



## SOFTWARE LICENSE AND SUPPORT SERVICES AGREEMENT

### \*\*\* IMPORTANT INFORMATION – PLEASE READ CAREFULLY \*\*\*

This Software contains computer programs and other proprietary material and information, the use of which is subject to and expressly conditioned upon acceptance of this Software License and Support Services Agreement (the “Agreement”).

This Agreement is a legally binding document between you (meaning the individual person or the entity that the individual represents that has obtained the Software for its internal productive use, or when previously approved by EMC, for use in delivering a Service Offering to Clients, as defined below and not for outright resale) (the “Customer”) and EMC (which means (i) EMC Corporation, if Customer is located in the United States; (ii) the local EMC sales subsidiary, if Customer is located in a country in which EMC Corporation has a local sales subsidiary; (iii) EMC Computer Systems Austria GmbH if customer is located in (a) the former European Eastern Bloc countries; (b) Africa (excluding South Africa); (c) Middle East (excluding Israel); (d) the Russian Federation and the Commonwealth of Independent States; and (e) Austria, Cyprus, Greece, Malta, Pakistan or Turkey; and (iv) EMC Information Systems International (“EISI”), if Customer is located outside the United States and in a country in which EMC Corporation does not have a local sales subsidiary and is not processed through EMC Computer Systems Austria GmbH). Unless EMC agrees otherwise in writing, this Agreement governs Customer's use of the Software except to the extent all or any portion of the Software is: (a) the subject of a separate written agreement; or (b) governed by a third party licensor's terms and conditions. Capitalized terms have meaning stated in the Agreement.

If Customer does not have a currently enforceable, written and separately signed software license agreement directly with EMC or the EMC Channel Partner from whom Customer obtained this Software, then by clicking on the “Agree” or “Accept” or similar button at the end of this Agreement, or proceeding with the installation, downloading, use or reproduction of this Software, or authorizing any other person to do so, you are representing to EMC that you are (i) authorized to bind the Customer; and (ii) agreeing on behalf of the Customer that the terms of this Agreement shall govern the relationship of the parties with regard to the subject matter in this Agreement and are waiving any rights, to the maximum extent permitted by applicable law, to any claim anywhere in the world concerning the enforceability or validity of this Agreement.

If Customer has a currently enforceable, written and separately signed software license agreement directly with EMC or the EMC Channel Partner from whom Customer obtained this Software, then by clicking on the “Agree” or “Accept” or similar button at the end of this Agreement, or proceeding with the installation, downloading, use or reproduction of this Software, or authorizing any other person to do so, you are representing that you are (i) authorized to bind the Customer; and (ii) agreeing on behalf of the Customer that the terms of such written, signed agreement shall replace and supersede the terms of this Agreement and shall govern the relationship of the parties with regard to this Software, and are waiving any rights, to the maximum extent permitted by applicable law, to any claim anywhere in the world concerning the enforceability or validity of such written signed agreement.

*If you do not have authority to agree to the terms of this Agreement on behalf of the Customer, or do not accept the terms of this Agreement on behalf of the Customer, click on the “Cancel” or “Decline” or other similar button at the end of this Agreement and/or immediately cease any further attempt to install, download or use this Software for any purpose, and remove any partial or full copies made from this Software.*

EMC and Customer enter into this Agreement which shall become effective on the date on which Customer clicks on the “Agree” button described above or downloads, installs or uses the Software, whichever occurs first (the “Effective Date”).

#### 1. DEFINITIONS.

**A. “Affiliate”** means a legal entity that is controlled by, controls, or is under common “control” with EMC or Customer respectively. “Control” means more than 50% of the voting power or ownership interests.

**B. “Client”** means a third party who procures and receives the Service Offering, if any, from Customer.

**C. “Customer Support Tools”** means any software or other tools made available by EMC to Customer to enable Customer to perform self-maintenance activities.

**D. “EMC Channel Partner”** means a reseller, distributor or system integrator that is authorized by EMC to sell Software licenses and Support Services. The term shall also refer to any third party duly authorized by an EMC Channel Partner to do the same.

**E. “Documentation”** means the then-current, generally available, written user manuals and online help and guides for Software provided by EMC for Software.

**F. “Installation Site”** means the ship-to-address or other location identified on the EMC quote or other document prepared by EMC as the site of installation and/or use of Software, or a subsequent location approved by EMC.

**G. “Maintenance Aids”** mean any hardware, software or other tools, other than Customer Support Tools, used by EMC to perform diagnostic or remedial activities on Software.

**H. “Product Notice”** means the notice by which EMC informs Customer of product-specific use rights and restrictions, warranty periods, warranty upgrades and maintenance (support) terms. Product Notices may be delivered in an EMC quote, otherwise in writing and/or a posting on the applicable EMC website, currently located at

[http://www.emc.com/products/warranty\\_maintenance/index.jsp](http://www.emc.com/products/warranty_maintenance/index.jsp).

The terms of the Product Notice in effect as of the date of the EMC quote to the Customer (when Customer purchases directly from EMC) or the EMC Channel Partner (when Customer purchases via an EMC Channel Partner) shall be deemed incorporated into and made a part of this Agreement. Each Product Notice is dated and is archived when it is superseded by a newer version. EMC shall not change any Product Notice retroactively with regard to any Software or Support Services listed on an EMC quote issued prior to the date of the applicable Product Notice. At Customer's request, EMC shall without undue delay provide Customer with a copy of the applicable Product Notice and/or attach it to the relevant EMC quote.

**I. "Service Offering"** means Customer's service offering offered on a software-as-a-service ("SaaS"), infrastructure as a service ("IaaS"), platform as a service ("PaaS") hosted, turn-key, on-demand, service bureau, or similar basis.

**J. "Software"** means any programming code provided by EMC to Customer as a standard product, also including microcode, firmware and operating system software, which requires acceptance of this Agreement, and any copies made by or on behalf of Customer.

**K. "Software Release"** means any subsequent version of Software provided by EMC after initial Delivery of Software but does not mean a new product.

**L. "Support Services" or "Services"** means the services for the support and maintenance of Software as set forth in Attachment 1 to this Agreement.

**M. "Supplier"** means an entity (other than Customer) whose components, subassemblies, software and/or services have been incorporated into Software.

## **2. DELIVERY AND INSTALLATION.**

**A. Delivery.** Title and risk of loss for sold physical media containing Software shall transfer to Customer upon EMC's delivery to a carrier at EMC's designated point of shipment ("**Delivery**"). Unless otherwise agreed, a common carrier shall be specified by EMC. Software may be provided by (i) Delivery of physical media; or (ii) electronic download (when so offered by EMC).

**B. Software Installation and Acceptance.** All Software will be deemed to be delivered and accepted, meaning that Software operates in substantial conformity to the Software's Documentation upon (i) Delivery of the physical media; or (ii) transmission of a notice of availability for download (accompanied by the license key when required by EMC). Notwithstanding such acceptance, Customer retains all rights and remedies set forth in the Section entitled "Product Warranty."

## **3. LICENSE TERMS.**

**A. General License Grant.** Subject to Customer's compliance with this Agreement, EMC grants to Customer a non-exclusive and non-transferable (except as specified in this Agreement) license to use the Software and the Documentation during the period of the license solely for Customer's internal business operations, unless EMC has expressly authorized Customer to use such in connection with a Service Offering. Unless otherwise indicated in this Agreement or the applicable EMC quote, licenses granted to Customer will be perpetual, will be for use of object code only, and will commence on either Delivery of the physical media or the date Customer is notified of availability for electronic download. Use of Software may require Customer to

complete EMC's then current product registration process, if any, to obtain and input an authorization key or license file.

**B. Licensing Models.** Software is licensed for use only in accordance with the commercial terms and restrictions of the Software's relevant licensing model, which are stated in the Product Notice and/or quote from EMC or an EMC Channel Partner. For example, the licensing model may provide that Software is licensed for use solely (i) for a certain number of licensing units; (ii) on or in connection with a certain piece of equipment, CPU, network or other hardware environment; and/or (iii) for a specified amount of storage capacity. Microcode, firmware or operating system software required to enable the hardware with which it is shipped to perform its basic functions, is licensed for use solely on such hardware.

**C. Copying Permitted.** Customer may copy the Software and Documentation as necessary to install and run the quantity of copies licensed, but otherwise for archival purposes only

**D. License Restrictions.** Without EMC's prior written consent, Customer must not, and must not allow any third party to: (i) use Software in an application service provider, service bureau, or similar capacity for third parties; or (ii) disclose to any third party the results of any benchmarking testing or comparative or competitive analyses of EMC's Software done by or on behalf of Customer; (iii) make available Software in any form to anyone other than Customer's employees or contractors reasonably acceptable to EMC and which require access to use Software on behalf of Customer in a matter permitted by this Agreement; (iv) transfer or sublicense Software or Documentation to an Affiliate or any third party; (v) use Software in conflict with the terms and restrictions of the Software's licensing model and other requirements specified in the Product Notice and/or EMC quote; (vi) except to the extent permitted by applicable mandatory law, modify, translate, enhance, or create derivative works from the Software, or reverse assemble or disassemble, reverse engineer, decompile, or otherwise attempt to derive source code from the Software; (vii) remove any copyright or other proprietary notices on or in any copies of Software; or (viii) violate or circumvent any technological restrictions within the Software or specified in this Agreement, such as via software or services.

**E. Software Releases.** Software Releases shall be subject to the license terms applicable to Software.

**F. Records and Audit.** During the license term for Software and for two (2) years after its expiration or termination, Customer will maintain accurate records of its use of the Software sufficient to show compliance with the terms of this Agreement. During this period, EMC will have the right to audit Customer's use of the Software to confirm compliance with the terms of this Agreement. That audit is subject to reasonable notice by EMC and will not unreasonably interfere with Customer's business activities. EMC may conduct no more than one (1) audit in any twelve (12) month period, and only during normal business hours. Customer will reasonably cooperate with EMC and any third party auditor and will, without prejudice to other rights of EMC, address any non-compliance identified by the audit by promptly procuring additional licenses. Customer will promptly reimburse EMC or its designee for all reasonable costs of the audit if the audit reveals either underpayment of more than five (5%) percent of the Software fees payable by Customer for the period audited, or that Customer has materially failed to maintain accurate records of Software use.

**G. Termination of License.** EMC may terminate licenses for cause if Customer breaches the terms governing use of Software and fails to cure within thirty (30) days after receipt of EMC's written notice thereof. Upon such termination, Customer shall cease all use and return or certify destruction of the applicable Software (including copies) to EMC.

**H. Reserved Rights.** EMC reserves all rights not expressly granted to Customer and does not transfer any ownership rights in any Software.

**I. Other License Terms.** If a particular Software or component is provided with its own license terms ("Separate License Terms"), typically in the form of a (i) "click-to-accept" agreement included as part of the installation and/or download process, or (ii) "shrink-wrap" agreement included in the packaging for the Software, or (iii) notice indicating that by installation and/or use thereof the related license terms apply, then, in case of conflict with the terms of this Agreement, such Separate License Terms shall (a) prevail with regard to Software or components for which EMC is not the licensor; and (b) not prevail with regard to Software or component for which EMC is the licensor.

#### **4. PRODUCT WARRANTY.**

**A. Software Media.** EMC warrants that the physical media, if any, on which Software is provided by EMC, shall be free from material defects in materials and workmanship, and perform substantially in accordance with the applicable Documentation for such physical media until the expiration of the warranty period. Unless otherwise noted on the Product Notice or EMC quote, the warranty coverage for the microcode, firmware or operating system software that enables EMC hardware to perform as described in its Documentation shall be no less than that which applies to such hardware. Support Services from EMC for Software are available for separate purchase and the Support Options are identified at the Product Notice.

**B. Software Media Warranty Duration.** The warranty for physical media for Software provided by EMC, if any, is ninety (90) days and commences upon Delivery.

**C. Software Media Warranty Remedies.** EMC's entire liability and Customer's exclusive remedies under the physical media for Software warranties described in this Section 4 shall be for EMC, at its option, to remedy the non-compliance or to replace the affected Software, and if EMC is unable to effect such within a reasonable time, then EMC shall arrange for the issuance of a refund in the amount received by EMC for the affected Software as depreciated on a straight line basis over a five (5) year period, upon return of such Software to EMC. All replaced Software contained on physical media or portions thereof shall be returned to and become the property of EMC. EMC shall have no liability hereunder after expiration of the applicable warranty period. The foregoing shall not void any supplementary remedies made available to Customer by an EMC Channel Partner, with respect to which EMC shall have no liability or obligation.

**D. Software Warranty, Duration and Remedy.** EMC warrants to Customer that the Software will, for a period of ninety (90) days following Delivery or notice of availability for electronic download ("Warranty Period"), substantially conform to the applicable Documentation, provided that the Software: (i) has been properly installed and used at all times in accordance with the applicable Documentation; and (ii) has not been modified or added to by persons other than EMC or its authorized representative. EMC will, at its own expense and as its sole

obligation and Customer's exclusive remedy for any breach of this warranty, either replace that Software or correct any reproducible error in that Software reported to EMC by Customer in writing during the Warranty Period. If EMC determines that it is unable to correct the error or replace the Software, EMC will arrange for the issuance of a refund in the amount received by EMC for that Software, in which case the license for that Software will terminate.

**E. Exclusions.** Warranty does not cover problems that arise from (i) accident or neglect by Customer or any third party; (ii) any third party items or services with which Software is used or other causes beyond EMC's control; (iii) installation, operation or use not in accordance with EMC's instructions or the applicable Documentation; (iv) use in an environment, in a manner or for a purpose for which Software was not designed; or (v) modification, alteration or repair by anyone other than EMC or its authorized representatives. EMC has no obligation whatsoever for Software installed or used beyond the licensed use, or whose original identification marks have been altered or removed. Removal or disablement of remote support capabilities during the warranty period requires reasonable notice to EMC. Such removal or disablement, or improper use or failure to use applicable Customer Support Tools shall be subject to a surcharge in accordance with EMC's then current standard rates.

**F. Service Enabled EMC Channel Partners.** Certain EMC Channel Partners may provide their own warranty services, which may include remote service and/or onsite repair. When Customer orders Software from such a service enabled entity, the terms of this Section 4, subparts A-E shall not apply to such Software, and Customer shall look solely to the service-enabled entity for warranty claims.

**G. Disclaimer of Warranty.** OTHER THAN THE WARRANTIES SET FORTH IN THIS AGREEMENT, AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EMC AND ITS SUPPLIERS MAKE NO OTHER EXPRESS WARRANTIES UNDER THIS AGREEMENT, AND DISCLAIM ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE. EMC AND ITS SUPPLIERS DO NOT WARRANT THAT THE SOFTWARE WILL OPERATE UNINTERRUPTED OR THAT IT WILL BE FREE FROM DEFECTS OR THAT IT WILL MEET CUSTOMER'S REQUIREMENTS.

#### **5. SUPPORT SERVICES.**

**A. Support Services.** If Customer has purchased Support Services for Software (or its related hardware, if any) directly from EMC, such shall be delivered by EMC as set forth in Attachment 1 to this Agreement. If Customer has purchased Support Services from an EMC Channel Partner, then EMC may provide Support Services as set forth in Attachment 1 to this Agreement to the extent that the EMC Channel Partner has contracted with EMC to provide Customer with Support Services.

**6. INDEMNITY.** For Software ordered after the revision date of this Agreement (August 11, 2016), EMC shall (i) at its own expense, defend Customer against any third party claim that Software as provided by EMC infringes a patent or copyright enforceable in a country that is a signatory to the Berne

Convention; and (ii) pay the resulting costs and damages finally awarded against Customer by a court of competent jurisdiction to the extent that such are the result of the third party claim, or pay the amounts stated in a written settlement negotiated and approved by EMC. The foregoing obligations are subject to the following: Customer (a) notifies EMC promptly in writing of such claim; (b) grants EMC sole control over the defense and settlement thereof; (c) reasonably cooperates in response to an EMC request for assistance and information; and (d) is not in material breach of this Agreement. Should any such Software become, or in EMC's opinion be likely to become, the subject of such a claim, EMC may, at its option and expense, (1) procure for Customer the right to make continued use thereof; (2) replace or modify such so that it becomes non-infringing; or (3) if, in EMC's opinion, neither of the foregoing are reasonably available, EMC shall notify Customer to return the Software and, upon receipt thereof, EMC shall arrange for the issuance of a refund of the price received by EMC for the affected Software, less straight-line depreciation based on a five (5) year useful life for Software. EMC shall have no obligation or liability to the extent that the alleged infringement arises out of or relates to: (A) combination, operation or use of Software as provided by EMC with any products, services, items, or technology that (i) were not provided by EMC; or (ii) were provided by EMC but were obtained by EMC from a third party (such as an EMC Select Product, Brokerage Product or any other technology, item or service not developed, performed or manufactured by EMC), except if provided by EMC as an embedded component of an EMC Product; (B) use for a purpose or in a manner for which the Software was not designed or use after EMC notifies Customer to cease such use due to a possible or pending claim of infringement; (C) any modification made by any person other than EMC or its authorized representatives; (D) any modifications to Software made by EMC pursuant to instructions, designs, specifications or any other information provided to EMC by or on behalf of Customer; (E) use of any version of Software when an upgrade or newer iteration of the Software made available by EMC would have avoided the infringement; (F) services provided by Customer and/or any revenue Customer derives therefrom; or (G) any data or information which Customer or a third party records on or utilizes in connection with Software. THIS SECTION STATES CUSTOMER'S SOLE AND EXCLUSIVE REMEDY AND EMC'S ENTIRE LIABILITY FOR INFRINGEMENT CLAIMS PERTAINING TO SOFTWARE.

## **7. LIMITATION OF LIABILITY.**

**A. Limitation on Direct Damages.** EXCEPT WITH RESPECT TO CLAIMS ARISING PURSUANT TO SECTION 6 ABOVE, EMC'S TOTAL LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF ANY TYPE WHATSOEVER, ARISING OUT OF SOFTWARE OR SUPPORT SERVICE PROVIDED HEREUNDER, SHALL BE LIMITED TO PROVEN DIRECT DAMAGES CAUSED BY EMC'S SOLE NEGLIGENCE IN AN AMOUNT NOT TO EXCEED (i) US\$1,000,000, FOR DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY; AND (ii) THE PRICE PAID TO EMC FOR THE SPECIFIC SUPPORT SERVICE (CALCULATED ON AN ANNUAL BASIS, WHEN APPLICABLE) OR SOFTWARE FROM WHICH SUCH CLAIM ARISES, FOR DAMAGE OF ANY TYPE NOT IDENTIFIED IN (i) ABOVE OR OTHERWISE EXCLUDED HEREUNDER.

**B. No Indirect Damages.** EXCEPT WITH RESPECT TO CLAIMS REGARDING VIOLATION OF EMC'S INTELLECTUAL PROPERTY RIGHTS, NEITHER CUSTOMER NOR EMC SHALL HAVE LIABILITY TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, OR INDIRECT DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, REVENUES, DATA AND/OR USE), EVEN IF ADVISED OF THE POSSIBILITY THEREOF.

**C. Special Exclusion.** IN JURISDICTIONS THAT DO NOT ALLOW LIMITATION OR EXCLUSION OF CONSEQUENTIAL OR INCIDENTAL DAMAGES, ALL OR A PORTION OF SECTION 7.A AND/OR 7.B ABOVE MAY NOT APPLY.

**D. Regular Back-ups.** As part of its obligation to mitigate damages, Customer shall take reasonable data back-up measures. In particular, Customer shall provide for a daily back-up process and back-up the relevant data before EMC performs any remedial, upgrade, or other works on Customer's production systems. To the extent EMC's liability for loss of data is not anyway excluded under this Agreement, EMC shall in case of data losses only be liable for the typical effort to recover the data which would have accrued if Customer had appropriately backed up its data.

**E. Limitation Period.** All claims must be made within (i) the time period specified by applicable law; or (ii) eighteen (18) months after the cause of action accrues if (a) no such period is specified at law; or (b) the applicable law allows the parties to agree to a shorter period than that specified therein.

**F. Suppliers.** The foregoing limitations shall also apply in favor of EMC's suppliers.

## **8. EVALUATION AND LOANED SOFTWARE.**

**A. General.** This Agreement shall also apply to (i) **"Evaluation Software"** (meaning the copy of Software which contains this Agreement, including any copies made by or on behalf of Customer, and all Documentation for the foregoing, which are licensed for a limited period of time at no charge to enable Customer to evaluate such Software prior to making a final decision on licensing or purchasing such from EMC; and (ii) **"Loaned Software"** (meaning the copy of Software which contains this Agreement, including any copies made by or on behalf of Customer, and all Documentation for the foregoing, which are licensed for a limited period of time at no charge), subject to the following provisions:

**B. Schedule Content.** The particular Evaluation or Loaned Software, period of use, Installation Site and other transaction-specific conditions will be identified by EMC or shall otherwise be as mutually agreed between EMC and Customer in the form of an evaluation or loan schedule referencing this Agreement, and the signed schedule shall be considered the equivalent of a Customer purchase order under this Agreement.

**C. Title.** No title shall pass to Customer, but shall remain with EMC. Notwithstanding any deviating terms in this Agreement or in a "click-to-accept" or "shrink-wrap" license, all licenses to use Evaluation and Loaned Software expire at the end of the evaluation or loan period or thirty (30) days after EMC provides Customer with notice that EMC has terminated the license to use Evaluation and/or Loaned Software for EMC's convenience, whichever occurs first. The terms and conditions specified in Section 3.G (Termination of License) shall apply to Evaluation and Loaned Software.

**D. Return.** Customer shall promptly return Evaluation and Loaned Software upon expiration of the agreed period or when terminated by EMC for convenience by giving thirty (30) days' written notice, whichever occurs first.

**E. Data Security Options.** Customer is fully responsible for the permanent erasure of all of its information, including without limitation, all personally identifiable and other protected information placed on, and by use of a method that does not cause damage to, physical media containing Evaluation or Loaned Software before such are returned to EMC, and for all costs associated with such erasure (descriptions and charges associated with EMC's then currently offered data erasure services are available on request). EMC is not responsible for any information contained on such items notwithstanding anything to the contrary contained herein.

**F. Risk of Loss.** The risk of loss or damage to any physical media containing Evaluation or Loaned Product passes to Customer upon arrival at the Installation Site and remains with Customer until such physical media arrives at the return location specified by EMC. Customer is also fully responsible for the de-installation, and any costs associated with such de-installation. EMC is not responsible for any information contained on any physical media containing Evaluation or Loaned Software notwithstanding anything to the contrary herein.

**G. Use.** Customer may use Evaluation and Loaned Software free of charge, but, in the case of Evaluation Software, solely for the purpose of evaluating the Software and not in a production environment.

**H. Limitation of Liability.** Without prejudice to any other limitations on EMC's liability (which shall also apply to Evaluation and Loaned Software), Evaluation and Loaned Software are provided "AS IS" and any warranty or damage claims against EMC in connection therewith are hereby excluded, except in the event of fraud or willful misconduct of EMC.

**9. CONFIDENTIALITY.** "Confidential Information" means any information that is marked "confidential" or "proprietary" or any other similar term or in relation to which its confidentiality should by its nature be inferred or, if disclosed orally, is identified as being confidential at the time of disclosure and, within two (2) weeks thereafter, is summarized, appropriately labeled and provided in tangible form. Confidential Information does not include information that is (i) rightfully in the receiving party's possession without prior obligation of confidentiality from the disclosing party; (ii) a matter of public knowledge; (iii) rightfully furnished to the receiving party by a third party without confidentiality restriction; or (iv) independently developed by the receiving party without reference to the disclosing party's Confidential Information. Each party shall (a) use Confidential Information of the other party only for the purposes of exercising rights or performing obligations in connection with this Agreement or any purchase order hereunder or to generally operate and coordinate its business activities with its Affiliates; and (b) protect from disclosure to any third parties, by use of a standard of care equivalent to that as used by recipient to protect its own information of a similar nature and importance, and, no less than the use of reasonable care, any Confidential Information disclosed by the other party for a period commencing upon the date of disclosure until three (3) years thereafter, except with respect to (1) Customer data to which EMC may have access in connection with the provision of Support Services, which shall

remain Confidential Information until one of the exceptions stated in the above definition of Confidential Information applies; and (2) Confidential Information that constitutes, contains or reveals, in whole or in part, EMC proprietary rights, which shall not be disclosed by the receiving party at any time. Notwithstanding the foregoing, the receiving party may disclose Confidential Information (A) to its Affiliate for the purpose of fulfilling its obligations or exercising its rights hereunder as long as such Affiliate complies with the foregoing; and (B) to the extent required by law (provided the receiving party has given the disclosing party prompt notice).

**10. TRADE COMPLIANCE.** All content, Support Services and the technology included therein (collectively the "Materials") provided under this Agreement are subject to governmental restrictions on exports and imports including without limitation (i) exports from the U.S. and the European Union as well as re-export from third countries in the form received; (ii) exports from other countries in which the Materials may be produced or located; (iii) disclosures of technology to non-U.S. persons; (iv) exports from other countries of the same or products derivative of Materials; and (v) the importation and/or use the Materials outside of the U.S. or other countries (collectively, "Trade Laws"). Customer must comply with all Trade Laws. Diversion contrary to U.S. law or other Trade Laws is expressly prohibited. In addition, Customer shall not send or deliver to EMC any data controlled by the International Traffic in Arms Regulations ("ITAR"), and shall not request Materials or Support Service from EMC where an ITAR license is required in order for EMC to provide such Materials or Support Service, unless the EMC Global Trade Compliance Group Office has signed a specific agreement consenting to provide ITAR controlled Materials or Service to Customer. Customer represents and warrants that it is not (a) listed on any of the lists of restricted parties found at <http://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern>; (b) located in any country subject to embargo by the U.S. (identified as an E:1 country in Supplement 1 to Part 740 of the United States Export Administration Regulations ("EAR"), as shown here and updated from time to time: <http://www.ecfr.gov/cgi-bin/text-idx?SID=7f51b38428b0614519eea4b4fdc8640e&node=15:2.1.3.4.25.0.1.21.28&rgn=div9>; or (c) engaged in the proliferation of weapons of mass destruction (i.e., nuclear, chemical or biological weapons or missiles). Customer will not participate or ask EMC to participate in any illegal boycott.

## **11. TERMINATION.**

**A. Term of Agreement.** The term of the Agreement begins on the Effective Date and continues until the Agreement is terminated in accordance with the terms and conditions specified in this Agreement.

**B. Termination of Agreement.** The Agreement may be terminated by either party for convenience at any time, effective sixty (60) days after delivery of written notice to the other party. Any provision will survive any termination or expiration if by its nature and context it is intended to survive, including provisions relating to records and audit, confidentiality and liability. In addition to the termination rights specified elsewhere in this Agreement, either Customer or EMC may terminate this Agreement upon written notice due to the other party's material breach of the terms governing use of the Software; provided that such breach is not cured within thirty (30) days after the provision



of written notice to the breaching party specifying the nature of such breach. Upon termination of this Agreement, Customer shall cease all use and return or certify destruction of the applicable Software (including copies) to EMC.

## **12. MISCELLANEOUS.**

**A. References.** EMC may identify Customer as a user of EMC's Software and/or Support Services. Each party shall not, and shall not authorize or assist another to, originate, produce, issue or release any written publicity, news release, marketing collateral or other publication or public announcement, relating in any way to this Agreement, without the prior written approval of the other, which approval shall not be unreasonably withheld.

**B. Notices.** Any notices hereunder shall be in writing. The parties agree that this Agreement has been written in the English language, that the English language version shall govern and that all notices shall be in the English language.

**C. Entire Agreement.** This Agreement, the Exhibits specified in Section J below and each purchase order (i) comprise the complete statement of the agreement of the parties with regard to the subject matter thereof; and (ii) may be modified only in a writing with evidence of acceptance by EMC and Customer. All terms of any purchase order or other document provided by Customer, including but not limited to any pre-printed terms thereon and any terms that are inconsistent or conflict with this Agreement and/or EMC quote, shall be null and void and of no legal force or effect, even if EMC does not expressly object to such terms.

**D. Force Majeure.** Except for payment of fees due EMC, neither party will be liable for failure to perform its obligations during any period if performance is delayed or rendered impracticable or impossible due to circumstances beyond that party's reasonable control.

**E. Assignment.** Customer will not assign this Agreement or a purchase order or any right or obligation herein or delegate any performance without EMC's prior written consent, which consent will not be unreasonably withheld. Any other attempted assignment or transfer by Customer will be void. EMC may use its Affiliates or other sufficiently qualified subcontractors to provide Support Services to Customer, provided that EMC remains responsible to Customer for the Support Services' performance.

**F. Governing Law.** This Agreement is governed by: (i) the laws of the Commonwealth of Massachusetts when EMC means EMC Corporation; (ii) the laws of the applicable country in which the applicable EMC subsidiary is registered to do business when EMC means the local EMC subsidiary; (iii) the laws of Austria when EMC is EMC Computer Systems Austria GmbH; and (iv) the laws of Ireland when EMC means EISI. In each case, the applicability of laws shall exclude any conflict of law rules. The U.N. Convention on Contracts for the International Sale of Goods shall not apply. In the event of a dispute concerning this Agreement, Customer consents to the sole and exclusive personal jurisdiction of the courts of competency in the location where EMC is domiciled.

**G. Waiver.** Failure to enforce a provision of this Agreement will not constitute a waiver.

**H. Independent Contractors.** The parties shall act as independent contractors for all purposes under this Agreement. Nothing contained herein shall be deemed to constitute either party as an agent or representative of the other party, or both

parties as joint venturers or partners for any purpose. Neither party shall be responsible for the acts or omissions of the other party, and neither party shall have authority to speak for, represent or obligate the other party in any way without the prior written approval of the other party.

**I. Severability.** If any part of this Agreement or purchase order is held unenforceable, the validity of all remaining parts will not be affected.

**J. Exhibits.** The following Exhibits form part of this Agreement, and in the event of a conflict between an Exhibit and the main terms of this Agreement, the terms of the Exhibit shall prevail.

Attachment 1 –Support Services Exhibit

## **13. COUNTRY SPECIFIC TERMS.**

**A. CANADA.** The terms in this subsection A apply only when EMC means the EMC sales subsidiary located in Canada (currently EMC Corporation of Canada):

1. Section 2.A (Delivery). The second sentence is deleted in its entirety and replaced with: "Title and risk of loss to physical media, if any, transfers to Customer at the time and place that the media clears Canadian Customs."

2. Section 3.A (General License Grant). The last two sentences are deleted and replaced with: "Licenses granted shall commence on the date the physical media, if any, clears Canadian Customs or electronic availability of such Software to Customer." Documentation is licensed solely for purposes of supporting Customer's use of the Software as permitted in this Section.

3. Section 12 (MISCELLANEOUS). Add the following as new subsection K:

I. The parties have required that this Agreement be drawn up in English and have also agreed that all notices or other documents required by or contemplated in this Agreement be written in English.

Les parties ont requis que cette convention soit rédigée en anglais et ont également convenu que tout avis ou autre document exigé aux termes des présentes ou découlant de l'une quelconque de ses dispositions sera préparé en anglais.

**B. United Kingdom.** The terms in this subsection B apply only when EMC means the EMC sales subsidiary located in the United Kingdom (currently EMC Computer Systems (UK) Limited):

1. Section 4.E (Exclusions). The entire section is deleted and replaced with:

**E. Exclusions.** Except as expressly stated in the applicable warranty set forth in this Agreement, EMC (including its Suppliers) provides Software "AS IS" and makes no other express or implied warranties, written or oral, and ALL OTHER WARRANTIES AND CONDITIONS (SAVE FOR THE WARRANTIES AND CONDITIONS IMPLIED BY SECTION 12 OF THE SALE OF GOODS ACT 1979) ARE SPECIFICALLY EXCLUDED TO THE FULLEST EXTENT PERMITTED BY LAW, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND ANY WARRANTY ARISING BY STATUTE, OPERATION

OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE.

2. Section 7 (LIMITATION OF LIABILITY). This Section is deleted in its entirety and replaced with:

**7. LIMITATION OF LIABILITY AND PRESERVATION OF DATA.**

**A. The entire aggregate liability of EMC (including its Suppliers) under or in connection with the supply of the Software or Service, whether in tort (including negligence), for breach of contract, misrepresentation or otherwise, is limited in respect of each event or a series of events: (i) to the amounts actually paid by Customer for the Software or Services which give rise to such liability during the twelve (12) month period immediately preceding the date of the cause of action giving rise to such claim; or (ii) Great British Pounds Sterling one million (£1,000,000), whichever is the greater amount. In no event shall EMC (including its suppliers) or Customer be liable to the other or any other person or entity for loss of profits, loss of revenue, loss of use or any indirect, special, incidental, consequential or exemplary damages arising out of or in connection with this Agreement, the license of the Software or the provision of Services, and the use, performance, receipt or disposition of such Software or Services, even if such party has been advised of the possibility of such damages or losses. Nothing in this Agreement shall operate to exclude or restrict EMC's liability for: (a) death or personal injury resulting from negligence; (b) breach of obligations arising from section 12 of the Sale of Goods Act 1979; or (c) fraud.**

**B. CUSTOMER OBLIGATIONS IN RESPECT OF PRESERVATION OF DATA.** During the term of the Agreement, the Customer shall:

1) from a point in time prior to the point of failure, (i) make full and/or incremental backups of data which allow recovery in an application consistent form, and (ii) store such back-ups at an off-site location sufficiently distant to avoid being impacted by the event(s) (e.g. including but not limited to flood, fire, power loss, denial of access or air crash) and affect the availability of data at the impacted site;

2) have adequate processes and procedures in place to restore data back to a point in time and prior to point of failure, and in the event of real or perceived data loss, provide the skills/backup and outage windows to restore the data in question;

3) use anti-virus software, regularly install updates across all data which is accessible across the network, and protect all storage arrays against power surges and unplanned power outages with Uninterruptible Power Supplies; and

4) ensure that all operating system, firmware, system utility (e.g. but not limited to, volume management, cluster management and backup) and patch levels are kept to EMC recommended versions and that any proposed changes thereto shall be communicated to EMC in a timely fashion.

3. Section 12 (MISCELLANEOUS). Add the following as new subsection K:

K. Each of the parties acknowledges and agrees that in entering into this Agreement, it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly set out in this Agreement as a warranty. The only remedy available to Customer for a breach of the warranties shall be for breach of contract under the terms of this Agreement. Nothing in Section 7 shall however operate to limit or exclude any liability for fraud. No term of this Agreement shall be enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person that is not a party to this Agreement. If any part of this Agreement is held unenforceable, the validity of the remaining provisions shall not be affected.

**C. Ireland.** The terms in this subsection C apply only when EMC means the EMC sales subsidiary located in Ireland (currently EMC Information Systems International:

1. Section 4.E (Exclusions). The entire section is deleted and replaced with:

**E. Exclusions.** Except as expressly stated in the applicable warranty set forth in this Agreement and the applicable exhibits, EMC (including its Suppliers) makes no warranties, and ALL WARRANTIES, TERMS AND CONDITIONS, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED BY LAW, CUSTOMER OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES, TERMS AND CONDITIONS, OF FITNESS FOR PURPOSE, DESCRIPTION, AND QUALITY ARE HEREBY EXCLUDED TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAW.

2. Section 7 (LIMITATION OF LIABILITY). This section is deleted in its entirety and replaced with the following:

**7. LIMITATION OF LIABILITY.**

**A.** EMC does not exclude or limit its liability to the Customer for death or personal injury, or, breach of obligations implied by Section 12 of the Sale of Goods Act, 1893, as amended by the Sale of Goods and Supply of Services Act, 1980, or, due to the fraud or fraudulent misrepresentation of EMC, its employees or agents.

**B.** Subject always to subsection 7.A, the liability of EMC (including its Suppliers) to the Customer under or in connection with an order, whether arising from negligent error or omission, breach of contract, or otherwise ("Defaults") shall be: (i) the aggregate liability of EMC for all Defaults resulting in direct loss of or damage to the tangible property of the Customer shall be limited to damages which shall not exceed the greater of two hundred per cent (200%) of the applicable price paid and/or payable for the Software or Service, or one million euros (€1,000,000); or (ii) the aggregate liability of EMC for all Defaults, other than those governed by subsection 7.B(i) shall be limited to damages which shall not exceed (a) in respect of the Software, the greater of one hundred and fifty per cent (150%) of the applicable price paid and/or payable or five hundred thousand euro (€500,000); or (b) in respect of the services, if any, the greater of one hundred and fifty per cent (150%) of the applicable

charges paid and/or payable or five hundred thousand euro (€500,000).

**C.** In no event shall EMC (including its suppliers) be liable to Customer for (i) loss of profits, loss of business, loss of revenue, loss of use, wasted management time, cost of substitute services or facilities, loss of goodwill or anticipated savings, loss of or loss of use of any software or data; and/or (ii) indirect, consequential or special loss or damage; and/or (iii) damages, costs and/or expenses due to third party claims; and/or (iv) loss or damage due to the Customer's failure to comply with obligations under this Agreement, failure to do back-ups of data or any other matter under the control of the Customer. For the purposes of this Section 7, the term "loss" shall include a partial loss, as well as a complete or total loss.

**D.** The parties expressly agree that should any limitation or provision contained in this Section 7 be held to be invalid under any applicable statute or rule of law, it shall to that extent be deemed omitted, but if any party thereby becomes liable for loss or damage which would otherwise have been excluded such liability shall be subject to the other limitations and provisions set out in this Section 7.

**E.** The parties expressly agree that any order for specific performance made in connection with this Agreement in respect of EMC shall be subject to the financial limitations set out in sub-section 7.B.

**F.** The parties expressly agree that the provisions of Section 6 (INDEMNITY) shall not be subject to the limitations and exclusions of liability set out in sub-section 7.B.

**G. CUSTOMER OBLIGATIONS IN RESPECT OF PRESERVATION OF DATA.** During the term of the Agreement the Customer shall:

1) from a point in time prior to the point of failure, (i) make full and/or incremental backups of data which allow recovery in an application consistent form, and (ii) store such back-ups at an off-site location sufficiently distant to avoid being impacted by the event(s) (e.g. including but not limited to flood, fire, power loss, denial of access or air crash) and affect the availability of data at the impacted site;

2) have adequate processes and procedures in place to restore data back to a point in time and prior to point of failure, and in the event of real or perceived data loss, provide the skills/backup and outage windows to restore the data in question;

3) use anti-virus software, regularly install updates across all data which is accessible across the network, and protect all storage arrays against power surges and unplanned power outages with Uninterruptible Power Supplies; and

4) ensure that all operating system, firmware, system utility (e.g. but not limited to, volume management, cluster management and backup) and patch levels are kept to EMC recommended versions and that any proposed changes thereto shall be communicated to EMC in a timely fashion.

3. Section 7.E (Limitation Period). This Section is deleted in its entirety and replaced with the following as a totally separate section:

**WAIVER OF RIGHT TO BRING ACTIONS:** The Customer waives the right to bring any claim arising out of or in connection with this Agreement more than twenty-four (24) months after the date of the cause of action giving rise to such claim.

**D. European Union.** The terms in this subsection D apply only when EMC means an EMC sales subsidiary located in the European Union:

1. Section 3.A (General License Grant). The following is added at the end of this section:

Customer shall not, and Customer shall not permit any third party to, modify, enhance, supplement, create derivative works from, reverse assemble, reverse engineer, reverse compile or otherwise reduce to human readable form the Software without EMC's prior written consent, except to the extent that local, mandatory law grants Customer the right to decompile such Software in order to obtain information necessary to render such interoperable with other software. In such event, Customer shall first inform EMC of its intention and request EMC to provide Customer with the necessary information. EMC may impose reasonable conditions on the provision of the requested information, including the payment of a reasonable fee.

**E. Australia.** The terms in this subsection E apply only when EMC means the EMC sales subsidiary located in Australia (currently **EMC Global Holdings Company (Australian Branch)** ABN 86 669 010 6895):

1. Section 7 (LIMITATION OF LIABILITY). This section is deleted in its entirety and replaced with the following:

## **7. LIMITATION OF LIABILITY.**

**A. Limitation on Direct Damages.** EXCEPT WITH RESPECT TO CLAIMS ARISING UNDER SECTION 6 OF THIS AGREEMENT, EMC'S AND ITS SUPPLIERS' TOTAL LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF ANY TYPE WHATSOEVER, ARISING OUT OF SOFTWARE OR SERVICE PROVIDED HEREUNDER, SHALL BE LIMITED TO PROVEN DIRECT DAMAGES CAUSED BY EMC'S SOLE NEGLIGENCE IN AN AMOUNT NOT TO EXCEED (i) AUD\$2,000,000, FOR DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY; AND (ii) THE PRICE PAID BY CUSTOMER TO EMC FOR THE SPECIFIC SERVICE (CALCULATED ON AN ANNUAL BASIS, WHEN APPLICABLE) OR SOFTWARE FROM WHICH SUCH CLAIM ARISES, FOR DAMAGE OF ANY TYPE NOT IDENTIFIED IN (i) ABOVE OR OTHERWISE EXCLUDED HEREUNDER.

**B. No Indirect Damages.** EXCEPT WITH RESPECT TO CLAIMS REGARDING VIOLATION OF EMC'S INTELLECTUAL PROPERTY RIGHTS, NEITHER CUSTOMER NOR EMC (INCLUDING EMC'S SUPPLIERS) SHALL (a) HAVE LIABILITY TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, OR INDIRECT DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, REVENUES, DATA AND/OR USE), EVEN IF ADVISED OF THE POSSIBILITY



THEREOF; AND (b) BRING ANY CLAIM BASED ON SOFTWARE OR SERVICE PROVIDED HEREUNDER MORE THAN EIGHTEEN (18) MONTHS AFTER THE CAUSE OF ACTION ACCRUES.

**C. Trade Practices Legislation.** EMC's liability under any statutory right or any condition or warranty, including any implied by any State Fair Trading Act or the Trade Practices Act, 1974 (Cth) is, to the maximum extent permitted by law, excluded. To the extent that such liability cannot be excluded, EMC's liability is limited at the option of EMC to: (a) in the case of Software, any one or more of the following: (i) the replacement thereof or the supply of its equivalent; (ii) the repair thereof; (iii) the payment of the cost of replacement thereof or of acquiring its equivalent; or (iv) the payment of the cost of having such repaired, and (b) in the case of any Services performed by EMC under or in connection with this Agreement: (i) the supply of those Services again; or (ii) the payment of the cost of having those Services supplied again.

**F. New Zealand** - The terms in this subsection F apply only when EMC means the EMC sales subsidiary located in New Zealand (currently EMC CORPORATION (NEW ZEALAND BRANCH) AKOS. 1188883):

1. Section 7 (LIMITATION OF LIABILITY). This section is deleted in its entirety and replaced with the following:

#### **7. LIMITATION OF LIABILITY.**

**A. Limitation on Direct Damages.** EXCEPT WITH RESPECT TO CLAIMS ARISING UNDER SECTION 6 OF THIS AGREEMENT, EMC'S AND ITS SUPPLIERS' TOTAL LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF ANY TYPE WHATSOEVER, ARISING OUT OF SOFTWARE OR SERVICE PROVIDED HEREUNDER, SHALL BE LIMITED TO PROVEN DIRECT DAMAGES CAUSED BY EMC'S SOLE NEGLIGENCE IN AN AMOUNT NOT TO EXCEED (i) NZ\$2,000,000, FOR DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY; AND (ii) THE PRICE PAID BY CUSTOMER TO EMC FOR THE SPECIFIC SERVICE (CALCULATED ON AN ANNUAL BASIS, WHEN APPLICABLE) OR SOFTWARE FROM WHICH SUCH CLAIM ARISES, FOR DAMAGE OF ANY TYPE NOT IDENTIFIED IN (i) ABOVE OR OTHERWISE EXCLUDED HEREUNDER.

**B. No Indirect Damages.** EXCEPT WITH RESPECT TO CLAIMS REGARDING VIOLATION OF EMC'S INTELLECTUAL PROPERTY RIGHTS, NEITHER CUSTOMER NOR EMC (INCLUDING EMC'S SUPPLIERS) SHALL (a) HAVE LIABILITY TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, OR INDIRECT DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, REVENUES, DATA AND/OR USE), EVEN IF ADVISED OF THE POSSIBILITY THEREOF; AND (b) BRING ANY CLAIM BASED ON SOFTWARE OR SERVICE PROVIDED HEREUNDER MORE THAN EIGHTEEN (18) MONTHS AFTER THE CAUSE OF ACTION ACCRUES.

**C. Fair Trading Legislation.** EMC's liability under any statutory right or any condition or warranty, including any implied by the Fair Trading Act 1986 or Consumer Guarantees Act 1993 ("FTA") or any similar law is, to the maximum extent permitted by law, excluded. To the extent that such liability cannot be excluded, EMC's liability is limited at the option of EMC to: (a) in the case of any Software, any one or more of the following: (i) the replacement thereof or the supply of its equivalent; (ii) the repair thereof; (iii) the payment of the cost of replacement thereof or of acquiring its equivalent; or (iv) the payment of the cost of having such repaired, and (b) in the case of any Services performed by EMC under or in connection with this Agreement: (i) the supply of those Services again; or (ii) the payment of the cost of having those Services supplied again.

**G. Japan** - The terms in this subsection G apply only when EMC mean the EMC sales subsidiary located in Japan (currently EMC Japan K.K.):

1. Section 1.H (Product Notice). This section is deleted in its entirety and replaced with the following:

**H. "Product Notice"** means the notice by which EMC informs Customer of product-specific use rights and restrictions, warranty period, warranty upgrades and maintenance (support) terms. Product Notices may be delivered in an EMC quote, otherwise in writing and/or a posting on the applicable EMC website, currently located at <http://japan.emc.com/customer-services/product-warranty-and-service-descriptions.htm>. The terms of the Product Notice in effect as of the date of the EMC quote shall be deemed incorporated into and made a part of the relevant Customer purchase order. Each Product Notice is dated and is archived when it is superseded by a newer version. EMC shall not change any Product Notice retroactively with regard to any Software or Support Services listed on an EMC quote issued prior to the date of the applicable Product Notice. At Customer's request, EMC shall without undue provide Customer with a copy of the applicable Product Notice and/or attach it to the relevant EMC quote. In a conflict between the terms and conditions of this Agreement and Product Notice, those of Product Notice shall prevail.

2. Section 4.E (Exclusions). The entire section is deleted and replaced with the following:

**E. Exclusions.** Except as expressly stated in the applicable warranty set forth in this Agreement, EMC (including its Suppliers) provides Software on an "AS IS" basis and makes no other express or implied warranties, written or oral, and ALL OTHER WARRANTIES AND CONDITIONS ARE SPECIFICALLY EXCLUDED TO THE MAXIMUM EXTENT PERMITTED BY LAW, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE.

3. Section 7.A (Limitation on Direct Damages). This section is deleted in its entirety and replaced with the following:

**A. General Limitation.** EXCEPT WITH RESPECT TO CLAIMS ARISING UNDER SECTION 6 ABOVE, EMC'S TOTAL LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM OF ANY TYPE WHATSOEVER, ARISING OUT OF SOFTWARE OR SERVICE PROVIDED HEREUNDER, SHALL BE LIMITED TO THE EXTENT OF PROVEN MONEY DAMAGES AS DIRECT CONSEQUENCES CAUSED BY, AND ORDINARILY ARISED FROM, EMC'S SOLE NEGLIGENCE IN AN AMOUNT NOT TO EXCEED (i) JPY100,000,000, FOR DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY; AND (ii) THE PRICE PAID BY CUSTOMER TO EMC FOR THE SPECIFIC SERVICE (CALCULATED ON AN ANNUAL BASIS, WHEN APPLICABLE) OR SOFTWARE FROM WHICH SUCH CLAIM ARISES, FOR DAMAGE OF ANY TYPE NOT IDENTIFIED IN (i) ABOVE OR OTHERWISE EXCLUDED HEREUNDER.

**H. Germany** - The terms in this subsection H apply only when EMC means the EMC sales subsidiary located in Germany (currently EMC Deutschland GmbH, Am Kronberger Hang 2a, Schwalbach/Ts.)

1. Section 4.E (Exclusions). The entire section is deleted and replaced with the following:

**4.E No further warranties.** EMC's warranty is restricted to what is expressly set forth in this Agreement and the applicable exhibits. EMC (including its Suppliers) does not give any express or implied warranties beyond the foregoing. Public statements of EMC or its Affiliates on features of Products are only binding upon EMC if those are expressly referred to documentation that is part of the contract between Customer and EMC.

2. Section 7 (LIMITATION OF LIABILITY). The entire section is deleted and replaced with the following:

**7. LIMITATION OF LIABILITY.** For all claims of Customer for damages under or in connection with this Agreement and the supply of Software or Service hereunder, whatever the legal basis (including liability for defects, other breaches of contract and tort) may be, the following shall apply:

**A. Unrestricted liability.** In case of death or personal injury, in case of EMC's gross negligence or wilful misconduct, and in case of claims under the German Product Liability Act (*Produkthaftungsgesetz*), EMC shall be liable to Customer according to statutory law.

**B. Restricted liability.** In all other cases, the following shall apply:

- (i) EMC's liability shall be limited to typical, foreseeable damages.
- (ii) Unless a differing liability cap is expressly agreed otherwise, the typical foreseeable damages shall, for each damaging event, not exceed the total price paid by Customer to EMC for the Software and Services (calculated on an annual basis in case of ongoing Services to be provided for a period of more than one year) in relation to which such claim arises, but in any event not less than 100.000,00 EUR and not more than 1.000.000,00 EUR.

(iii) EMC shall be liable to Customer only if EMC has breached a material contractual obligation (i. e. an obligation the performance of which is essential to allow the implementation of the agreement, and the compliance with which Customer usually may rely on).

(iv) EMC shall not be liable for any consequential or indirect damages to the extent such damages are untypical or unforeseeable.

**C. Guarantees.** EMC does not give a guarantee in relation to Software or Services (*Beschaffenheitsgarantie*) that would entail an unlimited liability of EMC or a liability regardless of negligence or fault pursuant to the German Civil Code, except if an unlimited liability and/or liability regardless of negligence or fault has been expressly agreed in writing. The mere use of terms like "to guarantee", "to ensure" or similar wording shall not be considered sufficient to establish such liability, but a binding contractual commitment of EMC that is subject to the agreed limitation of liability.

**D. Regular Back-ups.** As part of its obligation to mitigate damages, Customer shall take reasonable data back-up measures. In particular, Customer shall provide for a daily back-up process and back-up the relevant data before EMC performs any remedial, upgrade or other works on Customer's production systems. To the extent EMC's liability for loss of data is not anyway excluded under this Agreement, EMC shall in case of data losses only be liable for the typical effort to recover the data which would have accrued if Customer had appropriately backed up its data.

**E. Limitation Period.** Unless otherwise required by applicable law, the limitation period for claims for damages shall be eighteen (18) months after the cause of action accrues, unless statutory law provides for a shorter limitation period.

**F. Suppliers.** The foregoing limitations shall also apply in favor of EMC's suppliers and employees.

**I. Switzerland** - The terms in this subsection I apply only when EMC means the EMC sales subsidiary located in Switzerland (currently EMC Computer Systems AG, Hardturmstrasse 181, Zurich)

1. Section 4. E (Exclusions). The entire section is deleted and replaced with the following:

**4.E. No further warranties.** Warranty is restricted to what is expressly set forth in this Agreement and the applicable exhibits. EMC (including its Suppliers) does not give any express or implied warranties beyond the foregoing. Public statements of EMC or its Affiliates on features of Products are only binding upon EMC if those are expressly referred to documentation that is part of the contract between Customer and EMC.

2. Section 7 (LIMITATION OF LIABILITY). This Section shall be amended so that in case of EMC's willful misconduct or gross negligence, and where a limitation of liability is not permissible under applicable mandatory law, EMC shall be liable according to statutory law. In all other cases, the terms and conditions specified in Section 13, Subsection H

## Attachment 1 to Software License and Support Services Agreement

### Support Services Exhibit

This Support Services Exhibit (“**Exhibit**”) sets forth the terms governing EMC’s provision of Support Services during or after the applicable warranty period in cases where Customer orders Support Services (i) directly from EMC, or (ii) from an EMC Channel Partner who provides that the Agreement shall govern orders for Support Services performed by EMC.

#### 1. DEFINITIONS.

**A.** All definitions set forth in the main body of the Agreement shall also apply to this Exhibit.

**B. “EMC Service Area”** means the area that is within (i) one hundred (100) drivable miles of an EMC service location; and (ii) the same country as the EMC service location.

**C. “Time and Materials Service”** means any maintenance or support service that is provided by EMC but not part of fixed-fee Support Services or other generally available service related offering from EMC using a pre-established fee, but which will be separately charged to Customer or the EMC Channel Partner (as applicable) on a time and materials basis and may be made available under a separate set of Time and Materials Services terms and conditions.

#### 2. SUPPORT SERVICES.

**A. Scope.** The contents of Support Services for each Product (the “**Support Option**”) are set forth in the Product Notice, and unless otherwise indicated in the Product Notice, consist of (i) using commercially reasonable efforts to remedy failures of Products to perform substantially in accordance with EMC’s applicable Documentation; (ii) providing English-language (or, where available, local language) help line service (via telephone or other electronic media); and (iii) providing, or enabling Customer to download Software Releases and Documentation updates made generally available by EMC at no additional charge to other purchasers of Support Services for the applicable Product. EMC reserves the right to change the scope of Support Services on sixty (60) days’ prior written notice to Customer.

**B. Additional Support.** EMC reserves the right to charge for Support Services performed outside the time frames of the applicable Support Option as a Time and Materials Service. Time and Materials Service will be charged and invoiced by EMC in accordance with terms governing each such Time and Materials Service engagement. Except to the extent that Support Services are independent of the Equipment’s location, EMC will have no obligation to provide Support Services with respect to Equipment that is outside the EMC Service Area. Support Services do not apply to any Software other than the current and the immediately prior Software Release. Support Services are subject to EMC’s then-current end-of-service-life policy for the respective Product. EMC shall have no obligation to provide Support Services for Software problems that cannot be reproduced at EMC’s facility or via remote access to Customer’s. Support Services do not include the supply of Equipment upgrades, if any, needed to utilize new features or functionality in a Software Release.

**C. Exclusions.** Support Services do not cover a problem that would have been excluded from coverage pursuant to Section 4 E in the main body of the Agreement had the problem arisen during the warranty period of the affected Product.

**D. Re-Instatement of Support.** If Customer wishes to re-instate Support Services for a Product that is not then currently covered thereby, such re-instatement shall be subject to a certification at EMC’s then current Time and Materials Service rates and conditions. Once so certified, Support Services shall commence upon payment to EMC of (i) the charge for the above described Time and Materials Service; (ii) the amount EMC would have normally charged had Support Services been in effect during the period of the lapse or discontinuation; and (iii) the charge for the next twelve (12) months of the newly commenced Support Services.

**E. EMC Channel Partner Provided Support.** Certain EMC Channel Partners may provide technical support, which may include remote service and/or onsite repair. Where Customer orders Software from such an EMC Channel Partner (confirm status with your EMC Channel Partner), the terms of this Attachment shall not apply to such Software, and Customer shall look solely to that EMC Channel Partner for any support on the Software.

#### 3. CUSTOMER RESPONSIBILITIES.

**A. Cooperation.** Customer shall (i) promptly notify EMC when a Product fails and provide EMC with sufficient details so that the failure can be reproduced by EMC; (ii) allow EMC remote and on-site (when deemed necessary by EMC) access to the Product to provide Support Services; and (iii) furnish necessary facilities (which for on-site access means suitable work space, computers, power, light, phone, internet network availability, software and equipment reasonably required by EMC), information and assistance required to provide Support Services.

**B. Support Contacts.** Unless a specific number of authorized contacts are indicated on the Product Notice, Customer shall designate in writing a reasonable number of authorized contacts, as determined by Customer and EMC, who shall initially report problems and receive Support Services from EMC. Each Customer representative shall be familiar with Customer’s requirements and shall have the expertise and capabilities necessary to permit EMC to fulfill its obligations. A change to the authorized support contacts by Customer shall be submitted to EMC in writing.

#### 4. ADDITIONAL TERMS.

**A. Maintenance Aids and Spare Parts for Equipment.** Customer authorizes EMC to store Maintenance Aids and spare parts at the Installation Site and agrees that such are for use only by EMC authorized personnel. Customer shall not, and shall not authorize any third party to, make any use thereof. EMC is authorized, upon the conclusion of the Support Services or at any other time, upon reasonable notice to Customer, to enter the Installation Site, or to use remote means, to remove and/or disable Maintenance Aids and spare parts. Customer shall reasonably cooperate in this effort.

**B. Customer Support Tools.** EMC may choose to make Customer Support Tools available to assist Customer in performing various maintenance or support related tasks. Customer shall use Customer Support Tools only in accordance with terms under which EMC makes such available.

**C. Equipment Replacements.** All replaced Equipment (or portions thereof) shall become the property of EMC upon Customer's receipt of the corresponding replacement, and shall be returned promptly upon EMC's request. If such replaced Equipment is not so returned within fifteen (15) days after EMC's request, Customer shall pay EMC or the applicable EMC Channel Partner (as applicable) EMC's then current spare parts list price therefore.

**D. Data Security Options.** Customer is, at its own expense, fully responsible for the permanent erasure of all information, including without limitation all personally identifiable and other protected information placed on, and by use of a method that does not cause damage to, any replaced parts or any other items that Customer provides to EMC for repair, trade-in, or disposal, before such items are returned to EMC. Descriptions and charges associated with EMC's then currently offered data erasure services are available on request. EMC is not responsible for any information contained on such items notwithstanding anything to the contrary herein.

**E. Proactive Product Changes.** EMC may, at its expense, implement changes to the Products upon reasonable notice to Customer (i) when such changes do not adversely affect interchangeability or performance of the Products; (ii) when EMC reasonably believes such changes are required for purposes of safety or reliability; or (iii) when EMC is required by law to do so. Customer shall give EMC reasonable access to the Products for such purpose.

**F. Software Releases.** Upon use of a Software Release, Customer shall remove and make no further use of all prior Software Releases, and protect such prior Software Releases from disclosure or use by any third party. Customer is authorized to retain a copy of each Software Release properly obtained by Customer for Customer's archive purposes and use as a temporary back-up if the current Software Release becomes inoperable. Customer shall use and deploy Software Releases strictly in accordance with terms of the original license for Software.

**G. Change of Equipment Location or Configuration.** Customer may change the Installation Site or configuration of a Product under Support Services by EMC only after written notice to EMC. If the new location is in a different country, such move is subject to EMC's prior written approval. Customer shall promptly notify EMC of any changes to the configuration, or movement of Equipment by anyone other than EMC. EMC reserves the right to inspect and evaluate the changes in configuration or location of affected Equipment at EMC's then current Time and Materials Service terms, conditions and rates. Additional charges, if any, related to changes in configuration or location of Equipment shall apply from the date the change took place.

**H. Movement of Software.** If Customer is current in the payment of the applicable Support Services fee, Customer may, to the extent technologically compatible, discontinue all use of the Software on the hardware or network environment for which it was originally licensed and begin the corresponding use thereof on a different Customer owned or controlled hardware or network environment provided that Customer (i) gives EMC advance,

written notice of such move; and (ii) pays the applicable transfer and/or upgrade fee assessed for such a move (if any).

**I. Remote Support Capability.** As part of Support Services, EMC makes various remote support capabilities available for certain Products in accordance with its then current policies and procedures. EMC's warranty and Support Services fees are based on the availability and use of such remote support capabilities. Customer has the option to not activate or to disable remote support capabilities, but it shall notify EMC thereof without undue delay. If Customer chooses to disable or to not activate the remote support capabilities, then, with regard to all Products affected by such disablement (i) EMC may arrange to assess a surcharge in accordance with EMC's then current standard rates; and (ii) agreed response times or other agreed service levels (if any) shall no longer apply.

**J. Alterations and Attachments to Equipment.** EMC does not restrict Customer from making alterations to, or installing other products in or with, the Equipment at Customer's expense; provided Customer is responsible for any inspection fees and/or additional charges resulting from such activities. If the alterations or attachments prevent or hinder EMC's performance of Support Services, Customer shall, upon EMC's request, take corrective action. Customer's failure to take appropriate corrective action shall be deemed a breach hereof.

**K. Transfer of Equipment to Secondary Purchasers.** If Customer decides to sell, assign or otherwise transfer the use and/or ownership of Equipment to a Secondary Purchaser (meaning a bona fide end user that (i) is not considered, in EMC's reasonable discretion, to be a competitor of EMC; and/or (ii) has not had prior disputes with EMC), to the extent EMC resources reasonably permit, EMC shall make available to Customer, as a Time and Materials Service, de-installation services. In addition, and to the extent EMC resources reasonably permit, EMC shall make available to the Secondary Purchaser, (a) Equipment installation and re-certification services as a Time and Materials Service; and (b) Support Services for Equipment meeting the certification criteria.

**L. Software Support Services affected by Change in Equipment Status.** For Software used on or operated in connection with Equipment that ceases to be covered by Support Services or the EMC Equipment warranty, EMC reserves the right to send Customer written notice that EMC has either chosen to discontinue or change the price for Support Services for such Software (with such price change effective as of the date the applicable Equipment ceases to be so covered). If EMC sends a discontinuation notice, or if Customer rejects or does not respond to the notice of a proposed price change within thirty (30) days after receipt, Customer will be deemed to have terminated the Software Support Services for its convenience and the terms of Section 7. C. 2 below shall apply.

**5. PRICING.** In cases where Customer has ordered Support Services directly from EMC, the fee for Support Services for Products shall be as set forth on the applicable quote from EMC. Additions to the Products on the EMC quote may result in additional Support Services fees. Time and Materials Service will be changed and invoiced by EMC in accordance with terms governing each such Time and Materials Service engagement.

## **6. WARRANTY ON SUPPORT SERVICES.**

**A. Support Services.** EMC shall perform the labor portion of Support Services in a workmanlike manner in accordance with

generally accepted industry standards. Customer shall notify EMC of any failure to so perform as soon as reasonably possible, and in no event more than ten (10) days after the date on which such failure first occurs. A replacement part provided in connection with Support Services receives the remainder of the Product warranty or Support Services coverage applicable to the Product containing the replacement part.

**B. Customer Remedies.** Customer's exclusive remedy and EMC's entire liability under the foregoing warranties shall be for EMC to, at its option, (i) use reasonable efforts to (a) re-perform the deficient labor services within a reasonable time, or (b) replace any replacement parts which become defective during the remainder of the warranty or Support Services coverage applicable to the Product containing the replacement part, or sixty (60) days after installation thereof, whichever occurs later; and (ii) if, after reasonable efforts, EMC is not able correct such deficiencies, then Customer has the right to terminate for breach in accordance with Section 7 D below.

**C. No Further Warranties.** EXCEPT AS EXPRESSLY STATED HEREIN, AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, WITH REGARD TO PRODUCTS, REPLACEMENT PARTS, SERVICES OR ANY OTHER ITEMS OR MATTERS ARISING HEREUNDER, EMC (INCLUDING ITS SUPPLIERS) MAKES NO OTHER EXPRESS WARRANTIES, WRITTEN OR ORAL, AND DISCLAIMS ALL IMPLIED WARRANTIES. INsofar AS PERMITTED UNDER APPLICABLE LAW, ALL OTHER WARRANTIES ARE SPECIFICALLY EXCLUDED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE.

## **7. TERM AND TERMINATION.**

**A. Software Support Services Term.** Software related Support Services that are ordered at the same time as the license for such Software shall commence on the date of shipment of the physical media or electronic availability of the Software and continue for the period specified on the EMC quote. Renewals of Software related Support Services shall commence and expire in accordance with the dates on the applicable EMC quote.

**B. Equipment Support Services Term.** Support Services (including Support Option upgrades, if applicable) for Equipment are provided during the warranty period. Renewals of Equipment related Support Services shall commence and expire in accordance with the dates on the applicable quote. Support

Services for hardware upgrades installed into Equipment are coterminous with the Support Services that are then in effect for the Equipment into which such upgrades are installed.

**C. Termination for Convenience.** In addition to the term and termination provisions set forth in the main body of the Agreement, the following apply to Support Services:

1. **By EMC.** If EMC terminates for its convenience, Customer's sole and exclusive remedy and EMC's sole and exclusive obligation shall be to arrange for the issuance of a refund to Customer of the portion of any pre-paid Support Services fee received by EMC that corresponds to the period between the effective date of the termination for convenience and the end of the then current Support Services period.

2. **By Customer.** If Customer terminates Support Services for its convenience, Customer's sole and exclusive remedy and EMC's sole and exclusive obligation shall be to arrange for the issuance to Customer (in cases where Customer orders Support Services directly from EMC) or to the applicable EMC Channel Partner, as applicable, a credit that corresponds to the period between the effective date of the termination for convenience and the end of the then current Support Services period. Such credit may only be used against future purchases of Products or Support Services from EMC and may be reduced to recapture unearned discounts (meaning discounts to a Support Services fee that were based on a Customer obligation that can no longer be fulfilled due to the termination).

**D. Termination for Breach.** In addition to the term and termination provisions set forth in the Agreement, either party may terminate the Support Services for a specific Product for cause due to a material failure of the other party to comply with the terms of this Support Exhibit with regard to such Product, provided that the terminating party has given thirty (30) days' written notice specifying the failure and the other party has not remedied such failure within such time. If EMC terminates the Support Services for any Product(s) affected by such a failure by Customer, such termination shall be without further liability for EMC and without any obligation to refund any fees already received by EMC therefore. If Customer terminates for EMC's breach, Customer's sole and exclusive remedy and EMC's sole and exclusive obligation shall be to arrange for the issuance of a credit for use against current or future purchases of Products or Support Services or arrange for the issuance of a refund (as selected by Customer) for that portion of any pre-paid Support Service fee that corresponds to the period between the effective date of the termination for breach and the end of the then current Support Services period.