


Form PTO-1594 (Rev. 03/01) OMB No. 0651-0027 (exp. 5/31/2002) Tab settings ⇨ ⇨ ⇨	<b>RECORDATION FORM COVER SHEET</b> <b>TRADEMARKS ONLY</b>	U.S. DEPARTMENT OF COMMERCE U.S. Patent and Trademark Office
To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.		
<b>1. Name of conveying party(ies):</b> Phase Forward Incorporated  <input type="checkbox"/> Individual(s) <input type="checkbox"/> Association <input type="checkbox"/> General Partnership <input type="checkbox"/> Limited Partnership <input checked="" type="checkbox"/> Corporation-State DE <input type="checkbox"/> Other _____  Additional name(s) of conveying party(ies) attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<b>2. Name and address of receiving party(ies)</b> Name: <u>Silicon Valley Bank dba Silicon Valley</u> <u>East</u> Internal _____ Address: _____  Street Address: <u>3003 Tasman Drive</u>  City: <u>Santa Clara</u> State: <u>CA</u> Zip: <u>95054</u>  <input type="checkbox"/> Individual(s) citizenship _____ <input type="checkbox"/> Association _____ <input type="checkbox"/> General Partnership _____ <input type="checkbox"/> Limited Partnership _____ <input type="checkbox"/> Corporation-State _____ <input checked="" type="checkbox"/> Other <u>California-Chartered Bank</u> <small>If assignee is not domiciled in the United States, a domestic representative designation is attached: <input type="checkbox"/> Yes <input type="checkbox"/> No (Designations must be a separate document from assignment)</small> Additional name(s) & address(es) attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
<b>3. Nature of conveyance:</b> <input type="checkbox"/> Assignment <input type="checkbox"/> Merger <input type="checkbox"/> Security Agreement <input type="checkbox"/> Change of Name <input checked="" type="checkbox"/> Other <u>Resubmission of Security Agreement</u>  Execution Date: <u>03/31/03</u>	<b>4. Application number(s) or registration number(s):</b> A. Trademark Application No.(s) <u>78/121,743</u> <u>76/485,487 76/115,006</u>  B. Trademark Registration No.(s) _____  Additional number(s) attached <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
<b>5. Name and address of party to whom correspondence concerning document should be mailed:</b> Name: <u>Christopher E. Kondracki</u>  Internal Address: _____  _____  Street Address: <u>2001 Jefferson Davis, Hwy.</u> <u>Suite 505</u>  City: <u>Arlington</u> State: <u>VA</u> Zip: <u>22202</u>	<b>6. Total number of applications and registrations involved:</b> ..... <span style="border: 1px solid black; padding: 2px;">3</span>  <b>7. Total fee (37 CFR 3.41).....\$</b> <u>90.00</u> <input type="checkbox"/> Enclosed <input checked="" type="checkbox"/> Authorized to be charged to deposit account  <b>8. Deposit account number:</b> <u>19-3545</u>	
<b>DO NOT USE THIS SPACE</b>		
<b>9. Signature.</b>  <div style="display: flex; justify-content: space-between; align-items: flex-end;"> <div style="width: 30%;"> <u>Christopher E. Kondracki</u>            Name of Person Signing         </div> <div style="width: 30%; text-align: center;">             Signature         </div> <div style="width: 30%; text-align: right;"> <u>4/17/03</u>            Date         </div> </div> <div style="text-align: right; margin-top: 5px;"> <span style="border: 1px solid black; padding: 2px;">14</span> </div>		

Total number of pages including cover sheet, attachments, and document: 14  
 Mail documents to be recorded with required cover sheet information to:  
 Commissioner of Patent & Trademarks, Box Assignments  
 Washington, D.C. 20231

## SECOND AMENDED AND RESTATED INTELLECTUAL PROPERTY SECURITY AGREEMENT

This Second Amended and Restated Intellectual Property Security Agreement (this "IP Agreement") is made as of the 31<sup>st</sup> day of March, 2003, by and between **PHASE FORWARD INCORPORATED**, a Delaware corporation with its principal place of business at 1440 Main Street, Waltham, Massachusetts 02451 ("Grantor"), and **SILICON VALLEY BANK**, a California-chartered bank, with its principal place of business at 3003 Tasman Drive, Santa Clara, California 95054 and with a loan production office located at One Newton Executive Park, Suite 200, 2221 Washington Street, Newton, Massachusetts 02462, doing business under the name "Silicon Valley East" ("Lender"). This Amended and Restated Intellectual Property Security Agreement amends and restates a certain Amended and Restated Intellectual Property Security Agreement dated as of April 17, 2002, by and between Grantor and Lender.

### RECITALS

A. Lender has agreed to make advances of money and to extend certain financial accommodations to Grantor (the "Loan"), pursuant to a certain Second Amended and Restated Loan and Security Agreement dated as of April 17, 2002 by and among Grantor and Lender, as amended by a certain First Loan Modification Agreement dated as of December 24, 2002, as further amended by a certain Second Loan Modification Agreement dated as of February 28, 2003, and as further amended by a certain Third Loan Modification Agreement dated as of March 31, 2003 (as amended, the "Loan Agreement"). The Loan is secured pursuant to the terms of the Loan Agreement. Lender is willing to enter into certain financial accommodations with Grantor, but only upon the condition, among others, that Grantor shall grant to Lender a security interest in certain Copyrights, Trademarks, and Patents, and other assets, to secure the obligations of Grantor under the Loan Agreement. Defined terms used but not defined herein shall have the same meanings as in the Loan Agreement.

B. Pursuant to the terms of the Loan Agreement, Grantor has granted to Lender a security interest in all of Grantor's right title and interest, whether presently existing or hereafter acquired in, to and under all of the Collateral (as defined therein).

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged and intending to be legally bound, as collateral security for the prompt and complete payment when due of Grantor's Indebtedness (as defined below), Grantor hereby represents, warrants, covenants and agrees as follows:

1. Grant of Security Interest. Subject to section 4 of this IP Agreement, as collateral security for the prompt and complete payment and performance of all of Grantor's present or future indebtedness, obligations and liabilities to Lender (hereinafter, the "Indebtedness"), including, without limitation, under the Loan Agreement, Grantor hereby grants a security interest, in all of Grantor's right, title and interest in, to and under its registered and unregistered intellectual property collateral (all of which shall collectively be called the "Intellectual Property Collateral"), including, without limitation, the following:

(a) Any and all copyright rights, copyright applications, copyright registrations and like protections in each work or authorship and derivative work thereof, whether published or unpublished and whether or not the same also constitutes a trade secret, now or hereafter existing, created, acquired or held, including without limitation those set forth on EXHIBIT A attached hereto (collectively, the "Copyrights");

(b) Any and all trade secrets, and any and all intellectual property rights in computer software and computer software products now or hereafter existing, created, acquired or held;

(c) Any and all design rights which may be available to Grantor now or hereafter existing, created, acquired or held;

(d) All patents, patent applications and like protections including, without limitation, improvements, divisions, continuations, renewals, reissues, extensions and continuations-in-part of the same, including without limitation the patents and patent applications set forth on EXHIBIT B attached hereto (collectively, the "Patents");

to any Trademark, Patent, or Copyright specified in this IP Agreement.

(f) Grantor shall use commercially reasonable efforts to: (i) protect, defend and maintain the validity and enforceability of the Trademarks, Patents, and Copyrights (ii) detect infringements of the Trademarks, Patents, and Copyrights and promptly advise Lender in writing of material infringements detected and (iii) not allow any Trademarks, Patents, or Copyrights to be abandoned, forfeited or dedicated to the public without the written consent of Lender, which shall not be unreasonably withheld, unless Grantor determines that reasonable business practices suggest that abandonment is appropriate. Lender understands and acknowledges that, notwithstanding anything in this IP Agreement or any other agreement or instrument to which Grantor and Lenders are parties, although Grantor has filed applications with the United States Patent and Trademark Office with respect to certain trademarks and patents, and may continue to do so in the future, there can be no assurances as to the approval of such applications and Grantor makes no representations or warranties as to the likelihood of such approval or the outcome of any challenges to such applications.

(g) Grantor shall, from time to time, execute and file such other instruments, and take such further actions as Lender may reasonably request from time to time necessary to perfect or continue the perfection of Lender's interest in the Intellectual Property Collateral which accounts for a material portion of Grantor's revenue.

(h) This IP Agreement will create, and in the case of after acquired Intellectual Property Collateral, this IP Agreement will create at the time Grantor first has rights in such after acquired Intellectual Property Collateral, in favor of Lender a valid and perfected first priority security interest and collateral assignment in the Intellectual Property Collateral in the United States securing the payment and performance of the obligations evidenced by the Loan Agreement upon making the filings referred to in clause (i) below.

(i) To its knowledge, except for, and upon, the filing with the United States Patent and Trademark office with respect to the Patents and Trademarks and the Register of Copyrights with respect to the Copyrights necessary to perfect the security interests created hereunder and except as has been already made or obtained, no authorization, approval or other action by, and no notice to or filing with, any U.S. governmental authority or U.S. regulatory body is required either (i) for the grant by Grantor of the security interest granted hereby, or for the execution, delivery or performance of this IP Agreement by Grantor in the U.S. or (ii) for the perfection in the United States or the exercise by Lender of its rights and remedies thereunder.

(j) To its knowledge, all information heretofore or herein supplied to Lender by or on behalf of Grantor with respect to the Intellectual Property Collateral is accurate and complete in all material respects.

(k) Subject to section 3(c) above, Grantor shall not enter into any agreement that would materially impair or conflict with Grantor's obligations hereunder without Lender's prior written consent, which consent shall not be unreasonably withheld. Subject to section 3(c) above, Grantor shall not permit the inclusion in any material contract to which it becomes a party of any provisions that could or might in any way prevent the creation of a security interest in Grantor's rights and interest in any property included within the definition of the Intellectual Property Collateral acquired under such contracts.

(l) Upon any executive officer of Grantor obtaining actual knowledge thereof, Grantor will promptly notify Lender in writing of any event that materially adversely affects the value of any material Intellectual Property Collateral, the ability of Grantor to dispose of any material Intellectual Property Collateral of the rights and remedies of Lender in relation thereto, including the levy of any legal process against any of the Intellectual Property Collateral.

4. Lender's Rights. Lender shall have the right, but not the obligation, to take, at Grantor's sole expense, any actions that Grantor is required under this IP Agreement to take but which Grantor fails to take, after thirty (30) days' notice to Grantor. Grantor shall reimburse and indemnify Lender for all reasonable costs and reasonable expenses incurred in the reasonable exercise of its rights under this section 4.

5. Inspection Rights. Grantor hereby grants to Lender and its employees, representatives and agents the right to visit, during reasonable hours upon prior reasonable written notice to Grantor, any of Grantor's plants and facilities that

manufacture, install or store products (or that have done so during the prior six-month period) that are sold utilizing any of the Intellectual Property Collateral, and to inspect the products and quality control records relating thereto upon reasonable written notice to Grantor and as often as may be reasonably requested, but not more than once in every six (6) months; provided, however, nothing herein shall entitle Lender access to Grantor's trade secrets and other proprietary information.

6. Further Assurances; Attorney in Fact.

(a) On a continuing basis, Grantor will, subject to any prior licenses, encumbrances and restrictions and prospective licenses or other agreements referred to in section 3(c), make, execute, acknowledge and deliver, and file and record in the proper filing and recording places in the United States, all such instruments, including appropriate financing and continuation statements and collateral agreements and filings with the United States Patent and Trademarks Office and the Register of Copyrights, and take all such action as may reasonably be deemed necessary or advisable, as requested by Lender, to carry out the intent and purposes of this IP Agreement, or for assuring and confirming to Lender the grant or perfection of a security interest in all Intellectual Property Collateral, in accordance with this IP Agreement.

(b) Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact, with full authority in the place and stead of Grantor and in the name of Grantor, Lender or otherwise, from time to time in Lender's discretion, upon Grantor's failure or inability to do so, to take any action and to execute any instrument which Lender may reasonably deem necessary or advisable to accomplish the purposes of this IP Agreement, including:

(i) To modify, in its sole discretion, this IP Agreement without first obtaining Grantor's approval of or signature to such modification by amending Exhibit A, Exhibit B, Exhibit C, and Exhibit D hereof, as appropriate, to include reference to any right, title or interest in any Copyrights, Patents, or Trademarks acquired by Grantor after the execution hereof or to delete any reference to any right, title or interest in any Copyrights, Patents, or Trademarks in which Grantor no longer has or claims any right, title or interest;

(ii) To file, in its sole discretion, one or more financing or continuation statements and amendments thereto, relative to any of the Intellectual Property Collateral without the signature of Grantor where permitted by law; and

(iii) Grantor hereby authorizes Lender to file financing statements without notice to Grantor with all appropriate jurisdictions, as Lender deems appropriate, in order to further perfect or protect Lender's interest in the Intellectual Property Collateral.

7. Events of Default. The occurrence of any of the following shall constitute an Event of Default under this IP Agreement:

(a) An Event of Default occurs under the Loan Agreement; or

(b) Grantor breaches any material warranty or agreement made by Grantor in this IP Agreement.

8. Remedies. Upon the occurrence and continuance of an Event of Default, Lender shall have the right to exercise all the remedies of a secured party under the Massachusetts Uniform Commercial Code, including without limitation the right to require Grantor to assemble the Intellectual Property Collateral and any tangible property in which Lender has a security interest and to make it available to Lender at a place designated by Lender. Lender shall have a nonexclusive, royalty free license to use the Copyrights, Patents, and Trademarks to the extent reasonably necessary to permit Lender to exercise its rights and remedies upon the occurrence of an Event of Default. Grantor will pay any expenses (including reasonable attorney's fees) incurred by Lender in connection with the exercise of any of Lender's rights hereunder, including without limitation any expense incurred in disposing of the Intellectual Property Collateral. All of Lender's rights and remedies with respect to the Intellectual Property Collateral shall be cumulative.

9. Indemnity. Grantor agrees to defend, indemnify and hold harmless Lender and its officers, employees, and agents against: (a) all obligations, demands, claims, and liabilities claimed or asserted by any other party in connection with the transactions contemplated by this IP Agreement, and (b) all losses or expenses in any way suffered, incurred, or paid by Lender as a result of or in any way arising out of, following or consequential to transactions between Lender and Grantor,

whether under this IP Agreement or otherwise (including without limitation, reasonable attorneys fees and reasonable expenses), except for losses arising from or out of Lender's gross negligence or willful misconduct.

10. Termination. At such time as Grantor shall completely satisfy all of the obligations secured hereunder, Lender shall promptly execute and deliver to Grantor all terminations, releases, and other instruments as may be necessary or proper to terminate this IP Agreement and the security interest granted to Lender by Grantor pursuant to section 1 of this IP Agreement.

11. Course of Dealing. No course of dealing, nor any failure to exercise, nor any delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

12. Amendments. This IP Agreement may be amended only by a written instrument signed by both parties hereto.

13. Counterparts. This IP Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute the same instrument.

14. Law and Jurisdiction. This IP Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts. GRANTOR ACCEPTS FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, UNCONDITIONALLY, THE NON-EXCLUSIVE JURISDICTION OF ANY STATE OR FEDERAL COURT OF COMPETENT JURISDICTION IN THE COMMONWEALTH OF MASSACHUSETTS IN ANY ACTION, SUIT, OR PROCEEDING OF ANY KIND, AGAINST IT WHICH ARISES OUT OF OR BY REASON OF THIS AGREEMENT; PROVIDED, HOWEVER, THAT IF FOR ANY REASON LENDER CANNOT AVAIL ITSELF OF THE COURTS OF THE COMMONWEALTH OF MASSACHUSETTS, GRANTOR ACCEPTS JURISDICTION OF THE COURTS AND VENUE IN SANTA CLARA COUNTY, CALIFORNIA.

GRANTOR AND LENDER EACH HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF ANY OF THE LOAN DOCUMENTS OR ANY OF THE TRANSACTIONS CONTEMPLATED THEREIN, INCLUDING CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW OR STATUTORY CLAIMS. EACH PARTY RECOGNIZES AND AGREES THAT THE FOREGOING WAIVER CONSTITUTES A MATERIAL INDUCEMENT FOR IT TO ENTER INTO THIS AGREEMENT. EACH PARTY REPRESENTS AND WARRANTS THAT IT HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL AND THAT IT KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

15. Confidentiality. In handling any confidential information, Lender shall exercise the same degree of care that it exercises for its own proprietary information, but disclosure of information may be made: (i) to Lender's subsidiaries or affiliates in connection with their present or prospective business relations with Grantor, subject to the terms of this section; (ii) to prospective transferees or purchasers of any interest in the Loans, provided that the Lender will use commercially reasonable efforts in obtaining such prospective transferee or purchaser's agreement to the terms of this provision; (iii) as required by law, regulation, subpoena, or other order, (iv) as required in connection with Lender's examination or audit; and (v) as Lender considers appropriate in exercising remedies under this Agreement. Confidential information does not include information that either: (a) is in the public domain or in Lender's possession when disclosed to Lender, or becomes part of the public domain after disclosure to Lender; or (b) is disclosed to Lender by a third party, if Lender reasonably does not know that the third party is prohibited from disclosing the information.

16. Termination of IP Agreement. This IP Agreement shall be terminated (in accordance with Section 10, above) and the Intellectual Property Collateral shall be released upon the satisfaction of (i), (ii) and (iii) below: (i) Grantor shall have Net Income (as defined in the Loan Agreement) of not less than One Dollar (\$1.00) for at least two (2) consecutive quarters (commencing after the date of this Agreement), and (ii) there is no Event of Default (as defined in the Loan Agreement) occurring on the date in which Grantor satisfies (i) above, and (iii) Grantor has provided to Bank, in writing, a statement certifying as to the satisfaction of (i) and (ii) above.



**EXECUTED** as a sealed instrument under the laws of the Commonwealth of Massachusetts on the day and year first written above.

**Address of Grantor:**

1440 Main Street, Waltham, Massachusetts 02451

**GRANTOR:**

**PHASE FORWARD INCORPORATED**

By:  \_\_\_\_\_

**D. Ari Buchler**

Name: Vice President and General Counsel

Title: Phase Forward Incorporated

**SILICON VALLEY BANK**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

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