

SECTION:	Reseller Sales		
POLICY #:	RS 26	PAGE:	1 of 1
SUBJECT:	Pervasive PSQL Reseller Sales		
DATE:	08/14	SUPERSEDES:	None

TITLE: RS26, Pervasive Reseller Sales Policy and Distribution Agreement

POLICY: Authorized Channel Partners who sell the Pervasive PSQL product must adhere to this policy RS26 including the "Pervasive PSQL Reseller Distribution Agreement" attached to this Policy.

SCOPE: This policy applies to all sales of Pervasive PSQL database licenses. As of August 1, 2014, by a Channel Partner's first and any subsequent orders of PSQL from NCR, that Channel Partner is accepting, without further action required, the Pervasive PSQL Reseller Distribution Agreement attached to this Policy immediately below.

PROCEDURES:

1. Channel Partners may resell the Pervasive PSQL products as offered by NCR via a bulletin or other communication device.
2. Pervasive PSQL licenses may only be purchased in conjunction with a ScanMaster V2 POS system license. PSQL licenses purchased from NCR may not be used with any other product from any other vendor or for any other reason. Orders for new PSQL licenses can only be accepted when accompanied by a matching new ScanMaster license purchase on the same purchase order.
3. ScanMaster licenses or ScanMaster V2 upgrades may not be sold without a matching Pervasive PSQL license. NCR will decline any ScanMaster license order not accompanied by a PSQL license order which is sufficient to fully operate the ScanMaster system order.
4. Channel Partners purchase PSQL from NCR under distribution terms and conditions required by Actian (the owner of Pervasive PSQL). The Channel Partners' rights and responsibilities governing PSQL resale are provided in this Policy RS26, including the Pervasive PSQL Reseller Distribution Agreement attached to this policy immediately below.
5. The Pervasive PSQL Reseller Distribution Agreement is automatically in force with inferred Channel Partner agreement upon the Channel Partner's first, and any subsequent, PSQL order(s) to NCR. The terms of this Agreement expressly govern all such orders and Channel Partner activity in regards to the Pervasive PSQL product.
6. The "Pervasive PSQL Reseller Distribution Agreement" is provided below.



Pervasive PSQL Reseller Distribution Agreement

TERMS OF AGREEMENT

This “Agreement” sets forth the terms and conditions under which an NCR “Channel Partner” and NCR Corporation (“NCR”) (each a “Party” to this Agreement and collectively the “Parties”) agree that NCR shall appoint such Channel Partner as an authorized “Reseller” and grant to the Reseller certain non-exclusive and non-transferable rights as set forth below with respect to certain Pervasive PSQL software (the “Software”) as may be offered for sale or resale by NCR, together with any related “Documentation” for the Software. This Agreement shall be in force and govern any Channel Partner and all of such Channel Partner’s orders for the Software from NCR. The “Effective Date” of this Agreement is **August 1, 2014**.

Entire Agreement. This Agreement including the accompanying terms and conditions constitutes the entire agreement between the Parties with respect to the Software, and supersedes all proposals, prior discussions and writings between the Parties with respect to the subject matter of this Agreement, and replaces any agreements previously executed by the Parties in relation to the Software or any predecessor releases or versions of the Software. Each Party represents and warrants to the other Party that in entering into this Agreement, it has not relied upon any promises, assurances, or representations from the other Party not expressly contained in this Agreement. Only a written instrument signed by authorized representatives of both Parties may amend this Agreement (regardless of the Parties’ course of business, commerce or other conduct).

1. APPOINTMENT AND LICENSE GRANT

- 1.1 Subject to the terms and conditions of this Agreement, NCR appoints Channel Partner as a non-exclusive authorized Reseller in the Channel Partner’s geographic territory as specified in Channel Partner’s Reseller Agreement, Schedule B (Territory), such agreement being with NCR, Retailix or any NCR or Retailix predecessors, and grants to Reseller certain non-exclusive and non-transferable licenses and rights to use, copy, market, and distribute the Software, which rights are limited to the following:
 - 1.1.1 A non-exclusive, non-transferable license to purchase and resell and distribute the Software with, and only with, NCR’s “ScanMaster” POS system in such form as the Software is licensed and supplied from NCR, and in accordance with the terms of this Agreement.
- 1.2 Reseller has the right only to market and distribute the Software to a Reseller customer (“End User”) that is purchasing the NCR ScanMaster system for such End User’s use. Reseller may not themselves, or authorize any customer or End User to, rent, lease, sublease or time share the Software or Documentation or any part thereof, or use the Software to host applications for third parties or to provide service bureau, time-sharing or other computer services to third parties.
- 1.4 No other rights with respect to the Software are granted under this Agreement. Without limiting the generality of the foregoing: (i) Reseller shall use or distribute the Software only as an integral bundled element of the ScanMaster product and the Software may not be used or distributed as a standalone product; and (ii) any Software license copies, exclusive of one (1) backup copy and one (1) archival per unique Software license made by Reseller, for any purpose or no purpose and/or any Software copies used internally by Reseller shall be subject to the license fees and payment obligations set forth in NCR offering documentation regarding the Software. Reseller may install free of charge, internally or at its ScanMaster End User sites, any patches and maintenance fixes to the Software, provided such patches and maintenance fixes are not priced as a separate salable product (for example a new version or upgrade) by NCR or by Pervasive.
- 1.5 License rights granted under this Agreement for the Software do not include any license, right, power or authority to subject the Software, ScanMaster or any other product or NCR or Pervasive intellectual property rights in whole or in part to any of the terms of an Excluded License. “Excluded License” means any license that requires as a condition of use, modification or distribution of software subject to such license, that such software or other software combined and/distributed with such software be (a) disclosed or distributed in source code form; (b) licensed for the purpose of making derivative works; or (c) redistributable at no charge.

2. TERM AND RENEWALS

- 2.1 The “Term” of this Agreement shall be for one year after the Effective Date specified above, unless otherwise terminated in accordance with Section 10 of this Agreement.
- 2.2 Renewals: the Term shall thereafter, on the anniversary of the Effective Date, (“Renewal Date”), automatically renew for successive one (1) year Terms, which shall be under the same terms and conditions as the expiring Term, unless the Agreement is terminated as per Section 10 of this Agreement.

3. OBLIGATIONS OF RESELLER

- 3.1 As of the Effective Date, each ScanMaster license purchased by Reseller shall be accompanied by a license purchase for the Software, including all appropriate counts and features required for operation and as specified by configuration information about the Software provided by NCR. Reseller shall distribute the Software authorized by all such licenses purchases accompanied by a copy of Pervasive’s end user license agreement (the “Pervasive EULA”) which shall be provided to Reseller by NCR. Pervasive and NCR reserve the right to change such Pervasive EULA at any time upon written notice to Reseller or by distributing such modified Pervasive EULA to accompany Reseller license purchases for the Software, provided, however, that such modifications will not apply retroactively to existing installations of the Software or Reseller’s own internal installations which had received and implemented the Software prior to such modifications.
- 3.2 Reseller understands that NCR is obligated to report, to Pervasive, Reseller’s name when either (i) this Agreement is executed and (ii) on each occasion when Reseller purchases licenses for the Software, either for Reseller’s internal use or for resale to an End User.
- 3.3 Reseller agrees to display, or leave in place unaltered, certain Pervasive trademarks and logos on any products, brochures, packaging or documentation, provided by NCR in relation to the Software, that bear such Pervasive trademarks.

4. FEES AND PAYMENT

- 4.1 All “License Fees” due to NCR hereunder will be paid to NCR by Reseller as per the amounts and discounts published or otherwise agreed by NCR, using the standard terms and conditions of the Channel Partner’s then-current Reseller Agreement with NCR or Retailix etc.
- 4.2 For clarification, except for one (1) backup and one (1) archival copy per unique Software license, Reseller understands and agrees that Reseller must pay a License Fee for each Software copy made by Reseller or Reseller’s End Users. Subject to the immediately preceding sentence, any Software copies made by Reseller or Reseller’s End Users will be subject to the full License Fee whether or not Reseller actually distributes such copies or receives payment for such copies. Reseller’s obligation to pay a License Fee for a Software copy arises at the time Reseller makes the copy (regardless of whether, or when, any distribution of such copy occurs). For further clarification, and without limiting the preceding terms of this Section 4.2, Reseller shall pay a License Fee for each Software copy: (i) used in Reseller’s demonstration or lab or test environments or for any purpose, (ii) retained in Resellers’ inventory, (iii) used for trial or evaluation purposes, (iv) downloaded from NCR or other websites, (vi) made by End Users for any purpose, (vi) which is a Software version upgrade made, used or distributed (unless the Reseller copy is under, and has paid for, a current Pervasive Annual Upgrade Maintenance contract which includes Software version upgrades), (vii) and/or (viii) distributed within Reseller’s operation or business and/or to End Users in such a manner that the Reseller and/or End User has access to multiple Software copies; in which event(s) a License Fee will be due to NCR for the number of Software copies to which the Reseller or End User has access regardless of how many Software copies were actually purchased by the Reseller or End User.

5. DELIVERY AND REPRODUCTION OF SOFTWARE

- 5.1 NCR will provide required licenses, media, Pervasive EULAs and documentation as required for fulfillment and implementation of licenses for the Software. These items may be provided in any format or medium of NCR’s choosing. Reseller is granted the right to copy and distribute one (1) copy of the documentation with each licensed copy of the Software purchased by Reseller.
- 5.2 All copies of the Software and documentation made by Reseller shall include the copyright notice, trademarks and other proprietary legends appearing in the original Software and documentation provided by NCR or otherwise specified by NCR.
- 5.3 All shipments shall be FOB shipping point and Reseller shall pay all costs of shipment and delivery, including insurance, customs, duties, tariffs, and other import and export fees.

6. SOFTWARE SUPPORT AND TRAINING

- 6.1 Reseller shall be responsible for receiving and responding to all calls for support from End Users (Level 1 and Level 2 support (as defined by NCR’s current Policies and Procedures Guide – “Policies”), including initial problem analysis, diagnosis, and replication of the problem at Reseller’s location, for the ScanMaster system and the Software. NCR will provide standard Level 3/Level 4 support as defined by NCR’s then-current Policies.
- 6.2 No support services other than those normally provided under NCR’s then-current Policies are offered for the Software. Resellers desiring such services may contact NCR to arrange additional support or other services. Notwithstanding the foregoing, NCR is not obligated to provide, specify or quote any such additional services.
- 6.3 Reseller understands that NCR shall have twelve (12) months from receipt of a new release of the Software from Pervasive in which to implement such new Software release into ScanMaster. Further, following such period, NCR will not be able to copy or distribute the prior version or versions of the Software. Reseller understands that NCR is only able and obligated to support prior versions of the Software for the nine (9) months following the release date of a new Pervasive Software release.
- 6.4 By Reseller’s order of and payment for license(s) of the Pervasive Software from NCR, Reseller acknowledges and agrees to the terms and conditions in this Pervasive Reseller Distribution Agreement and that it has read and agrees to be bound by any published terms and conditions for the Pervasive Software within the channel program’s Policies and Procedures, as referenced in the Channel Partner’s Reseller Agreement.

7. RECORDS AND REPORTS

- 7.1 During the Term of this Agreement including any Renewals, and for three (3) years thereafter, Reseller shall keep accurate records and accounts pertaining to this Agreement in accordance with generally accepted accounting principles and standard business practices in the computer industry. Such records shall include, but are not limited to, a record of: (i) all copies of the Software made or distributed by Reseller for internal or End User purposes, including those to each of Reseller’s End Users for any purpose including Archival or Backup purposes, (ii) each unique license key for each Software copy received by Reseller and used internally and/or distributed to any End User, (iii) the name of each End User to which Reseller resold ScanMaster and the Software, and (iv) Reseller shall provide such records to NCR upon NCR’s request for inspection and audit by NCR or Pervasive’s third party accountants pursuant to this Section. NCR or Pervasive’s third party accountants may, at its sole cost (except as set forth below) and no more than once every 12 months and for an inspection period not to exceed three years retroactively (including the present relevant calendar year) inspect Reseller’s business records relating solely to the transactions, rights, restrictions, obligations and fees contemplated herein, which may include inspecting Reseller’s facilities, and Distribution Agreements, on fifteen (15) days prior written notice to Reseller. Such inspections are solely for the purpose of verifying Reseller’s compliance with the provisions of this Agreement and amounts due by Reseller to NCR hereunder. In the event any such inspection reveals an underpayment by Reseller, Reseller shall promptly remit the amount of the underpayment for the period covered by the inspection along with the applicable late charge specified in Section 4.1, and (b) if such underpayment exceeds five percent (5%) of the payment due for the period covered by the inspection, Reseller will reimburse NCR or Pervasive for its reasonable expenses incurred in connection with the inspection. NCR’s and Pervasive’s rights under this Section shall remain in effect during the Term of this Agreement and any Renewals and through the period ending three (3) years from the termination or expiration of this Agreement and any Renewals. To the extent that NCR or Pervasive’s third party auditor determines that Reseller has overpaid NCR, NCR shall promptly reimburse Reseller such overpaid amount. The restrictions of Section 9.4 shall apply to the inspection with respect to Reseller’s records provided for the inspection. The Pervasive auditor shall provide to Pervasive only the records specified in subsections 7.1(i) – (iii) above and the conclusions of its inspection, and shall not provide any of Reseller’s other records without Reseller’s written consent.

8. TITLE, USE OF TRADE NAMES AND TRADEMARKS

- 8.1 All right, title, and interest in and to the Software and all copies of the Software shall remain vested in Pervasive at all times. The Software is licensed, and not sold. All right, title, and interest in and to NCR’s ScanMaster product and all copies thereof shall remain vested in NCR at all times.

- 8.2 Any reproduction, distribution, or use of Pervasive's trademarks, service marks, or trade names shall be solely in direct connection with Reseller's exercise of its marketing and distribution rights under this Agreement. All proprietary markings, including the use of the Pervasive logo, shall be in the form, location, and quality specified by Pervasive. Reseller acknowledges that all benefit accruing from its use of Pervasive's trademarks, service marks, or trade names pursuant to this Agreement will inure to the benefit of Pervasive.

9. PROPRIETARY RIGHTS

- 9.1 The Software, including the documentation and other related materials furnished to Reseller, constitutes the copyrighted works of Pervasive. Such Software, documentation, and related materials also contain valuable trade secrets and confidential information that is proprietary to Pervasive. Reseller will take every reasonable precaution and steps to prevent the theft, unauthorized reproduction, distribution, use, and/or disclosure of such items. Reseller also will reasonably cooperate and assist NCR or Pervasive, at NCR or Pervasive's cost, in bringing legal action against any End User for, and/or otherwise seeking to remedy any, unauthorized use, copying, and/or distribution of the Software.
- 9.2 Neither Reseller nor any End User has the right to modify, translate or make derivative works of the Software. Furthermore, neither Reseller nor any End User shall have the right to disassemble, decompile, or apply any procedure to the Software, including reverse engineering or any similar process, in order to ascertain, derive, and/or appropriate for any reason or purpose, the source code or source listings for the Software, or any trade secret information or process contained in the Software.
- 9.3 Reseller acknowledges and agrees that Pervasive would suffer irreparable harm, for which monetary damages would not be an adequate remedy, in the event of any unauthorized use, reproduction, disclosure or distribution of the Software by Reseller or Reseller's End Users. Reseller therefore agrees that, to protect any and all of its proprietary rights, NCR and Pervasive shall have the right to take all reasonable steps to protect Pervasive's proprietary interests, including, but not limited to seeking injunctive relief and any other remedies as may be available at law or in equity in the event Reseller breaches its obligations under this Agreement.
- 9.4 In addition, each Party shall hold in confidence all other materials or information disclosed to it in confidence under this Agreement by the other Party. Such other materials or information may include financial, business, marketing plans, and End User data and information or other proprietary information. All oral information, which is to be held in confidence, shall be so identified when disclosed and reduced to writing within thirty (30) days. The obligations of the Parties hereunder shall not apply to any materials or information that (i) is or becomes a part of the public domain through no act or omission of the Party so obligated or (ii) is independently developed without use or benefit of such disclosed information by such Party as evidenced by written records or (iii) was legally in recipient Party's possession before receipt from disclosing Party as evidenced by written records or (iv) was rightly received by recipient Party from a third party without obligations of confidentiality.

10. TERMINATION

- 10.1 This Agreement may be terminated as follows:
- 10.1.1 By either Party upon thirty (30) days written notice to the other Party if such Party fails to perform any obligation required of it hereunder and such failure is not cured within such thirty (30) day period; or
 - 10.1.2 By either Party if the other Party files a petition for bankruptcy or insolvency, has an involuntary petition under bankruptcy laws filed against it, commences an action providing for relief under bankruptcy laws, files for the appointment of a receiver, makes an assignment for the benefit of creditors or is adjudicated a bankrupt concern; or
 - 10.1.3 By NCR upon fifteen (15) days written notice to Reseller (notwithstanding Section 10.1.1) if NCR will be unable to fulfill its obligations under this Agreement due to expiration of NCR's agreements with Pervasive.
 - 10.1.4 By either Party upon thirty (30) days written notice to the other Party in advance of the Renewal Date of the desire to decline the automatic renewal described in Section 2.1, in which case this Agreement will terminate at the end of the current Term without further notification by NCR to Reseller.
- 10.2 Upon the termination or expiration of this Agreement for any reason. Reseller's rights under this Agreement shall cease and Reseller shall return all copies of the Software and documentation then in its possession; provided, however, unless this Agreement is terminated by NCR for Reseller's breach, Reseller shall have the right to retain a mutually agreed number of copies of the Software solely to fulfill Reseller's support obligations for ScanMaster, which support obligations do not include providing additional or replacement copies or licenses of the Software. Pervasive EULAs entered into by End Users in accordance with this Agreement will survive termination of this Agreement in accordance with the applicable Pervasive EULA terms.
- 10.3 No termination of this Agreement shall affect any obligation to make payment of outstanding amounts owed by either Party to the other Party. NO CLAIM BASED ON A BREACH OF THIS AGREEMENT BY RESELLER OR AN INFRINGEMENT OF NCR'S RIGHTS BY RESELLER WILL ACCRUE UNTIL NCR OBTAINS ACTUAL KNOWLEDGE OF THE BREACH OR INFRINGEMENT. WITHOUT LIMITING THE FOREGOING, AND BY WAY OF EXAMPLE ONLY, IF RESELLER MAKES A COPY OF THE SOFTWARE FOR WHICH RESELLER MUST PAY A LICENSE FEE, ANY STATUTE OF LIMITATIONS, LACHES, OR OTHER SIMILAR PERIOD SHALL NOT BEGIN TO RUN UNTIL NCR OBTAINS ACTUAL KNOWLEDGE OF THAT COPY AND THE FACT THAT RESELLER FAILED TO PAY FOR SUCH COPY.

11. LIMITED WARRANTY

- 11.1 NCR warrants to Reseller that NCR has the right to enter into this Agreement and to grant the rights and license granted in this Agreement and that to the best of NCR's knowledge the Software does not infringe any U.S. or any other patent, copyright, or trade secret or violate any other U.S. proprietary right of a third party. Reseller's sole remedy, and NCR's sole liability and obligation, for breach of the warranties in this section is the intellectual property indemnity provided by NCR to Reseller as set forth in Section 12 below.
- 11.2 NCR also warrants that for a period of thirty (30) days from the date of delivery to Reseller, the Software shall perform substantially in accordance with Pervasive's applicable user documentation. In the event of any breach of the foregoing warranty, NCR, at its sole expense and as its sole liability and Reseller's sole remedy, shall modify or replace the applicable Software.
- 11.3 Reseller shall not extend any warranties to any End Users on behalf of NCR or Pervasive, except as provided in the Pervasive EULA.
- 11.4 EXCEPT AS OTHERWISE STATED IN THIS AGREEMENT, NCR MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

11.5 NCR's warranties under this Agreement shall be void and of no effect with respect to any Software which has been modified by Reseller or by any party other than NCR or Pervasive, or which is used in any manner other than as authorized under this Agreement.

12. INDEMNITY FOR INFRINGEMENT

12.1 NCR will defend, at its expense, indemnify and hold Reseller harmless from and against any action brought against Reseller that is based on a claim that the Software, as provided by NCR and used in the manner authorized under this Agreement, infringes a U.S., Canadian or Bermudian patent, copyright, trade secret, or other U.S., Canadian or Bermudian proprietary right of a third party ("Infringement").

12.2 NCR will pay any costs, damages, and reasonable attorney's fees finally awarded to such third party in such action which are attributable to such claim of Infringement, and will pay all settlement amounts agreed to in writing by NCR, provided that Reseller (i) promptly notifies NCR in writing of any such claim or the possibility thereof, (ii) gives NCR sole control of the settlement, compromise, negotiation, and defense of any such claim provided that NCR will not, without the prior written approval of Reseller, obligate or impose liability on Reseller, and (iii) reasonably cooperates with NCR, at NCR's expense, with respect to any such claim. In addition to the foregoing indemnification, NCR may, at its option, obtain the right to continue use of the Software, substitute other equivalent software, or modify the Software so that it is no longer infringing, or to the extent the foregoing options are not reasonably feasible, NCR shall terminate this Agreement upon written notice and NCR shall refund to Reseller the license fees paid by Reseller to NCR in connection with the infringing Software provided that Reseller is required to refund, and actually refunds, to its End Users fees paid by such End Users to Reseller for such infringing Software. Reseller may obtain separate counsel, at its expense, provided that the obligations of NCR under this Section 12 shall remain in full force and effect.

12.3 The foregoing indemnity shall not apply to any Infringement claim arising from: (i) Software which has been modified by parties other than NCR unless authorized by NCR or Pervasive in writing, in which case such NCR infringement indemnity shall apply; (ii) use of the Software in conjunction with a product other than ScanMaster, (iii) Software which was copied, used or distributed in breach of this Agreement, the Pervasive EULA; or (iv) Software copies for which applicable license fees were not paid to NCR.

12.4 Subject to NCR's indemnification obligations set forth above in this Section 12, Reseller shall defend, at its expense, indemnify and hold NCR harmless from and against any action brought against NCR that is based on a claim that the combination or use of any product other than ScanMaster with the Software, due to Reseller's actions or Reseller's written instructions, infringes any patent, copyright, trade secret, or other intellectual proprietary right of a third party, provided, however, that the foregoing indemnification will not apply in the event that the Software alone is the cause of such infringement. Reseller will pay any costs, damages, and reasonable attorney's fees finally awarded to such third party in such action which are attributable to such claim of infringement. The foregoing obligation is subject to NCR (i) promptly notifying Reseller in writing of any such claim, (ii) granting Reseller the sole control of the defense, compromise, negotiation and settlement of such claim provided that Reseller will not, without the prior written approval of NCR, obligate or impose liability on NCR, and (iii) reasonably cooperating with Reseller, at Reseller's expense, with respect to any such claim. NCR may obtain separate counsel, at its expense, to confer with Reseller's counsel, provided that Reseller shall have sole control of such defense and subject to the foregoing, the obligations of Reseller under this Section 12 shall remain in full force and effect.

13. LIMITATION OF LIABILITY

13.1 SUBJECT TO SECTION 13.2 BELOW NEITHER PARTY'S LIABILITY UNDER ANY CLAIM ARISING OUT OF THIS AGREEMENT SHALL EXCEED THE LICENSE FEES PAID TO NCR BY RESELLER DURING THE TWELVE (12) MONTH PERIOD PRECEDING THE CAUSE WHICH GAVE RISE TO SUCH DAMAGES. NEITHER PARTY WILL BE LIABLE FOR LOST PROFITS OR GOODWILL OR LOSS OF DATA, OR FOR SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, UNDER ANY THEORY OF LIABILITY, EVEN IF SUCH PARTY IS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

13.2 The liability limitations set forth in Section 13.1 above do not apply to: (i) either party's breach of its confidentiality obligations under this Agreement; (ii) Reseller's breach of the license grants and restrictions set forth in Section 1 above and/or a breach by Reseller of Section 9.2 above (but excluding End User's breach of Section 9.2 for which Reseller shall not have liability); (iii) Reseller's payment obligations under this Agreement; (iv) either party's indemnification obligations under Section 12 (Indemnity for Infringement) of this Agreement; or (v) either party's infringement of the other party's intellectual property rights.

14. JOINT EFFORTS

14.1 Pervasive may conduct up to two (2) mailings annually to Resellers and to Reseller's End Users.

15. MISCELLANEOUS

15.1 This Agreement shall be binding upon and inure to the benefit of the successors and assigns of NCR. Reseller may not transfer or assign this Agreement, or any rights or obligations hereunder, by contract, operation of law, change of control, or otherwise without the prior written consent of NCR, which consent will not be unreasonably withheld. Subject to the foregoing, any merger, sale of assets or other change of control of Reseller shall be deemed an assignment for purposes of this Section. Any attempted assignment in violation of the foregoing shall be null and void. This Agreement does not create any rights in any person or entity other than Reseller.

15.2 In the event a party brings any action or claim to enforce any provision or for a breach of this Agreement, such party, if it prevails, shall be entitled to recover, in addition to any other amounts awarded, reasonable fees of attorneys and experts and other related costs and expenses and such amounts shall be excluded from the limitation of liability set forth in Section 13.

15.3 Any notice required under this Agreement shall be given in writing and shall be deemed effective upon delivery to the party to whom addressed. All notices shall be sent to the applicable address specified on the face page of this Agreement or to such other address as the parties may designate in writing. All notices sent pursuant to this section shall be sent in writing via certified mail return receipt requested, or in such other way that sender obtains a written receipt.

15.4 THIS SECTION INCLUDES CHOICE OF LAW AND EXCLUSIVE VENUE PROVISIONS.

- 15.4.1 This Agreement shall be governed by and interpreted under the laws of the State of Texas, U.S.A. without regard to rules governing conflicts of law. In addition, any claim, dispute or controversy (whether in contract, tort or otherwise, including statutory, common law, intentional tort, and equitable claims) between NCR and Reseller arising from or relating in any way to this Agreement, its interpretation, its termination, and/or the relationships which result from this Agreement ("Dispute") shall be governed by the laws of the State of Texas, U.S.A. or, where applicable, by the federal laws of the U.S.A., without regard to rules governing conflicts of law. The parties expressly disclaim the application of the United Nations Convention on the International Sale of Goods to any Dispute.
- 15.4.2 **Exclusive jurisdiction and venue for any and all Disputes will be in the state and federal courts residing in Dallas, Texas.** Each party expressly consents to the exercise of personal jurisdiction over it by any such Texas court and waives any right it may have to have the action tried or determined in a different venue.
- 15.4.3 Before filing a lawsuit, the Parties will attempt to resolve any Dispute through at least one meeting (in person or via telephone) with persons fully authorized to resolve the Dispute or through mediation utilizing a mutually agreeable mediator. Such meeting or mediation shall occur within forty-five (45) days of a written demand by a Party requesting such meeting or mediation (or at a later time, if mutually agreed upon). Notwithstanding the foregoing: (i) either Party will have the right to obtain from a court in Dallas, Texas a temporary restraining order, a preliminary injunction or other equitable relief to preserve the status quo or prevent irreparable harm, though the meeting/mediation requirement herein shall otherwise be followed, and (ii) either Party will have the right to file proceedings in Dallas, Texas where it reasonably believes it must do so due to an impending expiration of a statute of limitations or other similar time period (though such party shall not effect service of process until the meeting/mediation requirement herein is satisfied, unless applicable rules or statutes or a court order require service before then).
- 15.5 Reseller shall comply with all then-current export laws and regulations of the U.S. Government pertaining to the Software. Reseller certifies that it will not directly or indirectly, export, re-export, or transship the Software or related information, media, or products in violation of U.S. laws, rules, and regulations. Reseller will fully comply with the U.S. Foreign Corrupt Practices Act and the U.S. Antiboycott laws. Reseller shall include a provision in its Distribution Agreements with End Users to require that these parties comply with such U.S. laws and regulations. None of the Software or underlying information or technology may be downloaded or otherwise exported or re-exported (i) into (or to a national or resident of) any country to which the U.S. has embargoed dual use items, services or technical data; or (ii) to any person or entity on the U.S. Treasury Department list of Specially Designated Nationals or the U.S. Commerce Department ("Commerce"), Denied Persons List, or the Commerce Unverified List, or the Commerce Entity List, or the U.S. Department of State list of Proliferators; or (iii) for any end use set out in EAR (Part 744 and elsewhere) prohibiting uses of items, services, and technical data related to weapons of mass destruction (missiles, nuclear weapons, chemical weapons, and biological weapons) and maritime nuclear propulsion.
- 15.6 If any portion of this Agreement is determined by a court of law to be or becomes unenforceable or illegal, such portion shall be deemed eliminated to the extent of its invalidity and the remainder of this Agreement shall remain in effect in accordance with its terms.
- 15.7 No waiver of any term or condition is valid unless in writing and signed by authorized representatives of both Parties. No waiver by any Party of any breach of any provision of this Agreement shall constitute a waiver of any other breach of the same or any other provision of this Agreement.
- 15.8 Each of the Parties are and shall remain at all times independent contractors, and nothing in this Agreement shall be deemed to create a joint venture, partnership, employment, or agency relationship between the parties. Neither party has the right or authority to assume or to create any obligation or responsibility on behalf of the other.
- 15.9 The Software is a "commercial item," as that term is defined in 48 C.F.R. 2.101 (Oct. 1995), consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212 (Sept. 1995). Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (June 1995), all U.S. Government End Users acquire the Software with only those rights set forth in this Agreement. Contractor/Manufacturer is Pervasive Software Inc., 12365 Riata Trace Parkway, Bldg B, Austin, Texas 78727.
- 15.10 The Software is not fault-tolerant and is not designed, manufactured or intended for use or resale as on-line control equipment in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, or weapons systems, in which the failure of the Software could lead directly to death, personal injury, or severe physical or environmental damage ("High Risk Activities"). Pervasive and its suppliers specifically disclaim any express or implied warranty of fitness for High Risk Activities.
- 15.11 The Indemnity for Infringement, Limitation of Liability, Title, Use of Trade Names and Trademarks, Proprietary Rights, Limited Warranty, Fees and Payment, and Miscellaneous Sections, and any other terms which are expressly stated to survive, shall survive termination or expiration of this Agreement.
- 15.12 Neither Party will be liable for any delay, nonperformance or related damages if such delay or nonperformance is due to causes beyond its reasonable control, including, but not limited to acts of God, electrical power failure, loss of communications, fire, explosion, war, or action of any governmental authority. If the delay continues for a period of more than 60 days, either party may terminate this Agreement upon written notice.
- 15.13 This Agreement shall be deemed for all purposes to have been drafted by both Parties. In the event of any dispute, therefore, any rule or principle regarding the construction of a contract against the drafter shall not apply.
- 15.14 Any section headings are for convenience purposes only and shall not affect the interpretation of this Agreement.