ALL CAUSES OF ACTION AND ALL THEORIES OF LIABILITY, WILL BE LIMITED TO AND WILL NOT EXCEED THE AMOUNTS PAID TO EDIFY BY CUSTOMER PURSUANT TO THIS AGREEMENT FOR THE PRODUCTS AND SERVICES WHICH ARE THE SUBJECT OF THE CAUSE OF ACTION OR CLAIM.

10.2 Exclusion of Damages. IN NO EVENT WILL EDIFY OR ITS LICENSORS BE LIABLE TO CUSTOMER FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS) ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE USE OR PERFORMANCE OF THE PRODUCTS OR SERVICES, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE, AND WHETHER OR NOT EDIFY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

10.3 Basis of Bargain. The parties expressly acknowledge and agree that Edify has set its prices and entered into this Agreement in reliance upon the limitations of liability specified herein, which allocate the risk between Edify and Customer.

11. TERMINATION.

11.1 Term. This Agreement will begin on the Effective Date and will remain in effect thereafter unless terminated earlier in accordance with the terms of this Agreement. The term of each Product license granted by Edify hereunder will begin upon the date of receipt by Customer of the Product specified in an accepted Order Schedule and will remain in effect thereafter until Customer discontinues use of such Product or until terminated earlier by either party in accordance with the terms of this Agreement.

11.2 Termination for Breach. Each party will have the right to terminate this Agreement or any Product license granted hereunder if the other party breaches any material term of this Agreement and fails to cure such breach within thirty (30) days after written notice thereof.

11.3 Automatic Termination. This Agreement, but not the Product licenses, will terminate automatically if either party hereto: (a) becomes the subject of any voluntary petition in bankruptcy or any voluntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors; or (b) becomes the subject of an involuntary petition in bankruptcy or any involuntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors, if such petition or proceeding is not dismissed within sixty (60) days of filing.

11.4 Effect of Termination. Upon any termination of this Agreement or of any individual Product license granted

hereunder, Customer will promptly return to Edify or, at Edify's request, destroy, the applicable Products and all copies and portions thereof, in all forms and types of media, and provide Edify with an officer's written certification, certifying to Customer's compliance with the foregoing.

11.5 Nonexclusive Remedy. Termination of this Agreement by either party will be a nonexclusive remedy for breach and will be without prejudice to any other right or remedy of such party.

11.6 Survival. The rights and obligations of the parties contained in Sections 3, 6, 8, 9, 10, 11.4, and 11.5 will survive the termination of this Agreement or of any individual Product license.

12. GENERAL.

12.1 Assignment. Neither Customer nor Edify will have the right to assign this Agreement, in whole or in part, without the other party's prior written consent. Any attempt to assign this Agreement, without such consent, will be null and void. Notwithstanding the foregoing, Customer may assign this Agreement, without Edify's consent, to any entity that controls, is controlled by, or is under common control with, Customer; provided that the assignee agrees in writing to be bound by the terms and conditions of this Agreement and the assignee is not a competitor of Edify. For purposes of the preceding sentence, "control" means having the ability to elect a majority of the board of directors or a similar governing body.

12.2 Governing Law and Jurisdiction. This Agreement will be governed by and construed in accordance with the laws of the State of California. Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts of the Northern District of California and the parties hereby consent to the personal jurisdiction and venue therein.

12.3 Severability. If for any reason a court of competent jurisdiction finds any provision of this Agreement invalid or unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible and the other provisions of this Agreement will remain in full force and effect.

12.4 Waiver. The failure by either party to enforce any provision of this Agreement will not constitute a waiver of future enforcement of that or any other provision.

12.5 Notices. All notices required or permitted under this Agreement will be in writing and delivered by confirmed facsimile transmission, by courier or overnight delivery service, or by certified mail, and in each instance will be deemed given upon receipt. All communications will be sent to the addresses set forth above or to such other address as may be specified by either party to the other in accordance with this Section. Either party may change its address for notices under this Agreement by giving written notice to the other party by the means specified in this Section.

12.6 Force Majeure. Neither party will be responsible for any failure or delay in its performance under this Agreement due to causes beyond its reasonable control, including but not limited to, labor disputes, strikes, lockouts,

shortages of or inability to obtain labor, energy, raw materials or supplies, war, riot, act of God or governmental action. Customer may terminate if the force majeure condition is not eliminated or cured within sixty (60) days from the occurrence thereof.

12.7 Relationship of Parties. The parties to this Agreement are independent contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise, or agency between the parties. Neither party will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent.

12.8 Announcements. Edify may not publicly announce and list Customer as a customer of Edify, or use Customer's name in any other manner, without Customer's express prior written consent to any such use.

12.9 Non-Solicitation. For a period of two (2) years after the Effective Date, Customer will not recruit or solicit any Edify employee that has provided any Services to Customer hereunder, without Edify's prior written consent.

12.10 Entire Agreement. This Agreement, including all schedules, exhibits and attachments attached hereto, contains the complete understanding and agreement of the parties and supersedes all prior or contemporaneous agreements or understandings, oral or written, relating to the subject matter herein. Any waiver, modification or amendment of any provision of this Agreement will be effective only if in writing and signed by duly authorized representatives of the parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the Effective Date by their duly authorized representatives.

CUSTOMER

By: B. E. Pasierb

Name: BERNARD E. PASIERB

Title: EXEC. VP

EDIFY CORPORATION

By: Jim Pangburn

Name: Jim Pangburn

Title: Director of Finance

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