

## **END USER LICENSE AGREEMENT**

Licensor: NetBrain

(Last Updated: September 16, 2019)

**\* \* \* PLEASE READ CAREFULLY \* \* \***

**This End User License Agreement (“Agreement”) is a legally binding agreement between (1) the entity that installs the Program (the “Customer”) and (2) NetBrain Technologies, Inc. or such of its Affiliates as has provided the Customer with a Quote and with which the Customer has placed an Order (“NetBrain”). The individual clicking the “I AGREE” button, represents and warrants that (a) he/she is duly authorized and has full authority to do so and to bind Customer to the provisions of this Agreement, and (b) he/she has read, understands and agrees, on behalf of the Customer, that the Customer shall be bound by the terms and conditions of this Agreement, including, but not limited to, the limited warranty and limitation of liability set out herein. In addition, by downloading, installing, copying or otherwise using, for any purpose, any of the Programs (as defined herein) available from NetBrain, Customer is agreeing to be bound by the terms and conditions of this Agreement.**

**IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS: (1) CLICK ON THE “CANCEL” BUTTON BELOW AND INSTALLATION WILL TERMINATE; (2) do not download, install, copy or use the Programs; and (3) Delete these materials from your computer and promptly (and in any event, within fourteen (14) days of receipt) return to NetBrain any diskette or other media you have received from NetBrain and any other items provided that are part of this product.**

**The Customer acknowledges that by clicking the “I AGREE” button, it has accepted NetBrain’s offer and a contract will be formed between the parties.**

NetBrain shall provide Customer with the Programs and modules selected by Customer, at the agreed-upon fees, and subject to the general terms and conditions set forth on Exhibit A (“Terms and Conditions”) and the service level commitments set forth on Exhibit B. In addition, NetBrain may from time to time provide Customer or Customer’s Affiliates with additional Programs and modules, as set forth on schedules, statements of work, purchase orders or other ordering documents (“Orders”) issued by Customer or its Affiliates pursuant to this Agreement. Each such Order, together with the terms and conditions of this Agreement shall constitute a separate agreement. The NetBrain entity entering into the Orders shall constitute “NetBrain” for purposes of such Orders, and Customer or the Customer Affiliate issuing the Order shall constitute “Customer” hereunder for purposes of the relevant Orders. For the avoidance of doubt, the contracting NetBrain entity shall be solely responsible for the performance of its obligations hereunder and no other NetBrain Affiliate shall have any responsibilities or liability with respect thereto.

### **EXHIBIT A**

#### **TERMS AND CONDITIONS**

##### **SECTION 1. DEFINITIONS.**

Whenever used in this Agreement, unless the context otherwise requires, the following terms will have the following specified meanings:

1.1 “Affiliate” means any entity directly or indirectly controlling, controlled by, or under common control with another entity, where “control” means ownership of more than fifty percent (50%) of the voting stock or other equity interests of an entity, or the right to direct the management of such entity.

1.2 “Bypass” shall mean a procedure communicated by NetBrain to Customer, which permits Customer to avoid Error(s) by implementing such procedure when using the Programs.

1.3 “Change of Control” means, with respect to any entity: (i) a transfer to a single entity or group of related entities (whether in a single transaction or a series of transactions) of more than fifty percent (50%) of the stock, assets, or other equity interests in an entity; or (ii) a transfer of the right to direct the management of such entity.

An initial public offering of an entity's stock shall not constitute a Change of Control within the meaning of this Agreement.

1.4 "Change Management" shall mean the add-on module to the Programs that enables engineers to define network changes through one or more configuration templates. Those templates can be applied to multiple devices/interfaces and deployed/rolled back automatically. The Change Management module enables engineers to verify the impact of the changes across the network to help ensure a safer change process.

1.5 "Concurrent Seat(s)" is a license allowing users to install the Programs on any number of machines, but the total number of concurrent users operating the Programs at any single moment may not exceed the total number that have been authorized under this Agreement.

1.6 "Documentation" means collectively: (a) all user, technical, support, and other manuals and all other written, printed, electronic, or other format materials published or otherwise made available by NetBrain that describe the functional, operational, and/or performance capabilities of the Programs; and (b) any other deliverable that is not Programs. Documentation shall not include source code.

1.7 "Enhancement(s)" shall mean a modification to the Programs that alters the functionalities described in the Documentation without materially degrading the functionalities or performance of the Programs prescribed by the Documentation.

1.8 "Error(s)" shall mean a reproducible failure of the Programs to conform to the Documentation for such Programs.

1.9 "Error Report" shall mean the document generated by NetBrain, pursuant to Section 3 hereof, each time that Customer reports an Error.

1.10 "Fix(es)" shall mean the document or materials to be created by NetBrain to correct any Error(s).

1.11 "Intellectual Property Rights" means patents, inventions, utility models, petty patents, trademarks, service marks, trade and service names, copyrights, database rights and design rights (whether or not any of them are registered, and including applications for registration of any of them), rights in know-how, moral rights, trade secrets and rights of confidence; all rights or forms of protection of a similar nature or having similar or equivalent effect to any of them which may exist anywhere in the world at the date of this Agreement or any Order or in the future.

1.12 "License Fee" shall mean the fees payable by Customer for the License(s).

1.13 "License(s)" shall mean the license granted by NetBrain to Customer to use the Programs, under this Agreement.

1.14 "Maintenance Fees" shall mean the annual fees payable by Customer for continued receipt of Maintenance Services.

1.15 "Maintenance Services" shall mean the support services defined in Section 3, to be provided under this Agreement.

1.16 "Managed Elements" shall mean any combination of Nodes, Ports and/or Processors.

1.17 "Nodes" means any number of the following: layer 3 switches, layer 2 switches, firewalls, routers, load balancers, wireless access points, and WAN optimizers, including, for the avoidance of doubt, any Nodes used as part of redundant standby network.

1.18 "Object Code" shall mean the binary machine readable version of the Programs.

1.19 "Port" shall mean the total number of physical ports on leaf-and spine switches, as well as fabric extenders, all within a Cisco ACI deployment.

1.20 "Processor" shall mean a single, physical chip that houses a central processing unit that can execute computer programs.

1.21 “Programs” means all of the programs and modules licensed to Customer by NetBrain, in machine-readable, Object Code form only as well as all other ancillary software provided by NetBrain in connection herewith. Programs include NetBrain Qapps, NetBrain Data View Templates, and NetBrain Runbooks (as defined in Section 9) and may also include any Third-Party Software and related documentation.

1.22 “Severity Level” shall mean the level of severity assigned to a reported Error, in accordance with the definitions set forth in Exhibit B to this Agreement.

1.23 “Site” shall mean a Customer computer facility located in one specific geographic location.

1.24 “Third Party Software” means software of companies other than NetBrain or a NetBrain Affiliate that NetBrain has licensed to you under this Agreement.

1.25 “Third Party Software Provider” means a company, other than NetBrain, that has licensed Third Party Software to NetBrain, which NetBrain sublicenses to Customer under this Agreement.

1.26 “Update” shall mean a compendium of Fixes which NetBrain releases to the users of the Programs from time to time and which NetBrain shall supply to Customer pursuant to the terms of this Agreement.

1.27 “Upgrades” means all releases, Updates and corrections of the Programs licensed to Customer hereunder (when and if available), specifically only those features and modules specified on any Order issued pursuant to this Agreement as licensed to Customer hereunder, in Object Code form, which are published and generally made commercially available by NetBrain to its licensees of the Programs with a change in the integer, tenths or hundredths digit of the version number (e.g., a change from version x.xx to y.xx or x.yx or x.xy).

## SECTION 2. PROGRAMS DELIVERY AND LICENSE.

2.1 PROGRAMS DELIVERABLES. Following execution of this Agreement, NetBrain shall deliver to Customer the number of Licenses as specified on any Order issued pursuant to this Agreement.

2.2 GRANT. Subject to Customer’s compliance with the provisions of this Agreement and the payment of all applicable License Fees (as defined below), for the term of such License, NetBrain hereby grants Customer a nonexclusive, perpetual non-transferable (except as otherwise provided herein) license to:

(a) Install and use the Programs for internal processing requirements of Customer within the number of Concurrent Seat(s) and Managed Elements then authorized under this Agreement. The number of Concurrent Seats and/or Managed Elements initially authorized hereunder is set forth on the relevant Order that has been accepted by NetBrain in writing or via fulfillment of the Order, or is set forth on any Quote issued by NetBrain.

(b) Customer may increase the number of Concurrent Seats and/or Managed Elements from time to time via an Order in unit quantities and upon payment to NetBrain of the applicable fees, provided that no Order shall be binding unless accepted by NetBrain in writing or via fulfillment of the Order. Maintenance Services on additional Nodes and Concurrent Seats added to Customer’s authorized quantity shall be co-termed with the then-current Maintenance Services on existing Managed Elements and Concurrent Seats such that all Maintenance Services expire at the same time. Any such Order, once accepted by NetBrain, is thereby incorporated by reference and shall become part of this Agreement.

(c) Reproduce the Documentation for the Programs that are the subject of the License and/or incorporate all or any portion of the Documentation in training materials prepared by the Customer, in each case solely for the internal use of the Customer and provided that the copyright notices and other proprietary rights legends appearing in or on the Programs or the Documentation are included on each copy of the Documentation and such materials. Customer shall keep accurate records of the number of reproductions and location of each copy.

(d) Backup Licenses. Upon request, and subject to NetBrain’s written approval in its sole discretion, Customers may receive additional copies of the Programs to be used on a backup basis to mirror the Programs in the same quantity of Concurrent Seats and Managed Elements in a duplicate, non-production environment strictly for backup purposes (“Backup Copy”); provided that NetBrain approval shall not be required with respect to any version of the Software that has built-in backup capabilities. The Backup Copy may not be used (i) concurrently with Customer’s License that is utilized in active production, (ii) to discover additional Managed Elements currently in

active production or on a redundant network that is in standby mode, or (iii) to augment the number of Concurrent Seats at any given time.

(e) Quality Assurance. Upon request, and subject to NetBrain's written approval in its sole discretion, Customers may receive additional copies of the Programs solely to be used on a separate lab network for the purpose of quality assurance testing relating to new patches, upgrades, updates, or new devices, and such other testing as may be allowed by NetBrain, in its sole discretion, in writing ("Quality Assurance Copy"). The Quality Assurance Copy shall be limited to a certain number of Concurrent Seats and Managed Elements as determined by NetBrain. If such Quality Assurance Copy is approved by NetBrain, Customer will be required to purchase Maintenance Services for such copy.

All rights not expressly granted are reserved by NetBrain.

2.2 A. GRANT – ADDITIONAL REQUIREMENTS (GERMANY). If the NetBrain Affiliate with which the Customer concludes this Agreement is NetBrain Technologies GmbH, nothing in this Section 2 shall exclude Customer's statutory right to transfer the licensed Programs or the Documentation to a third party. However, Customer shall only be entitled to such transfer provided that Customer:

- (a) discontinues in total any use of the transferred Programs and Documentation;
- (b) promptly deletes all copies of the transferred Programs and Documentation, installed at Customer's systems;
- (c) provides prior written notice to NetBrain regarding the third party's identity and location;
- (d) reproduces all notices of patent, copyright, trade secret, trademark, or other proprietary rights notices present on any transferred Programs and Documentation; and
- (e) hands out a copy of this Agreement to the third party.

Upon NetBrain's request, Customer will certify discontinuance in use and deletion of the Programs and Documentation, in writing. For the avoidance of doubt, Customer is prohibited from transferring or attempting to transfer any portions of this Agreement relating to maintenance and/or support services or any other services. Customer hereby agrees to indemnify and hold NetBrain harmless from any losses, costs, damages or expenses (including reasonable attorney's fees) incurred by NetBrain because of any failure by the Customer to comply with the requirements of this Section 2.2A.

2.3 Limited-use Evaluation, Education/Demonstration License. For an additional cost (as applicable), NetBrain shall provide a limited, non-exclusive license to install and use the Programs and Documentation in a non-production environment solely for the (i) evaluation of NetBrain products on Customer's network environment, or (ii) education and demonstration purposes on Customer's network environment, or any third party network environment, subject to NetBrain's prior written approval (collectively "Demonstration License"). The Demonstration License may be provided with limited operability and/or functionality. The Demonstration License is subject to the terms provided in this Agreement, provided, however, notwithstanding any other provision of this Agreement, NetBrain offers no representations or warranties of any kind with respect to any Demonstration License.

2.4 ACCEPTANCE. The Programs and Documentation shall be deemed accepted by Customer on delivery of the Programs and Documentation to Customer. Customer agrees that its decision to enter into this Agreement and to enter into Orders hereunder is based solely upon the availability of the features and functionality in the current released versions of the Programs and is not contingent on the delivery of any future functionality or features, nor dependent on any oral or written, public or private, comments made by NetBrain regarding future functionality or features or services, except as otherwise expressly set forth in this Agreement or in an Order executed by both parties.

2.5 DEVOPS and Personal Edition. NetBrain may offer Customer, at no charge, one or more versions of the Software for limited use, including DevOps ("DE") and Personal Edition ("PE"). Customer's use of DE and PE is subject to the terms provided in this Agreement. Notwithstanding the foregoing or any other provision of this Agreement, NetBrain offers no representations or warranties of any kind with respect to DE or PE, and the provisions of Section 7 of this Agreement shall not apply to DE or PE. In addition, DE and PE are not eligible for Maintenance Services (provided that NetBrain may, in its sole discretion, provide limited Maintenance Services

on an ad hoc basis), and NetBrain reserves the right to discontinue Customer's right to use DE and PE at any time, without notice.

Customer's use of DE is subject to the following additional provisions:

- (a) DE is limited to ten (10) Nodes;
- (b) DE may be used only (i) on a home network; (ii) in a lab network; or (iii) in a production network for a period not exceeding thirty (30) days; and

Customer's use of PE is subject to the following provisions:

- (a) PE is limited to twelve (12) Nodes; and
- (b) PE displays only one map at a time;
- (c) PE may be used only (i) on a home network; (ii) in a lab network; or (iii) in a production network for a period not exceeding thirty (30) days.

**2.6 RESTRICTIONS.** Customer shall use the Programs and Documentation only for the relevant purposes specified in Section 2 and in accordance with the following:

- (a) Customer shall not modify or prepare derivative works of the Programs or Documentation except as expressly permitted in Section 2.2;
- (b) Customer shall not reverse engineer, disassemble or decompile the Programs or attempt to reconstruct or discover any source code, underlying ideas, algorithms, file formats or programming interfaces of the Programs by any means whatsoever;
- (c) Customer shall not remove, obscure, or alter any notice of patent, copyright, trade secret, trademark, or other proprietary rights notices present on any Programs or Documentation;
- (d) Customer shall not sublicense, sell, lend, rent, lease, distribute or otherwise transfer all or any portion of the Programs or the Documentation to any third party except as may be permitted in Section 11.7 hereof; and
- (e) Customer shall not use the Programs or the Documentation to provide services to third parties, or otherwise use the same on a "service business" basis.

When the licensor is NetBrain Technologies GmbH: §§ 69d, 69e UrhG remain unaffected by this Section 2.6.

**2.7 COMPLIANCE WITH LAWS.** NetBrain and Customer shall each comply with all applicable laws, regulations, rules, orders and other requirements, now or hereafter in effect, of any applicable governmental authority, in their performance of this Agreement.

**2.8 PROPRIETARY RIGHTS.** The Programs (including all Bypasses, Fixes, Updates, Enhancements and Upgrades), Documentation contain valuable intellectual property rights, trade secret, and other proprietary rights of NetBrain and constitute the sole and exclusive property of NetBrain. Except as expressly provided in this Agreement, nothing contained herein, including, but not limited to, Section 9, shall be construed to convey to Customer any other right, title or interest in or to the Programs, Documentation NetBrain Qapps, NetBrain Data View Templates, NetBrain Runbooks or any NetBrain intellectual property or other proprietary right. In addition, NetBrain shall be free to use without restriction, any and all suggestions, ideas, enhancement requests, feedback, or recommendations made by Customer, and all enhancements and modifications made to the Programs, Documentation or other offerings of NetBrain shall continue to be owned solely and exclusively by NetBrain.

**2.9 AUDIT.** During the term of this Agreement and for a period of one (1) year thereafter, NetBrain may audit Customer's use and reproduction of the Programs, provided that it gives Customer at least thirty (30) days prior written notice. Any such audit shall be conducted during regular business hours and shall not unreasonably interfere with Customer's business activities. All information disclosed by Customer during the course of the audit shall be Confidential Information subject to the provisions of Section 11.1, provided that the designation as Confidential Information shall not be construed to limit NetBrain's right to enforce this Agreement. All audits

shall be conducted at NetBrain's sole cost and expense unless the audit reveals a material variance in the use of the Programs, Programs Modifications and Documentation from the use and distribution authorized under this Agreement, in which case Customer shall be liable to NetBrain for all reasonable audit expenses incurred by NetBrain. Customer shall also be liable for any unauthorized use or distribution of the Programs, Programs Modifications and Documentation discovered during such audit.

2.10 **USAGE STATISTICS.** In an effort to improve and ensure full utilization of the Programs, NetBrain reserves the right to monitor and collect and use utilization-related information of Customer, such as, but not limited to, percentage (%) of Managed Elements used, no. active users and network access rate. In addition, NetBrain reserves the right to collect other usage-related metrics from time to time, which may be anonymized and aggregated with information collected from other customers and used for internal research and development purposes, and to electronically verify Customer's compliance with the license limitations set forth in this Agreement.

### SECTION 3. MAINTENANCE SERVICES.

3.1 Provided that Customer and NetBrain have agreed upon Maintenance Services and Customer has paid NetBrain the applicable Maintenance Fee, NetBrain will provide Customer with the Maintenance Services described in this Section, in accordance with the Escalation Procedures and Processes for Programs Error Resolution ("Error Resolution Plan") set forth on Exhibit B.

(a) Email Support. First line support shall be provided via e-mail and can be obtained by submitting a support ticket to support@netbraintech.com. Customer may also submit a support ticket through NetBrain's website at <http://www.netbraintech.com/netbrain-support/submit-a-ticket.php>. NetBrain's support engineer will be able to look up Customer's License information based on Customer's company name and email address. Reported Errors will be investigated by NetBrain, and if a reported Error relates to the Programs, or is directly caused by the Programs: (a) an Error Report shall be opened; (b) the Error shall be assigned a Severity Level as per the provisions of the ("Error Resolution Plan"); and (c) the Error shall be resolved in accordance with the procedures and processes set forth in the ("Error Resolution Plan"). E-mail support is available between the hours of 9:00 AM and 5:00 PM EST, Monday through Friday, excluding NetBrain observed holidays.

(b) Telephone Support. In emergency situations, NetBrain telephone support representative(s) will be available to receive Customer's telephone calls during normal support hours, excluding NetBrain observed holidays. The telephone support hours are set forth on [www.netbraintech.com](http://www.netbraintech.com).

(c) Installation Assistance. NetBrain shall provide Customer telephone assistance for the implementation or installation of Bypasses, Fixes, and Updates during normal support hours, excluding NetBrain observed holidays. The telephone support hours are set forth on [www.netbraintech.com](http://www.netbraintech.com).

(d) Updates. NetBrain shall, on a when and if available basis, provide Customer such Updates as it provides to other customers for the Programs without additional charge from time to time.

(e) Enhancements. NetBrain shall provide Customer such Enhancements as it provides to other customers for the Programs without additional charge on a when and if available basis.

(f) Upgrades. Customer is entitled to free Upgrades to Programs, that are the subject of a License, including major version Upgrades and device configuration Updates on a when and if available basis. Upgrades are subject to availability and are limited to only those features and modules which are licensed to Customer under this Agreement.

(i) Regular Activity Reports. Upon written request by Customer, NetBrain shall provide: (i) a status report of Error resolution activities; and (ii) a status report of all outstanding Error Reports. Such status reports shall contain NetBrain's tracking number, Error description, Error resolution status, and release number for all Errors.

3.2 **WARRANTY ON MAINTENANCE.** All Maintenance Services performed by NetBrain under this Agreement shall be performed by NetBrain in a professional manner in accordance with industry standards. If NetBrain receives written notice of non-conforming Maintenance Services, NetBrain shall re-perform said Maintenance Services, which shall constitute Customer's sole and exclusive remedy. NetBrain does not warrant that the Maintenance Services or Programs (except where prohibited by applicable law) will be uninterrupted or

error free. For the avoidance of doubt: this Section 3.3 shall not be construed as a limitation of NetBrain's general liability under Section 8.2(d).

### 3.3 LIMITATIONS ON MAINTENANCE SERVICES.

- (a) NetBrain shall not maintain or support any third party programs.
- (b) NetBrain shall provide Maintenance Services only with respect to the two (2) most recent released Upgrades of the Programs.
- (c) Any time incurred by NetBrain in diagnosing or fixing problems that are not caused by the Programs, or are not covered by this Agreement (hereinafter "Out-of-Scope Maintenance"), are billable to Customer at NetBrain's then-existing rates with a one-hour minimum per call.
- (d) Any travel and expenses incurred in conjunction with Out-of-Scope Maintenance and support shall be billed to Customer at NetBrain's actual costs.

3.4 TRAINING. Training resources are available at the "Support" section of NetBrain's website. Instructor-led training classes are available at NetBrain's then-current rates, which may be adjusted by NetBrain from time to time without notice. Any Training Services purchased in advance must be completed or commenced within one hundred eighty (180) days of purchase as designated by the date of any applicable purchase order or, if none is provided, the date of delivery of the Programs and Documentation. If Training Services are not completed or commenced within such one hundred eighty (180) day period, Customer forfeits the right to use or schedule such Training Services and will not receive any refund or credit.

3.5 OTHER CONSULTING SERVICES. Customer may contact NetBrain and purchase additional consulting services to aid in the setup and customization of Programs, upon mutually agreeable terms. NetBrain has no obligation to provide such consulting services to Customer unless agreed by both parties.

## SECTION 4. COMPENSATION.

4.1 LICENSE FEE. In consideration of the grant of the License, Customer will pay NetBrain the License Fee.

### 4.2 FEES FOR MAINTENANCE SERVICES.

- (a) The Initial Maintenance Term shall continue for the period initially selected by Customer, accruing from the date of delivery of the Program(s) and Documentation (the "Initial Maintenance Term"). During the Initial Maintenance Term, Customer shall pay NetBrain the Maintenance Fee set forth in the relevant Order. Maintenance Services shall automatically renew on an annual basis until terminated by either party upon written notice of termination given to the other party at least sixty (60) days prior to the expiration date of the then-current maintenance term. After the end of the Initial Maintenance Term, NetBrain may increase the Maintenance Fee for subsequent Maintenance Periods.
- (b) Lapsed Maintenance Services may be reinstated within ninety (90) days, subject to Customer's payment of back-maintenance fees being fees that would have been paid for Maintenance Services by the Customer had such services not lapsed. If coverage has lapsed for more than ninety (90) days but less than twelve (12) months, Maintenance Services can be reinstated by paying the applicable Maintenance Fee plus a reinstatement fee equal to fifty percent (50%) of the lapsed Maintenance Fee. Customer acknowledges that the above-described payments constitute compensation to NetBrain for previously released Updates, Enhancements, and Upgrades that Customer will receive upon reinstituting Maintenance Services. The applicable Maintenance Fee itself is the annual Maintenance Fee starting from the expiration date of the last paid maintenance term through the end of the desired new maintenance term. After twelve (12) months of lapsed coverage, NetBrain cannot offer reinstatement and Customer would be required to purchase the latest version of the Programs and annual Maintenance Services.
- (c) Customer acknowledges that in the event it permits Maintenance Services to lapse, Customer will not receive Updates, Enhancements, Upgrades or any other modifications or changes to the Program(s) or Documentation typically provided as part of Maintenance Services, some of which may be critical. Accordingly, NetBrain does not recommend use of the Program(s) or Documentation on a production grade network unless Customer is a current subscriber to Maintenance Services.

### 4.3 PAYMENT.

(a) Unless otherwise agreed by the parties, all fees, charges and other sums payable to NetBrain under this Agreement will be due and payable within thirty (30) days after the invoice date. All monetary amounts shall be paid in the lawful currency applicable to or otherwise agreed with the NetBrain contracting entity. Customer shall pay all amounts due under this Agreement to the NetBrain at the address set forth on the Quote or such other location as NetBrain designates in writing. NetBrain will not accept or process credit card payments for invoices of more than \$20,000 USD or the equivalent in other currencies.

(b) Any amount not paid when due will bear interest at the rate of one and one half percent (1.5%) per month or, the maximum rate permitted by law, whichever is less, determined and compounded on a daily basis from the date due until the date paid, and Customer shall be liable for any reasonable costs of collection. In addition, in the event Customer fails to fulfill its payment obligations, NetBrain reserves the right to suspend the Licenses and /or Maintenance Services without notice.

(c) All fees, charges and other sums payable to NetBrain under this Agreement do not include any sales, use, excise, value added or other applicable taxes, tariffs or duties, payment of which shall be the sole responsibility of Customer, excluding any applicable federal and state taxes based on NetBrain's net income. In case NetBrain should be liable vis-à-vis the respective authority for any sales, use, excise, value added or other applicable taxes, tariffs or duties, the fee, charge or other sum payable to NetBrain shall be increased by the amount of such tax, tariff or duty and the Customer shall pay this amount to NetBrain together with the fee, charge or other sum payable to NetBrain. Customer shall provide NetBrain with all information required by NetBrain in order to fulfill its obligations under applicable tax-, tariff- or duties-laws; this shall in particular include the provision of Customer's business address as well as the VAT-ID or other relevant tax number of Customer (if any).

(d) This Agreement applies whether Customer purchases the Programs and/or Maintenance Service directly from NetBrain or through any other third party (collectively, "Reseller"). If Customer purchases through a Reseller, Resellers are not authorized to make any promises or commitments on NetBrain's behalf, and NetBrain is not bound by any obligations to Customer other than as specified in this Agreement. Customer acknowledges that NetBrain reserves the right to suspend and/or terminate the Licenses and/or Maintenance Services hereunder, without notice or liability, due to non-payment by the Reseller.

### SECTION 5. TERM AND TERMINATION.

5.1 The License grant shall remain in effect unless terminated in accordance with the provisions of this Agreement. The Maintenance Services term under this Agreement shall continue until terminated in accordance with Section 5.2(a).

5.2 TERMINATION BY CUSTOMER FOR CONVENIENCE. The License herein granted is for an indefinite period and may not be terminated by NetBrain for convenience. However, Customer may terminate this Agreement and the License for any reason by providing NetBrain with ninety (90) days prior written notice. No refunds of License Fees or Maintenance Fees will be provided for termination by Customer pursuant to this Section 5.2.

5.3 TERMINATION BY EITHER PARTY FOR CAUSE. If either party defaults in the performance of or compliance with any of its material obligations under this Agreement, and such default has not been remedied or cured within thirty (30) days after the other party gives the breaching party written notice specifying the default or, if the nature of the default is such that more than thirty (30) days are required for the cure thereof, and the breaching party fails to commence its effort to cure such breach or default within such thirty (30) days and to diligently prosecute the same to completion thereafter to the other party's satisfaction in its sole discretion, then the other party may terminate this Agreement and the License, in addition to its other rights and remedies at law or in equity. In the case of termination due to breach by NetBrain, Customer shall receive a pro-rata refund of Maintenance Fees for the remaining Maintenance period paid for beyond the termination date.

### 5.4 POST TERMINATION.

(a) Upon termination of this Agreement, Customer shall promptly cease the use of the Programs and Documentation, return any hardware in its possession or control to NetBrain (where applicable), and destroy (and in writing certify such destruction) or return to NetBrain all copies of the Programs and Documentation then in Customer's possession or control.



(b) All charges due and payable under this Agreement incurred prior to the date of the termination shall be fully paid by Customer.

## SECTION 6. WARRANTIES AND REMEDIES.

6.1 **PERFORMANCE WARRANTY AND REMEDY.** NetBrain warrants to Customer that, when operated in accordance with the Documentation and other instructions provided by NetBrain, the Programs will perform in all material respects in accordance with the functional specifications set forth in the Documentation (without the need for customization or modification, or delivery of additional services) for a period of thirty (30) days (when the licensor is NetBrain Technologies GmbH: as required by statute) after the date of delivery of the Programs at the Customer site. For the avoidance of doubt, this warranty shall not apply to Maintenance Services, including any Bypasses, Fixes, Updates, Enhancements, and Upgrades, which are warranted separately under Section 3.2. NetBrain also warrants that it shall promptly provide Customer with documentation and other user materials that are current and complete in all material respects, and that all such documentation and user materials shall contain information sufficient to explain the operation of the Programs to a trained software professional. If the Programs fail to comply with the warranty set forth in this Section 6.1, NetBrain will use reasonable commercial efforts to correct the noncompliance, provided that Customer notifies NetBrain of the noncompliance of the Programs within the warranty period, and NetBrain is able to reproduce the noncompliance as communicated by Customer to NetBrain. If after the expenditure of reasonable commercial efforts, NetBrain is unable to correct any such noncompliance, NetBrain may, in its sole discretion, if Customer so requests, refund to Customer the License Fee paid by Customer to NetBrain for such Programs in full satisfaction of Customer's claims relating to such noncompliance upon Customer's return of said Programs and, for the avoidance of doubt, Customer shall have no further claim or remedy against NetBrain, said refund constituting Customer's sole and exclusive remedy. The warranties described herein shall apply only to the Programs. This Section 6 shall not limit NetBrain's general liability as described in Section 8.2 (d).

6.2 **PERFORMANCE WARRANTY LIMITATIONS.** The warranties set forth in Section 6.1 do not apply to any noncompliance of the Programs or any Third Party Software resulting from misuse, casualty loss, use or combination of the Programs with any products, goods, software, services or other items furnished by anyone other than NetBrain (unless otherwise approved by NetBrain in writing), any modification not made by or for NetBrain (unless otherwise approved by NetBrain in writing), or any use of the Programs by Customer in contradiction of the terms of this Agreement (unless otherwise approved by NetBrain in writing).

6.3 **ADDITIONAL PROGRAM WARRANTIES.** NetBrain further warrants that NetBrain has checked for viruses in the Programs using commercially available virus checking programs consistent with standard industry practice. If the Programs fail to comply with the warranty set forth in this Section 6.3, NetBrain will use reasonable commercial efforts to correct the noncompliance. If after the expenditure of reasonable efforts, NetBrain is unable to correct any such noncompliance, NetBrain shall refund to Customer the License Fee paid by Customer to NetBrain for such Programs, reduced by an amount equal to the depreciated portion of the License Fee calculated on a five (5) year straight line basis, which shall constitute Customer's sole and exclusive remedy for such noncompliance.

## SECTION 7. INDEMNIFICATION.

Subject to the limitations set forth in Section 8.2, NetBrain agrees, at its own expense, to defend and indemnify Customer for, and at NetBrain's option to settle, any and all claims, demands, litigation, liabilities or actions brought against Customer alleging that the Programs as used within the scope of this Agreement infringe any United States patent, any third party's patent that is valid and enforceable in the European Union, or any copyright, trademark, trade secret or any other intellectual property right of any third party, and to pay all damages, expenses and costs, including reasonable attorney's fees, which may be assessed against Customer under any such claim, demand, litigation, liability or action. NetBrain shall be released from the foregoing obligation unless Customer provides NetBrain with (i) prompt written notice after Customer first becomes aware of such a claim, demand, litigation, liability or action, provided that failure to promptly notify NetBrain will not relieve NetBrain of its indemnification obligations hereunder except to the extent NetBrain is materially prejudiced thereby; (ii) sole control and authority over the defense or settlement thereof (Customer shall, at its sole expense, have the right to employ separate counsel to monitor the defense and settlement of the claim thereof); and (iii) proper and full information as is reasonable, and reasonable assistance to settle and/or defend any such claim or action. Without limiting the foregoing, if a final injunction is, or NetBrain believes in its sole discretion is likely to be, entered prohibiting the use of the Programs by Customer as contemplated herein, NetBrain will, at its sole option and expense, (a) procure for Customer the right to use the infringing Programs as provided herein; or (b) replace the

infringing Programs with non-infringing, functionally equivalent products; or (c) suitably modify the infringing Program so that it is not infringing, with no loss of functionality; or (d) in the event (a), (b) and (c) are not commercially reasonable, terminate the License, accept return of the infringing Programs and refund to Customer the License Fee paid therefor, reduced by an amount equal to the depreciated portion of the License Fee calculated on a five (5) year straight line basis. Notwithstanding the foregoing, NetBrain assumes no liability for infringement claims arising solely from (i) combination of the Programs with the other products not provided by NetBrain, (ii) any modifications to the Programs by any person other than NetBrain; (iii) any continued use of the version of the Programs in Customer's possession following notice by NetBrain that such Programs may be infringing; or (iv) use of any version of the Programs other than the most recent version that NetBrain has made available to Customer under the agreed Maintenance Services or without additional costs to Customer if the infringement would have been avoided by use of the most recent version.

THE FOREGOING PROVISIONS OF THIS SECTION 7 STATE THE ENTIRE LIABILITY AND OBLIGATIONS OF NETBRAIN AND THE EXCLUSIVE REMEDY OF CUSTOMER, WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY PATENT, COPYRIGHT, TRADE SECRET, TRADEMARK OR OTHER INTELLECTUAL PROPERTY RIGHT BY THE PROGRAMS.

#### SECTION 8. DISCLAIMER OF WARRANTY AND LIMITATION OF LIABILITY.

8.1 DISCLAIMER OF WARRANTIES. EXCEPT AS SET FORTH IN THIS AGREEMENT AND ALL ATTACHMENTS REFERENCED HEREIN AND SO FAR AS IT IS PERMITTED TO DO SO UNDER APPLICABLE LAW, NETBRAIN MAKES NO WARRANTIES WHETHER EXPRESSED, IMPLIED OR STATUTORY REGARDING OR RELATING THE PROGRAMS, DOCUMENTATION OR ANY MATERIALS OR SERVICES FURNISHED OR PROVIDED TO CUSTOMER UNDER THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO WARRANTIES OF PERFORMANCE, TITLE, USE OR NON-INFRINGEMENT. NETBRAIN SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND SATISFACTORY QUALITY WITH RESPECT TO THE PROGRAMS, DOCUMENTATION AND ANY OTHER MATERIALS AND SERVICES PROVIDED BY NETBRAIN HEREUNDER, AND WITH RESPECT TO THE USE OF THE FOREGOING. WITHOUT LIMITING THE FOREGOING, EXCEPT AS EXPRESSLY SET FORTH HEREIN, NETBRAIN DOES NOT GUARANTEE THE ADEQUACY, ACCURACY, TIMELINESS OR COMPLETENESS OF THE PROGRAM(S), DOCUMENTATION, OR MAINTENANCE SERVICES OR THAT THEY WILL OPERATE UNINTERRUPTED OR ERROR FREE.

#### 8.2 LIMITATION OF LIABILITY.

THE FOLLOWING SECTIONS (A)-(C) SHALL NOT APPLY IF THE NETBRAIN AFFILIATE WITH WHICH THE CUSTOMER CONCLUDES THIS AGREEMENT IS NETBRAIN TECHNOLOGIES GMBH.

(a) IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF USE, BUSINESS INTERRUPTION, LOSS OF DATA, LOSS OF GOODWILL, COST TO REPLACE, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND IN CONNECTION WITH OR ARISING OUT OF THE FURNISHING, PERFORMANCE OR USE OF THE PROGRAMS, DOCUMENTATION OR ANY MATERIALS OR SERVICES PROVIDED HEREUNDER, WHETHER ALLEGED AS A BREACH OF CONTRACT OR TORTIOUS CONDUCT, INCLUDING NEGLIGENCE, EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. UNLESS A SHORTER TERM IS PROVIDED FOR UNDER APPLICABLE LAW, ANY ACTION AGAINST NETBRAIN MUST BE BROUGHT NO LATER THAN TWELVE (12) MONTHS AFTER THE CAUSE OF ACTION ACCRUES.

(b) NOTWITHSTANDING ANYTHING CONTAINED IN THIS AGREEMENT TO THE CONTRARY, NETBRAIN'S LIABILITY UNDER THIS AGREEMENT FOR DAMAGES WILL NOT EXCEED THE AGGREGATE AMOUNT PAID BY THE CUSTOMER TO NETBRAIN UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE TIME SUCH LIABILITY AROSE.

(c) NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT TO THE CONTRARY, THE LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT SHALL NOT APPLY WITH RESPECT TO CLAIMS FOR DAMAGES ARISING FROM: (i) PERSONAL INJURY OR DEATH CAUSED BY

NEGLIGENCE; (ii) FRAUD OR FRAUDULENT MISREPRESENTATION; OR (iii) ANY MATTER FOR WHICH NETBRAIN MUST INDEMNIFY CUSTOMER PURSUANT TO SECTION 7.

(d) IF THE NETBRAIN AFFILIATE WITH WHICH THE CUSTOMER CONCLUDES THIS AGREEMENT IS NETBRAIN TECHNOLOGIES GMBH, THE FOLLOWING SUPERSEDES ANY OTHER PROVISION, ESPECIALLY SECTION 8.2(a)-(c):

NETBRAIN SHALL BE LIABLE FOR THE FULL EXTENT OF DAMAGE IN THE EVENT OF INTENTIONAL BEHAVIOUR (*VORSATZ*) OR GROSS NEGLIGENCE (*GROBE FAHRLÄSSIGKEIT*) BY NETBRAIN ITSELF OR ITS VICARIOUS AGENTS. IN ADDITION, NETBRAIN SHALL BE FULLY LIABLE IN THE CASE OF NON-OBSERVANCE OF GUARANTEES (*GARANTIEN*) AND IN CASE OF OTHER DEFINITE PROMISES, IN THE CASE OF CULPABLE INJURY TO LIFE, BODY AND HEALTH AND UNDER THE GERMAN PRODUCT LIABILITY ACT (*PRODUKTHAFTUNGSGESETZ*).

IN THE CASE OF CULPABLE VIOLATION OF ESSENTIAL CONTRACTUAL OBLIGATIONS, MEANING PRINCIPAL OBLIGATIONS ENABLING THE PROPER EXECUTION OF THE CONTRACT AND UPON WHICH THE CUSTOMER THEREFORE RELIES AND MAY RELY, NETBRAIN UNDERTAKES FULL LIABILITY ON THE MERITS. THE LIABILITY SHALL IN THIS CASE BE LIMITED TO DAMAGE THAT IS TYPICAL FOR THE CONTRACT AND THAT CAN BE REASONABLY FORESEEN. MOREOVER, THE LIABILITY FOR EACH INDIVIDUAL CASE OF DAMAGE SHALL BE LIMITED TO THE AMOUNT OF THE APPLICABLE FEE.

AS FOR THE REST, ANY CLAIMS FOR DIRECT OR INDIRECT DAMAGES (ON ANY LEGAL BASIS WHATSOEVER, INCLUDING ANY COMPENSATION CLAIMS BASED ON BREACH OF ANY PRE-CONTRACTUAL DUTY, OR TORTIOUS CLAIMS) SHALL BE EXCLUDED.

THE PARTIES UNDERTAKE IN THE EVENT OF DAMAGE OCCURRING OR HAVING ALREADY OCCURRED TO MAKE ALL NECESSARY EFFORTS OR TO ARRANGE FOR SUCH EFFORTS TO BE MADE WITHOUT DELAY IN ORDER TO LIMIT THE DAMAGE AND ITS EFFECTS TO A MINIMUM.

## SECTION 9. QAPPS, DATA VIEW TEMPLATES, AND RUNBOOKS.

9.1 The Programs and Documentation, including DE, may permit Customer to query and parse information, including, but not limited to, device configurations, performance parameters, figures, statistics, and properties ("Network Data") on Customer's network by executing a "Qapp" or a "Data View Template". A Qapp, designated by the file extension .qapp, is a series of commands, statements, if-then conditionals, or any other language, and embodied in any form, including, but not limited to, programming language, simple text, instructions, functions, scripts, code, data, or other material (collectively, "Filters") which is recognized by the Programs to initiate a query, parse, and analyze Network Data; and a Data View Template, designated by the file extension .xdvt, is a container including a set of Network Data, display settings, conditionals, statements, drilldown actions, or commands, and embodied in any form of Filters which is recognized by the Programs to initiate a query, parse and analyze Network Data, and display the data in a map or other user interface. In addition, the Programs and Documentation, including DE, may permit Customer to compile, serialize, or otherwise configure routine networking procedures and operations which a customer can execute systematically through the Programs to address certain network problems ("Runbooks").

### (a) CUSTOMER QAPPS, DATA VIEW TEMPLATES, AND RUNBOOKS.

(i) A "Customer Qapp" or a "Customer Data View Templates" is a Qapp or Data View Template that is created by Customer using an original Filter, or set of Filters, developed by Customer and which provides substantial functionality not contained in, or provided by, the Programs and Documentation, or any deliverable of the Programs and Documentation, including without limitation any data, Enhancements, Updates, upgrades, modifications, Bypasses, or Fixes (each a "Program Deliverable").

(ii) A "Customer Runbook" is a Runbook that is compiled and/or configured by Customer using a set of networking procedures and operations which can be executed systematically through the Programs and which provides substantial functionality not contained in or provided by the Programs and Documentation or any Program Deliverable.

(b) Customer acknowledges that the Programs and Documentation may be configured to permit Customer to develop Qapps, Data View Templates, and Runbooks with different levels of access control (which may permit

access by individuals outside Customer's organization. Customer has sole responsibility for determining the type of access controls that will apply to the Qapps, Data View Templates, and Runbooks that Customer may develop. Subject to the provisions of this Agreement, Customer retains all right, title, and interest in Customer Qapps, Customer Data View Templates, and Customer Runbooks.

9.2 In the event Customer uploads Customer Qapps, Customer Data View Templates, and/or Customer Runbooks to NetBrain's website (currently known as the "NetBrain Exchange"), unless the NetBrain Exchange includes a facility for Customer to impose Customer's own end user license terms on recipients/users of the Customer Qapps, Customer Data View Templates, and Customer Runbooks, Customer's distribution of Qapps, Data View Templates, and Runbooks through the NetBrain Exchange shall be governed by the then-applicable NetBrain Exchange Terms of Use available at <http://qapp.netbraintech.com/>.

9.3 NetBrain makes no representations or warranties of any kind that the Qapps, Data View Templates, or Runbooks developed by Customer will operate in accordance with the anticipated parameters of any of the access controls chosen by Customer. It shall be the sole responsibility of Customer to ensure that all Customer Qapps, Customer Data View Templates, and Customer Runbooks operate as intended, and Customer hereby forever releases NetBrain, its Affiliates and their respective officers, directors, employees, agents and representatives from any and all claims, liabilities or losses of every kind or nature arising out of or related to the failure of a Customer Qapp, Customer Data View Templates, or Customer Runbook to operate as intended.

9.4 NetBrain accepts no responsibility or liability of any kind for any loss or damage caused by Customer Qapps, Customer Data View Templates, or Customer Runbooks, including, but not limited to, direct, indirect, special, incidental, punitive or consequential damages, loss of profits, loss of use, business interruption, loss of data, loss of goodwill, cost to recover, or infringement of a third party's intellectual property rights.

9.5 NETBRAIN QAPPS, DATA VIEW TEMPLATES, and RUNBOOKS. NetBrain may also generate and distribute Qapps ("NetBrain Qapps"), Data View Templates ("NetBrain Data View Templates"), and Runbooks ("NetBrain Runbooks"). NetBrain Qapps, NetBrain Data View Templates, and NetBrain Runbooks include, but are not limited to, any Qapp, Data View Templates, or Runbook which: (i) has been made generally available by NetBrain through the Programs and Documentation, an Evaluation License, DE, any Program Deliverable or any other distribution method, or (ii) has been customized for Customer by NetBrain, in part or in whole. NetBrain retains all right, title, and interest in all NetBrain Qapps, NetBrain Data View Templates, and NetBrain Runbooks.

## SECTION 10. NETBRAIN CHANGE MANAGEMENT.

10.1 The Programs and Documentation enable a Customer to push automatic changes to a Customer network by using Change Management.

10.2 DISCLAIMER OF NETWORK CHANGES. The nature of Change Management is such that the Programs may make substantial changes that have the potential to negatively impact a Customer network. Any network changes derived from Change Management require the authorization of Customer, and therefore Customer understands that any changes made to a Customer network via Change Management are the sole responsibility of Customer, regardless of any contrary direction provided by NetBrain, or the Programs and Documentation. NetBrain makes no warranties, either express or implied, with respect to the use of Change Management, including efficacy of changes defined through Change Management. Customer will hold harmless and indemnify NetBrain, its Affiliates and their respective officers, directors, employees, agents and representatives from and against any liability, loss, costs, expenses, or damages caused by or resulting from Customer's use of Change Management on a network sustained by Customer, its Affiliates, or any third party. In the event of any failure of Customer's network resulting from Change Management, NetBrain will endeavor to assist Customer in rectifying the problem pursuant to Section 3 of the Agreement, provided that Customer is currently subscribed to Maintenance Services with NetBrain.

## SECTION 11. MISCELLANEOUS.

### 11.1 CONFIDENTIAL INFORMATION.

(a) By virtue of this Agreement, the parties may have access to information that is confidential to one another ("Confidential Information"). Confidential Information will include: all technical and business information, including without limitation all Programs and Documentation provided by NetBrain, planning, pricing and offerings for products and services; other product information including but not limited to configuration and packaging details; terms and pricing under this Agreement; all information clearly identified or marked as confidential; all information identified elsewhere in this Agreement as Confidential Information; and all information a reasonable

person would consider to be confidential, taking into account the circumstances surrounding its disclosure. In addition, any Third Party Software shall be included as Confidential Information, whether or not designated as Confidential Information. A party's Confidential Information will not include information that: (i) is or becomes generally known to the public through no act or omission of the receiving party; (ii) was in the receiving party's lawful possession prior to the disclosure and had not been obtained by the other receiving party either directly or indirectly from the disclosing party; (iii) is lawfully disclosed to the receiving party by a third party without restriction on disclosure; or (iv) is independently developed by the receiving party without use of or reference to the disclosing party's Confidential Information.

(b) The parties agree to hold each other's Confidential Information in confidence during the term of this Agreement and for a period of three (3) years after termination of this Agreement. Notwithstanding the foregoing, Customer will keep the Programs and Documentation confidential indefinitely after termination of this Agreement. The parties agree, unless required by law, not to make each other's Confidential Information available in any form to any third party for any purpose except to the extent necessary to exercise its rights under this Agreement, and to treat Confidential Information of the other party with the same degree of care with which it would treat its own confidential information of a like nature, and in no case with less than a reasonable degree of care.

(c) It shall not be a breach of this section if Confidential Information is disclosed pursuant to subpoena or other compulsory judicial or administrative process, provided the party served with such process promptly notifies the other party and provides reasonable assistance so that the other party may seek a protective order against public disclosure (except to the extent providing such notification is legally prohibited).

(d) Each party agrees to limit the disclosure of Confidential Information to those of its employees and agents who have a need to know such Confidential Information, and each party agrees to take all reasonable steps to ensure that Confidential Information is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement and shall be liable for any such disclosure or distribution.

(e) Each party agrees not to use the other party's Confidential Information for any purpose other than the performance of this Agreement. Each party shall not disclose the terms of this Agreement or the ongoing business relationship initiated by this Agreement except as required by law or governmental regulation without the other party's prior written consent, except that each party may disclose the terms of this Agreement on a confidential basis to its accountants, attorneys, parent organizations, Affiliates and financial advisors and lenders.

11.2 EXPORT REGULATIONS. Customer and NetBrain acknowledge that the Programs, Document(s) and all related technical information, documents, and materials may be subject to export controls under applicable law, including the U.S. Export Administration Regulations and, to the extent applicable, Customer and NetBrain shall: (a) comply with all requirements set forth in such laws and regulations; and (b) cooperate fully with each other in any official or unofficial audit or inspection that relates to such export requirements. Without limiting the generality of the foregoing, Customer agrees that the Program is prohibited for export or re-export to any person or entity on the U.S. Department of Commerce Denied Persons List or on the U.S. Department of Treasury's List of Specially Designated Nationals, Specially Designated Narcotics Traffickers or Specially Designated Terrorists, as such is changed from time to time.

11.3 PUBLICITY. Notwithstanding the provisions of Section 11.1(e), Customer permits NetBrain to use Customer's name, trademark, logo, and/or likeness ("Customer Trademark") for marketing purposes, including, but not limited to use in NetBrain marketing materials or on NetBrain's website. NetBrain agrees not to use the Customer Trademark in any offensive manner or any manner likely to confuse, mislead, or deceive the public, or which is adverse to the best interests of Customer. NetBrain understands and agrees that the Customer Trademark is proprietary to Customer, and Customer retains all rights, title, and interest thereto. In addition, for marketing purposes only, Customer permits NetBrain to publish any statements or testimonies made by a user of the Programs, provided that such publication shall be limited to NetBrain's website.

11.4 NON-SOLICITATION. During the term of this Agreement and for a period of one (1) year following termination, Customer shall not directly or indirectly solicit, encourage or attempt to hire or engage any employee of NetBrain to become employed by Customer, or to become engaged as a contractor or subcontractor except through NetBrain, without NetBrain's prior written consent except that Customer shall not be precluded from hiring any employee who (a) initiates discussions regarding such employment without any direct or indirect solicitation by Customer; (b) responds to any public advertisement placed by Customer; or (c) has been terminated by NetBrain prior to commencement of employment discussions between Customer and such employee.

11.5 NOTICES. All notices, demands, or other communications herein provided to be given or that may be given by any party to the other shall be deemed to have been duly given when made in writing and delivered in person,

or upon receipt, if (a) deposited in the postal system/mail, postage prepaid, certified or registered mail, return receipt requested, or (b) sent by reputable overnight courier addressed to the relevant parties at the address set forth at the beginning of this Agreement.

11.6 AMENDMENTS. All amendments, modifications, or supplements to this Agreement must be in writing and signed by the authorized representatives of both parties, and all such changes shall reference this Agreement and identify the specific articles or sections of this Agreement to be amended, modified, or supplemented.

11.7 ASSIGNMENT. Neither party may assign or transfer (directly, by operation of law, Change of Control, or otherwise) this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other party, not to be unreasonably withheld or delayed, except to the extent any proposed assignment by Customer is to an existing client of NetBrain, in which case NetBrain may withhold consent in its sole discretion. Notwithstanding the foregoing, NetBrain may, without Customer's consent assign this Agreement or any rights granted herein in whole or in part in connection with any reorganization, merger, acquisition or divestiture of NetBrain, a sale of all or substantially all of NetBrain's assets or stock, or any similar business transaction. Subject to the foregoing, this Agreement is binding upon, inures to the benefit of, and is enforceable by the parties and their respective successors and assigns.

11.8 NON-WAIVER. Any failure of either party to insist upon or enforce performance by the other party of any of the provisions of this Agreement or to exercise any rights or remedies under this Agreement will not be interpreted or construed as a waiver or relinquishment of such party's right to assert or rely upon such provision, right or remedy in that or any other instance.

11.9 ENTIRE AGREEMENT. This Agreement and all of its exhibits referenced herein constitute the entire agreement, and supersede any and all prior agreements, including any discussions, whether written or oral, between NetBrain and Customer relating to the Programs and Documentation, services and other items subject to this Agreement. Any terms and conditions contained in any Order, request for proposal, request for information or other documents submitted by Customer in connection with this Agreement shall be of no force and effect, and NetBrain's subsequent provision of the Programs and Documentation shall not constitute acceptance of such terms. By entering into this Agreement, Customer acknowledges and agrees that it shall receive only the Programs, Maintenance Services, and any other services (as applicable) contracted for under this Agreement or any Order in connection herewith and available in the most current released versions of the Programs and not any other product, feature, or functionality that the parties have discussed or that may appear in NetBrain public documents.

11.10 GOVERNING LAW, JURISDICTION AND MEDIATION. The rights and obligations of the parties under this Agreement shall not be governed by the 1980 UN Convention on Contracts for the International Sale of Goods, but instead shall be governed by and construed under the laws of either (a) The Commonwealth of Massachusetts, without reference to its conflict of laws principles where the NetBrain contracting entity is NetBrain Technologies Inc., or (b) in all other cases, the country in which the relevant NetBrain contracting entity is incorporated. In the event of any controversy, claim or dispute between the parties arising out of or relating to this Agreement, such controversy, claim or dispute may be tried solely in either (i) a state or federal court in the Commonwealth of Massachusetts, where the NetBrain contracting entity is NetBrain Technologies Inc., or (ii), in all other cases, the courts of the country in which the relevant NetBrain contracting entity is incorporated, and the parties hereby irrevocably consent to the jurisdiction, forum and venue of such courts. In the event of any dispute arising out of this Agreement, the parties agree to escalate the dispute to members of their respective senior management team, and such personnel shall negotiate in good faith to attempt to resolve dispute. In the event the parties' senior managers are unable to resolve the dispute, except as otherwise provided in this Agreement, no civil action with respect to any dispute, claim or controversy arising out of or in connection with this Agreement may be commenced until the matter has been submitted for non-binding mediation to a nationally recognized mediator or mediation service (the "Mediator"). Where the NetBrain contracting entity is NetBrain Technologies, Inc., the default Mediator shall be JAMS or its successor. Either party may commence mediation by providing a written request for mediation to the other party and to the Mediator, setting forth the subject of the dispute and the relief requested. The parties will cooperate with the Mediator and each other in selecting an individual mediator from Mediator's panel of neutrals, and in scheduling the mediation proceedings. The parties agree to participate in the mediation in good faith, and except as to attorneys' fees awarded by the arbitrators, the parties agree to share equally its costs. All conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the individual mediator and any employees of the Mediator, are confidential, privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding between the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Notwithstanding the foregoing, either party may seek equitable relief from a court of competent jurisdiction prior to the mediation in order to protect its intellectual property rights and Confidential Information. Except for such an action to obtain equitable

relief, neither party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, or forty five (45) days after the date of filing the written request for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so agree. In any suit or proceeding between the parties, arising out of or involving this Agreement, the prevailing party shall be entitled to recover its costs and expenses related to such suit or proceeding, including reasonable attorney's fees.

11.11 LANGUAGE. This Agreement is in the English language only, which language shall be controlling in all respects, and all versions hereof in any other language shall not be binding on the parties hereto. All communications and notices to be made or given pursuant to this Agreement shall be in the English language.

11.12 FORCE MAJEURE. Neither party will be liable for, or be considered to be in breach of or default under this Agreement as a result of any cause or condition beyond such party's reasonable control, including, but not limited to, acts of civil or military authority, national emergencies, third party labor difficulties, fire, flood or other catastrophe, acts of God, terrorism, insurrection, war, riots, failure of transportation or power supply, communications outage, Internet outage, cyber-attack, or performance (or lack thereof) of third parties.

11.13 SEVERABILITY. In the event that any provision of this Agreement (or any portion hereof) is determined by a court of competent jurisdiction to be illegal, invalid, or otherwise unenforceable, such provision (or part thereof) will be enforced to the extent possible consistent with the stated intention of the parties, or, if incapable of such enforcement, will be deemed to be severed and deleted from this Agreement, while the remainder of this Agreement will continue in full force and remain in effect according to its stated terms and conditions.

11.14 RELATIONSHIP OF THE PARTIES. This Agreement shall not be construed as creating an agency, partnership, joint venture or any other form of association, for tax purposes or otherwise, between the parties; the parties shall at all times be and remain independent contractors. Except as expressly agreed by the parties in writing, neither party shall have any right or authority, express or implied, to assume or create any obligation of any kind, or to make any representation or warranty, on behalf of the other party or to bind the other party in any respect whatsoever.

11.15 TITLES AND HEADINGS/CLERICAL ERRORS. The title and section headings of this Agreement are inserted for convenience only and are not intended to affect the meaning or interpretation of this Agreement. Clerical errors are subject to correction by mutual agreement of the parties.

11.16 COUNTERPARTS. Where the parties prefer to sign this Agreement, this Agreement may be signed in counterparts, with the same effect as if the signature on each counterpart were upon the same instrument.

11.17 NO RULE OF STRICT CONSTRUCTION. The language used in this Agreement will be deemed to be the language jointly chosen by NetBrain and Customer to express their mutual intent, and no rule of strict construction will be applied against either party. No provision of this Agreement will be interpreted in favor of, or against, either of the parties hereto by reason of such party having drafted such provision or this Agreement.

11.18 SURVIVAL. All provisions which by their nature and context impose continuing obligations on the parties shall survive any termination of this Agreement, including but not limited to, Customer's unsatisfied payment obligations.

## **EXHIBIT B**

### **ESCALATION PROCEDURES AND PROCESSES FOR PROGRAMS ERROR RESOLUTION**

#### **Classification of Errors**

All Errors reported by Customer to NetBrain shall be assigned a Severity Level by NetBrain. The point of contact throughout this initial Error reporting procedure shall be the applicable NetBrain support representative available to Customer under the terms of this Agreement. Reported Errors shall be classified as follows:

**Severity Level 1:** Severity Level 1 implies that the Programs is/are not functioning as a whole or in material part.

#### **Examples:**

Both workstation software and server software is down and could not restart.

**Severity Level 2:** Severity Level 2 implies that the Programs is/are running but that Customer is unable to use a portion of the Programs that is critical to Customer's operations, and no Bypass currently exists.

Examples:

Production system is generating data corruption with no Bypass.

Major functional component is unavailable with no Bypass.

**Severity Level 3:** Severity Level 3 implies that the Programs is/are operating close to normal, but there is a material Error for which an operational Bypass currently exists.

**Severity Level 4:** Severity Level 4 includes purely cosmetic Errors and Documentation anomalies.

**Out-of-Scope:** A reported problem is out-of-scope when it is determined not to be related to the Programs and is beyond the bounds of NetBrain's responsibility. Examples of such unrelated problems include, but are not limited to, Customer hosted applications or programs, Customer hardware and cabling, power or environmental conditions, and human error.

## **RESOLUTION OF ERRORS**

### **Severity Level 1**

**Error Resolution:** Immediate steps shall be taken toward solving the Error. If required, NetBrain staff shall be moved off of lower Severity Level Errors to service Severity Level 1 Errors.

**Resource Commitment:** When a Severity Level 1 Error is reported, NetBrain shall assign resources required to address the Error. If system access is required, Customer shall provide a contact available to NetBrain and access to its system and Programs for the duration of the Error correction procedures.

**Resolution Plan:** Within forty-eight (48) hours of receipt of the Error Report, NetBrain will begin development of a resolution plan designed to address the Error.

**Escalation and Status Thresholds:** When a Severity Level 1 Error Report is opened, the following escalation and status procedures shall be followed.

#### **Hour 1–Hour 24**

1. The Error shall be resolved by NetBrain first line support; or
2. The Error will be referred to the maintenance engineering group. All log files and a description of the work done by NetBrain will be transferred to this group. The report will receive an Error Report number which will be entered into the case manager. The error will be passed to the maintenance engineering group via e-mail.
3. The Customer will be notified of the status of the Error.

#### **Hour 24**

1. The maintenance engineering point of contact will resolve the Error; or
2. It will be decided that more resources are required to work on the Error.
3. The Customer will be notified of the status of the Error.

#### **Hour 48+**

1. Resolution Plan completed;
2. The maintenance engineering point of contact will resolve the Error; or
3. The maintenance engineer will continue working to resolve the Error.
4. The Customer will be notified of the status at this stage.



## **Severity Level 2**

**Error Resolution:** Severity Level 2 Errors will be analyzed in the order that they are reported. Severity Level 1 Errors will take priority over Severity Level 2 Errors.

**Resource Commitment:** Appropriate technical resources will be assigned to Severity Level 2 issues as long as Severity Level 1 Errors are not open.

**Resolution Plan:** Within seventy-two (72) hours of receipt of the Error Report, NetBrain will begin development of a resolution plan designed to address the Error.

**Escalation and Status Thresholds:** When a Severity Level 2 Error Report is opened, the following escalation and status procedures will be followed.

### **Hour 1 – Hour 36**

1. The Error shall be resolved by NetBrain; or
2. The maintenance point of contact person will be contacted. All log files and a description of the work done by NetBrain will be transferred to this group. An Error Report number will be assigned and entered in the trouble tracking system.
3. The Customer will be notified of the status at this stage.

### **Hour 36 – Hour 72+**

1. Resolution Plan completed;
2. The maintenance engineering point of contact will resolve the Error; or
3. The maintenance engineer will continue working to resolve the Error.
4. The Customer will be notified of the status at this stage.

## **Severity Level 3**

**Error Resolution:** Severity Level 3 Errors shall be researched after Severity Level 1 and Severity Level 2 Errors. The majority of the Severity Level 3 Errors shall be scheduled for correction and be resolved as part of scheduled future Update.

**Resource Commitment:** The majority of the Severity Level 3 Fixes shall be included in a future Update.

**Completion Goal:** The completion goal and objective shall be to correct Errors in a future Update.

**Escalation and Status Thresholds:** The status of Severity Level 3 Errors shall be available on demand. Upon Customer's request, a quarterly report will be distributed that will reference any uncorrected Errors that are over ninety (90) days old.

## **Severity Level 4**

**Error Resolution:** Severity Level 4 Errors shall be addressed at NetBrain's discretion after Severity Level 1, Severity Level 2, and Severity Level 3 Errors are corrected. Severity Level 4 Errors shall be reviewed by NetBrain's maintenance engineering team for correction in a future release of the Programs.

**Escalation and Status Thresholds:** The status of Severity Level 4 Errors shall be available on request.

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