

MUTANT DESIGN LTD
ENTERPRISE LICENCE AND SUPPORT AGREEMENT

NOTICE TO USER: PLEASE READ THIS AGREEMENT CAREFULLY. BY CLICKING “I ACCEPT” AND/OR BY DOWNLOADING AND/OR USING ALL OR ANY PORTION OF THE SOFTWARE YOU ACCEPT, FOR AND ON BEHALF OF THE COMPANY WHOSE NAME IS ON THE ORDER FORM (“LICENSEE”) THE FOLLOWING TERMS FROM MUTANT DESIGN LTD OF THE BAKER’S CHEST, HARTBURN, MORPETH, NORTHUMBERLAND NE61 4JB (“MUTANT”). YOU AGREE, ON BEHALF OF THE LICENSEE, TO BE BOUND BY ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT. YOU AGREE, ON BEHALF OF THE LICENSEE, THAT IT IS ENFORCEABLE AS IF IT WERE A WRITTEN NEGOTIATED AGREEMENT SIGNED BY YOU ON BEHALF OF THE LICENSEE. IF THE LICENSEE DOES NOT AGREE TO THE TERMS OF THIS AGREEMENT, OR IF YOU ARE NOT AUTHORISED TO ENTER INTO LEGALLY BINDING CONTRACTS ON BEHALF OF THE LICENSEE, DO NOT CLICK “I ACCEPT” AND DO NOT DOWNLOAD OR USE THE SOFTWARE.

1. DEFINITIONS

- 1.1 “Agreement” means this Licence and Support Agreement.
- 1.2 “Documentation” means the electronic user information supplied with the Software.
- 1.3 “Effective Date” means the date of receipt of payment of the first Licence Fee by Mutant.
- 1.4 “Fault” means either (a) failure of the Software to perform in accordance with the Documentation; or (b) a cessation, interruption or degradation of the usual functionality of the Software.
- 1.5 “Licence Fee” means the on time Licence Fee payable by Licensee in advance in respect of the use of the Software, as set out in the Order Form.
- 1.6 “Minimum Requirements” means a minimum technical specification of each of the PCs and/or laptops on which the Software is used which is required to enable the Software to function, as set out in the Documentation.
- 1.7 “Network Administrator” means a suitably experienced and qualified employee of the Licensee whose name appears on the Order Form, or as otherwise notified by Licensee to Mutant by email or in writing from time to time as being responsible for the implementation, administration and maintenance of the Software within Licensee organisation.
- 1.8 “Permitted Number” means the number of PCs and/or laptops on which the Licensee is permitted to install the Software, as set out in the Order Form.
- 1.9 “Order Form” means the order form submitted by the Licensee via the website located at <http://www.testdriven.net>, immediately prior to Licensee’s download of the Software.
- 1.10 “Releases” means the upgrades to the Software released from time to time at Mutant’s discretion and made generally available to Mutant’s licensees.
- 1.11 “Software” means the object code form of the enterprise version of the software product entitled TestDriven.Net, together with any bug fixes, enhancements, or other modifications of the Software provided to Licensee hereunder.
- 1.12 “Technical Support” means the provision by Mutant to the Network Administrator of technical support in respect of the use and operation of the Software, which is available

during the hours of 9:00 to 17:30 UK local time, Monday to Friday excluding all bank and public holidays.

- 1.13 “Technical Support Fee” means the fee payable annually in advance in respect of the provision by Mutant of the Technical Support to the Licensee.

2. GRANT OF RIGHTS; RESTRICTIONS

- 2.1 Subject to all the terms and conditions of this Agreement, Mutant hereby grants Licensee a perpetual, worldwide, nonexclusive, nontransferable licence to install and use the Software on the Permitted Number of PCs and/or laptops for its own internal use only. This licence is in respect of use of the Software by the Licensee only and no subsidiaries or holding company of the Licensee may use the Software.
- 2.2 Except as expressly permitted in this Agreement, Licensee shall not, and shall not permit others to: (i) modify, translate, create derivative copies of or copy the Software (other than one backup copy which reproduces all proprietary notices), in whole or in part; (ii) reverse engineer, decompile, disassemble or otherwise reduce the Software to source code form; (iii) distribute, sublicense, assign, share, timeshare, sell, rent, lease, grant a security interest in, use for service bureau purposes, or otherwise transfer the Software or Licensee’s right to use the Software; (iv) remove or modify any copyright, trademark, or other proprietary notices of Mutant affixed to the media containing the Software or contained within the Software; or (v) use the Software in any manner not expressly authorised by this Agreement.
- 2.3 Licensee agrees, subject to reasonable prior notice, to give Mutant such access and assistance to Licensee’s systems as may be necessary to confirm the number of users does not exceed the Permitted Number.

3. SUPPORT AND RELEASES

- 3.1 In consideration of payment by the Licensee of the annual Technical Support Fee, the Network Administrator may receive Technical Support in respect of the Software.
- 3.2 The Technical Support provided by Mutant shall comprise the following:
- 3.2.1 advice by email or telephone on the use of the Software;
 - 3.2.2 the diagnosis of Faults in the Software and instructions as to the rectification of such Faults by email or telephone;
 - 3.2.3 the creation and dispatch to the Licensee of Releases from time to time at Mutant’s discretion.
- 3.3 All email contact with Mutant shall be to the following email address unless the Licensee is notified to the contrary by Mutant: prioritysupport@mutantdesign.co.uk. All telephone contact with Mutant shall be to the following telephone number unless the Licensee is notified to the contrary by Mutant: +44 (0) 1670 772214.
- 3.4 The Network Administrator shall supply by email to Mutant a detailed description of any Fault in respect of which he requires Technical Support, and the circumstances in which it arose, forthwith upon becoming aware of the same.
- 3.5 The Technical Support shall not include the diagnosis and rectification of any Fault resulting from:

- 3.5.1 the improper use operation or neglect of the Software or the equipment upon which it is run;
 - 3.5.2 the modification of the Software or its merger (in whole or in part) with any other software except as permitted by this Agreement;
 - 3.5.3 the failure by the Licensee to implement Releases or recommendations in respect of or solutions to Faults previously advised by Mutant;
 - 3.5.4 any repair adjustment alteration or modification of the Software by any person other than Mutant without Mutant's prior consent;
 - 3.5.5 the use of the Software for a purpose for which it was not designed;
 - 3.5.6 rectification of lost or corrupted data arising for any reason other than Mutant's own negligence;
 - 3.5.7 loss or damage caused directly or indirectly by operator error or omission;
 - 3.5.8 a fault in Licensee or third party software or applications or any upgrade or new release in respect thereof;
 - 3.5.9 a fault in the equipment or in any other software operating in conjunction with or integrating with the Software.
- 3.6 Nothing in this Agreement shall require Mutant to make Releases available to the Licensee free of charge.

4 PROPRIETARY RIGHTS

- 4.1 Mutant has sole and exclusive ownership of all right, title, and interest in and to the Software, including all copyright and any other intellectual property rights therein. This Agreement conveys a limited licence to use the Software and shall not be construed to convey title to or ownership of the Software to Licensee. All rights in and to the Software not expressly granted to Licensee are reserved by Mutant.
- 4.2 For the avoidance of doubt, the Software does not include:
- 4.2.1 NUnit which is provided by <http://www.nunit.org> on the terms and conditions set out at: \Program Files\TestDriven.NET 2.0\NUnit\license.rtf
 - 4.2.2 NCoverExplorer which is provided by Grant Drake on the terms and conditions set out at: \Program Files\TestDriven.NET 2.0\NCoverExplorer\license.txt
 - 4.2.3 MSBee which is provided by Microsoft on the terms and conditions set out at: \Program Files\TestDriven.NET 2.0\MSBee\License.txt
 - 4.2.4 NCover which is distributed with permission from Peter Waldschmidt <peter@waldschmidt.com>

5 LICENCE FEE AND TECHNICAL SUPPORT FEE

- 5.1 In consideration for the licence for the Software granted to Licensee hereunder, Licensee shall pay Mutant the nonrefundable Licence Fee on the date that the Licensee accepts this Agreement. Such Licence Fee is exclusive of VAT or other sales tax.
- 5.2 In consideration for the provision of the Technical Support, Licensee shall pay Mutant an annual nonrefundable Technical Support Fee. The first such Technical Support Fee shall be due and payable on the date that the Licensee accepts this Agreement and thereafter shall be payable on the anniversary of the Effective Date pursuant to an invoice in respect thereof issued by Mutant. Such Technical Support Fee is exclusive of VAT or other sales tax.
- 5.3 Mutant shall be entitled to increase the Technical Support Fee by giving to the Licensee not less than 90 days prior written notice such notice to expire on an anniversary of Effective Date. Notwithstanding the foregoing, no increase in the Technical Support Fee shall take effect in respect of any period for which the Licensee has paid in advance.
- 5.4 In the event that the Licence Fee and/or the Technical Support Fee is not paid in accordance with the provisions herein, this Agreement shall terminate forthwith without notice, and the provisions of clause 6.3 shall take effect.
- 5.5 If any applicable law requires Licensee to withhold amounts from any payments to Mutant hereunder, (i) Licensee shall effect such withholding, remit such amounts to the appropriate taxing authorities and promptly furnish Mutant with tax receipts evidencing the payments of such amounts, and (ii) the sum payable by Licensee upon which the deduction or withholding is based shall be increased to the extent necessary to ensure that, after such deduction or withholding, Mutant receives and retains, free from liability for such deduction or withholding, a net amount equal to the amount Mutant would have received and retained in the absence of such required deduction or withholding.

6 TERM AND TERMINATION

- 6.1 This Agreement shall commence on the Effective Date and continue in effect for consecutive annual periods, unless and until terminated in accordance with clause 5.3 or clause 6.2, or unless terminated by Mutant on the provision of not less than thirty (30) days written notice to the Licensee, such notice to terminate on any anniversary of the Effective Date.
- 6.2 If either party breaches this Agreement in any material respect, the other party may give written notice to the breaching party of its intent to terminate, and if such breach is not cured within thirty (30) days after the breaching party's receipt of such notice, this Agreement shall terminate without any further notice required (but no cure period is required for any breach that cannot be cured).
- 6.3 Upon any termination of this Agreement, (a) the rights and licences granted to Licensee herein shall terminate; (b) Licensee shall cease all use of the Software; (c) Licensee shall delete all copies of the Software and Documentation in Licensee's possession or under its control; and (d) Licensee shall certify in writing to Mutant its compliance with the foregoing. Clauses 1, 2.2, 4, 5 (to the extent of unpaid obligations), 6.3, 7, 8 and 9 shall survive any termination of this Agreement.

7 REPRESENTATIONS AND WARRANTIES

- 7.1 Mutant warrants that the Software will function materially in accordance with the Documentation for a period of sixty (60) days from the Effective Date. Mutant shall have no obligation to provide ongoing support services to Licensee unless the Licensee has paid the Technical Support Fee.
- 7.2 The above warranty is conditional upon the Licensee complying with the Minimum Requirements.
- 7.3 THE WARRANTIES SET FORTH IN THIS CLAUSE 7 ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING BY STATUTE OR OTHERWISE IN LAW OR FROM COURSE OF DEALING, COURSE OF PERFORMANCE, OR USE OF TRADE, ALL OF WHICH ARE HEREBY EXCLUDED AND DISCLAIMED.
- 7.4 The Licensee hereby represents that it shall (i) comply with all applicable local and foreign laws and regulations which may govern the use of the Software, and (ii) use the Software only for lawful purposes and in accordance with the terms of this Agreement.

8 LIMITATION OF LIABILITY/INDEMNITY

- 8.1 SAVE IN RESPECT OF DEATH OR PERSONAL INJURY, FOR WHICH THE LIABILITY OF THE PARTIES SHALL BE UNLIMITED, LICENSEE'S SOLE REMEDY WITH RESPECT TO ANY CLAIMS ARISING OUT OF THIS AGREEMENT SHALL BE LIMITED IN THE AGGREGATE TO THE MONIES PAID BY LICENSEE TO MUTANT UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTH PERIOD PRECEDING THE EVENT GIVING RISE TO SUCH LIABILITY.
- 8.2 IN NO EVENT SHALL MUTANT BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS AND GOODWILL, BUSINESS OR BUSINESS BENEFIT, OR THE COST OF PROCUREMENT OF SUBSTITUTE PRODUCTS BY LICENSEE EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO CIRCUMSTANCES SHALL MUTANT BE LIABLE FOR ANY FAILURE OF THE SOFTWARE TO PERFORM IN ACCORDANCE WITH THE DOCUMENTATION, OR AT ALL, RESULTING FROM A FAILURE BY THE LICENSEE TO COMPLY WITH THE MINIMUM REQUIREMENTS. ADDITIONALLY, LICENSEE ACKNOWLEDGES THAT WHILST THE SOFTWARE MAY BE USED IN COMBINATION WITH THIRD PARTY SOFTWARE, MUTANT BEARS NO LIABILITY, HOWSOEVER ARISING, FOR ANY LOSS, DAMAGE OR COST THAT ARISES FROM A FAILURE OF THE SOFTWARE TO INTEGRATE WITH LICENSEE OR THIRD PARTY SOFTWARE.
- 8.3 LICENSEE HEREBY INDEMNIFIES MUTANT IN FULL AND ON DEMAND IN RESPECT OF ALL COSTS, DAMAGES AND LIABILITIES ARISING FROM ANY BREACH BY THE LICENSEE OF ANY TERM OF THIS AGREEMENT.

9 GENERAL

- 9.1 Licensee shall not assign this Agreement, in whole or in part, without the written consent of Mutant.
- 9.2 Licensee consents to the use by Mutant of Licensee's name in customer lists and other publicity, including interviews, case studies, and conference discussions, provided that

such publicity accurately describes the nature of the relationship between Licensee and Mutant.

- 9.3 This Agreement and its performance shall be governed by and construed in accordance with and the parties hereby submit to the exclusive jurisdiction of the laws of England and Wales.
- 9.4 Licensee agrees that because of the unique nature of the Software and Mutant's proprietary rights therein, a demonstrated breach of this Agreement by Licensee would irreparably harm Mutant and monetary damages would be inadequate compensation. Therefore, Licensee agrees that Mutant shall be entitled to preliminary and permanent injunctive relief, as determined by any court of competent jurisdiction to enforce the provisions of this Agreement.
- 9.5 If any provision of this Agreement or the Software thereof is declared void, illegal, or unenforceable, the remainder of this Agreement will be valid and enforceable to the extent permitted by applicable law. In such event, the parties agree to use their best efforts to replace the invalid or unenforceable provision by a provision that, to the extent permitted by the applicable law, achieves the purposes intended under the invalid or unenforceable provision.
- 9.6 Any failure by any party to this Agreement to enforce at any time any term or condition under this Agreement will not be considered a waiver of that party's right thereafter to enforce each and every term and condition of this Agreement.
- 9.7 Neither party will be responsible for delays resulting from circumstances beyond the reasonable control of such party, provided that the nonperforming party uses reasonable efforts to avoid or remove such causes of nonperformance and continues performance hereunder with reasonable dispatch whenever such causes are removed.
- 9.8 This Agreement and the Order Form (i) constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements, oral and written, made with respect to the subject matter hereof, and (ii) cannot be altered except by agreement in writing executed by an authorised representative of each party. No purchase order and/or standard terms of purchase provided by Licensee shall supersede this Agreement.
- 9.9 Nothing in this Agreement shall give, directly or indirectly, any third party any enforceable benefit or any right of action against Mutant and such third parties shall not be entitled to enforce any term of this Agreement against Mutant..

If you have any questions regarding this Licence and Support Agreement or if you wish to discuss the terms and conditions contained herein please contact Mutant Design Ltd using the contact details at <http://www.testdriven.net/> or at The Baker's Chest, Hartburn, Morpeth, Northumberland, NE61 4JB, United Kingdom.