

## END USER LICENSE AGREEMENT - SUBSCRIPTION

Licensors: NetBrain

(Last Updated: September 16, 2019)

This End User License Agreement - Subscription (“**Agreement**”) is incorporated by reference into each order form and statement of work, and to any mutually agreed upon, and executed or accepted (as applicable) purchase order or other ordering document (“**Order(s)**”), by NetBrain (defined below) and the Customer or its Affiliate (defined below) identified in the Order. Each such Order, together with the terms and conditions of this Agreement, shall constitute a separate agreement. The NetBrain entity specified in the applicable Order shall constitute “**NetBrain**” for purposes of such Order and this Agreement, and Customer or the Customer’s Affiliate entering into the Order shall constitute “**Customer**” hereunder for purposes of such Order and this Agreement. 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. NetBrain shall provide Customer with the Programs and Services (collectively the “**Product**”) specified in an Order, at the agreed-upon fees specified in the Order, and subject to the general terms and conditions set forth below (“**Terms and Conditions**”). The Terms and Conditions shall prevail over conflicting provisions of any Order unless the Order specifically identifies the applicable provisions of the Terms and Conditions and provides that the Order amends such provisions to the extent provided in the Order and that Order is signed by an authorized officer of NetBrain. Some aspects of the Programs and Services (each as defined below) may be subject to additional terms and conditions (“**Additional Terms**”) required by NetBrain (e.g., website and cloud services terms of use, and end user agreements), which shall supplement the Terms and Conditions.

**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, accessing or otherwise using, for any purpose, any of the Programs (defined below) 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; (2) do not download, install, copy, access or use the Programs; and (3) Delete any Program 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 the Product (defined above).**

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

### 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 Management**” shall mean the add-on module to the Programs that enables engineers to define network changes through one or more configuration templates. Those network changes can be applied to multiple devices/interfaces and executed/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.

- 1.4 **“Concurrent Seat(s)”** is a license allowing Customer to authorize an employee or contractor to access the Programs, but the total number of concurrent users operating the Programs at any single moment may not exceed the total number of Concurrent Seats that have been authorized under this Agreement.
- 1.5 **“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.
- 1.6 **“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.
- 1.7 **“Error(s)”** shall mean a reproducible failure of the Programs to conform to the Documentation for such Programs.
- 1.8 **“Error Report”** shall mean the document generated by NetBrain, pursuant to Section 3 hereof, each time that Customer reports an Error.
- 1.9 **“Fix(es)”** shall mean the document or materials to be created by NetBrain to correct any Error(s).
- 1.10 **“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.
- 1.11 **“License(s)”** shall mean the subscription license granted by NetBrain to Customer to use the Programs in accordance with the terms and conditions of this Agreement.
- 1.12 **“Managed Elements”** shall mean any combination of Nodes, Ports and/or Processors. **“Nodes”** means any number of the following: layer 3 switches, layer 2 switches, firewalls, routers, load balancers, wireless access points, wireless access controller, and WAN optimizers, including, for the avoidance of doubt, any Nodes used as part of redundant standby network. The node can be a physical entity or a virtual entity. **“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. **“Processor”** shall mean a single, physical chip that houses a central processing unit that can execute computer programs.
- 1.13 **“Object Code”** shall mean the binary machine readable version of the Programs.
- 1.14 **“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 and may also include any Third-Party Software and related documentation.
- 1.15 **“Site”** shall mean a Customer computer facility located in one specific geographic location.
- 1.16 **“Subscription Fee”** shall mean the fees, which include License(s) and Support Services, payable by Customer for a specified period pursuant to an applicable Order.
- 1.17 **“Support Services”** shall mean the services defined in Section 3 to be provided under this Agreement.
- 1.18 **“Third Party Software”** means software of companies other than NetBrain or a NetBrain Affiliate that NetBrain has sublicensed to Customer under this Agreement.
- 1.19 **“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.

1.20 **“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 provide 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 Subscription Fees (as defined above), NetBrain hereby grants Customer a limited, revocable, nonexclusive, non-transferable, non-sublicensable (except as otherwise provided herein) license, for the Subscription Period (defined below) set forth in the Order, as may be renewed pursuant to this Agreement.

(a) Customer may 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 as set forth on any order form 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, either in writing or via fulfillment of the Order, as applicable. Any such Order, once executed or accepted (as applicable) by NetBrain, is thereby incorporated by reference and shall become part of this Agreement.

(c) Customer may 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) Quality Assurance. Upon request, and subject to NetBrain’s written approval, in its sole discretion, Customer may receive an additional copy 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 specified number of Concurrent Seats and Managed Elements as determined by NetBrain in an Order.

(e) All rights not expressly granted are reserved by NetBrain.

2.3 Limited-Use Evaluation, Education/Demonstration License. For an additional cost (as applicable), NetBrain shall provide a limited, non-exclusive license, during the Subscription Period specified in an applicable Order, to install and use the Programs and Documentation in a non-production environment solely for: (i) the 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 of this Agreement, provided, however, notwithstanding any other provision of this Agreement, NetBrain offers no representations, warranties or indemnities of any kind with respect to any Demonstration License.

2.4 **ACCEPTANCE.** The Product, including without limitation applicable Programs, Services and Documentation, shall be deemed accepted by Customer upon delivery to Customer. Customer agrees that its decision to enter into this Agreement and to enter into any Order hereunder is based solely upon the availability of the features and functionality in the currently available 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 or accepted (as applicable) by both parties.

2.5 RESTRICTIONS. Customer shall access and 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 10.5 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 2.5.

2.6 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, applicable to it in their performance of this Agreement.

2.7 PROPRIETARY RIGHTS. The Product, including Programs (including all Bypasses, Fixes, Updates, Enhancements and Upgrades), Services and Documentation contain valuable Intellectual Property Rights 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 Services’ deliverables, Programs, Documentation, NetBrain Qapps, NetBrain Data View Templates, NetBrain Runbooks, or any NetBrain Intellectual Property Rights 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 any and all enhancements and modifications made to the Services’ deliverables, Programs, Documentation or other offerings of NetBrain shall continue to be owned solely and exclusively by NetBrain.

2.8 AUDIT. During the Subscription Period and for a period of two (2) years 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 deemed Confidential Information subject to the provisions of Section 9, 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/or 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.

2.9 USAGE STATISTICS. In accordance with the most current version of NetBrain’s Privacy Policy (located at: <https://www.netbraintech.com/privacy-policy/>), and 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, applicable system and resource versions, number of active users, and success rate of certain key features including updates. In addition, NetBrain reserves the right to collect other usage-related information from time to time, which will 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. By Customer’s acceptance of the terms of this Agreement and/or use of the Programs, Customer authorizes the

collection, use and disclosure of this information for the purposes provided for in this Agreement and/or the Privacy Policy. For the avoidance of doubt, Customer may disable certain information collection at any time, however, doing so may, but not exhaustively, interrupt the Programs' operation or disable certain functionality.

2.10 **OPEN SOURCE SOFTWARE NOTICE.** The NetBrain Programs contain, or rely upon, various open source software components, originating from the open source software communities, which are subject to additional restrictions. Any open source software components in the Programs are distributed by NetBrain in accordance with the applicable open source component's license terms and conditions. In the event of a conflict between an applicable open source component's license and the other portions of this Agreement, the open source component's license will take precedence (but solely with respect to the open source component(s) to which the license relates). By installing or using any of the Programs provided by NetBrain, Customer agrees to be bound by the terms and conditions of all applicable open source software licenses. If Customer does not agree to be bound to such terms and conditions, Customer must immediately discontinue use of the Programs and remove all copies from its system. Where the specific license terms of the open source software component entitle Customer to receive a copy of the source code, that source code shall be made available upon Customer's written request made to NetBrain.

### SECTION 3. SUPPORT SERVICES.

3.1 Provided that Customer has paid NetBrain the applicable Subscription Fee, NetBrain will provide Customer with the services described in this Section (collectively, "**Support Services**"):

(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, an Error Report shall be opened and the Error shall be resolved in accordance with NetBrain's standard procedures and processes for Error resolution, as may be updated from time to time. 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, on a when and if available basis, provide Customer such Enhancements as it provides to other customers for the Programs without additional charge.

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

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

be uninterrupted or error free. For the avoidance of doubt, this Section 3.2 shall not be construed as a limitation of NetBrain's general liability under Section 8.2.

### 3.3 LIMITATIONS ON SUPPORT SERVICES.

- (a) NetBrain shall not maintain or support any Third Party Software.
- (b) NetBrain shall provide Support 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 Support**"), are billable to Customer at rates to be specified in an Order and with a one-hour minimum per call.
- (d) Any travel and expenses incurred in conjunction with Out-of-Scope Support 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 ("**Training Services**") 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 Order or, if none is provided, the date of delivery of the Programs and Documentation. If the 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 consulting services to aid in the setup and customization of Programs, such services to be purchased pursuant to a statement of work in accordance with NetBrain's Professional Services Terms and Conditions available at [NetBrain Professional Services Terms & Conditions](#). NetBrain has no obligation to provide any such consulting services to Customer unless agreed by both parties in an applicable Order.

## SECTION 4. COMPENSATION & SUBSCRIPTION PERIOD

4.1 SUBSCRIPTION PERIOD AND FEE. In consideration of the License grant and provision of Support Services, Customer will pay NetBrain the Subscription Fee for the period initially specified in an Order, accruing from the date of delivery or access to the Programs and Documentation (the "**Initial Subscription Period**"). The subscription shall automatically renew for successive periods equal to that of the Initial Subscription Period (each a "**Renewal Period**") unless otherwise terminated by either party upon written notice to the other party at least sixty (60) days prior to the expiration date of the then-current Subscription Period. No subsequent Order shall be required for any such renewal. After the end of the Initial Subscription Period and any Renewal Period thereafter, NetBrain may increase the Subscription Fee for subsequent Renewal Periods by providing Customer with no less than thirty (30) days notice before the expiration date of the Initial Subscription Period or the then-current Renewal Period. All Subscription Fees are non-refundable unless otherwise stated herein.

### 4.2 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 pursuant to an applicable Order. Customer shall pay all amounts due under this Agreement to NetBrain at the address set forth on the Order or such other location as NetBrain designates in writing. NetBrain will not accept or process credit card payments except in its sole discretion.
- (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 incurred by NetBrain. In addition, in the event Customer fails to fulfill its payment obligations hereunder, NetBrain reserves the right to suspend the Licenses with or 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 Product, in whole or in part, 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 License hereunder, without notice or liability, due to non-payment by the Reseller. Resellers shall be bound by the terms and conditions of this Agreement and the applicable Reseller Agreement by and between such Reseller and NetBrain.

## SECTION 5. SUBSCRIPTION PERIOD AND TERMINATION.

5.1 The License grant shall remain in effect until the earlier of: (i) the expiration date of the Initial Subscription Period or the then-current Renewal Period; or (ii) termination of this Agreement in accordance with the provisions herein (the "**Subscription Period**").

5.2 **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, then the non-breaching party may immediately terminate this Agreement.

5.3 **EFFECT OF TERMINATION & POST TERMINATION.** Upon expiration or termination of this Agreement or an Order for any reason: (i) any amounts owed to NetBrain under this Agreement prior to such expiration or termination shall be immediately due and payable; (ii) all License rights granted in this Agreement shall immediately terminate; (iii) Customer, its Affiliates, and any third party agents must promptly discontinue use of the Programs and Documentation, and erase all copies thereof from their computers and systems; (iv) Customer, its Affiliates, and any third party agents will destroy all copies of the Programs, Documentation and any NetBrain Confidential Information in their possession or control, and certify in writing to NetBrain that each has fully complied with these requirements; and (v) if this Agreement is terminated due to Customer's uncured breach or cancelled early by Customer for any reason, Customer shall pay NetBrain, as a cancellation fee and not as a penalty, an amount equal to the sum of any unpaid fees for the remainder of the Initial Subscription Period or the then-current Renewal Period (as applicable) for any and all so terminated Order(s).

## 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 (or, 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 Support Services, including any Bypasses, Fixes, Updates, Enhancements, and Upgrades, which are warranted separately under Section 3.2. If the Programs fail to comply with the warranty set forth in this Section 6, NetBrain will use reasonable commercial efforts to correct the noncompliance, provided that Customer notifies NetBrain of the noncompliance of the Programs in writing 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 Subscription 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.

6.2 **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.

## SECTION 7. INDEMNIFICATION.

7.1 **CUSTOMER'S INDEMNIFICATION OBLIGATIONS.** Customer agrees, at its own expense, to indemnify, hold harmless, and defend NetBrain, its licensors, and its resellers from and against any and all third party claims, demands, litigation, liabilities or actions (collectively "**Claims**"), and all expenses, costs (including reasonable attorney's fees), judgments, damages and other liabilities resulting from such Claims, that arise or result from Customer's: (i) use or misuse of the Product in violation of this Agreement; (ii) violation of any material terms herein; and (iii) violation of any applicable law or regulation.

7.2 **NETBRAIN'S INDEMNIFICATION OBLIGATIONS.** 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 brought against Customer alleging that the Programs, as used within the scope of this Agreement, infringe any valid and enforceable patent of the United States or European Union. NetBrain shall be released from the foregoing obligation unless Customer provides NetBrain with: (i) prompt written notice (no later than ninety (90) days) after Customer first becomes aware of such a Claim; (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. Without limiting the foregoing, NetBrain has the right, in its sole discretion, to: (a) procure for Customer the right to use the allegedly infringing Programs as provided herein; (b) replace the allegedly infringing Programs with non-infringing, functionally equivalent products; (c) suitably modify the allegedly infringing Program to eliminate the Claims of infringement, with no material loss of functionality; or (d) in the event NetBrain determines in its sole judgment that (a), (b) and/or (c) are not possible or commercially reasonable, NetBrain may terminate the License and accept return of the infringing Programs and refund to Customer the Subscription Fee paid therefor, reduced by an amount equal to the depreciated portion of such Subscription Fee calculated on a straight line basis based on the length of the Subscription Period hereunder. Notwithstanding the foregoing, NetBrain assumes no liability for infringement Claims arising from: (i) combination of the Programs with any other products not provided by NetBrain; (ii) any modifications to the Programs by any person other than NetBrain or authorized by NetBrain; (iii) any continued use of the version of the Programs in Customer's possession following notice by NetBrain that such Programs are the subject of a third party Claim of infringement; (iv) use of any version of the Programs other than the most recent version that NetBrain has made available to Customer or without additional costs to Customer if the infringement would have been avoided by use of the most recent version; or (v) the Customer's specific business use of the Product which is the basis of the Claim, where the Product used for a different business use would not be the basis of the Claim.

7.3 **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 TO 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 SUPPORT SERVICES OR THAT THEY WILL OPERATE UNINTERRUPTED OR ERROR FREE.

## 8.2 LIMITATION OF LIABILITY.

THE FOLLOWING SECTIONS (a) AND (b) SHALL NOT APPLY IF THE NETBRAIN AFFILIATE WITH WHICH THE CUSTOMER CONTRACTS UNDER THIS AGREEMENT IS NETBRAIN TECHNOLOGIES GMBH (SEE ATTACHMENT A), OR TO ANY BREACH OF A PARTY'S CONFIDENTIALITY OR INDEMNIFICATION OBLIGATIONS HEREUNDER, OR TO CUSTOMER'S INFRINGEMENT OF NETBRAIN'S INTELLECTUAL PROPERTY RIGHTS:

(a) IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY DIRECT OR INDIRECT 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.

(b) NOTWITHSTANDING ANYTHING CONTAINED IN THIS AGREEMENT TO THE CONTRARY, NETBRAIN'S MONETARY LIABILITY UNDER THIS AGREEMENT SHALL NOT EXCEED THE LESSER OF ONE MILLION U.S. DOLLARS AND 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.

## SECTION 9 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 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 Subscription Period of this Agreement and for a period of three (3) years after termination or expiration of this Agreement. Notwithstanding the foregoing, Customer will keep the Programs and Documentation confidential indefinitely after termination or expiration 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, and in the event such disclosure is necessary, then only the minimum required information may be disclosed.

(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.

## SECTION 10. MISCELLANEOUS.

10.1 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 therefore, 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 Programs are 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.

10.2 PUBLICITY. Notwithstanding the confidentiality provisions of this Agreement, Customer permits NetBrain to use Customer's name, trademark, logo, and/or likeness ("**Customer Trademark**") for marketing purposes, including, but not limited to customer reference, joint press release, customer case study, speaking to press and analysts, and other mutually agreed upon joint marketing activities, for 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 and otherwise exploit any statements or testimonies made by the Customer's user(s) of the Programs.

10.3 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 part(y)(ies) at the address set forth at the beginning of this Agreement.

10.4 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.

10.5 ASSIGNMENT. Customer may not 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 NetBrain. "**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.

10.6 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.

10.7 ENTIRE AGREEMENT. This Agreement and any of its exhibits and attachments 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, Support Services and other items subject to this Agreement. Any and all terms and conditions contained in any purchase 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, Support 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. For the avoidance of doubt, by entering into this Agreement, Customer acknowledges and agrees that any and all prior agreements between NetBrain and Customer (i.e. perpetual license grant agreements) are null and void.

10.8 GOVERNING LAW, JURISDICTION, MEDIATION AND ARBITRATION/CLASS WAIVER.

(a) 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 procedural and substantive laws of the State of Delaware, USA without reference to its conflict of laws principles. In the event of any controversy, claim or dispute between the parties arising out of or relating to this Agreement ("**Dispute**") not required to be resolved by mediation or arbitration hereunder, the parties hereto agree that the state and federal courts located solely in Wilmington, Delaware, USA shall have exclusive jurisdiction over the matter (and each party hereby agrees to submit to the exclusive jurisdiction of those courts), excepting that any court with jurisdiction over the parties shall have authority to enforce an arbitration decision.

(b) 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 the Dispute.

(c) In the event the parties' senior managers are unable to resolve the Dispute, except as otherwise provided in this Agreement, no civil action or arbitration with respect to any Dispute may be commenced until the matter has been submitted for non-binding mediation in Wilmington, Delaware, USA to a single mediator through the American Arbitration Association and conducted in accordance with its Commercial Mediation Procedures ("**Mediator**"). The parties agree to participate in the mediation in good faith, to share equally the Mediator fees and costs, and to otherwise bear their own respective attorneys' fees and costs incurred in connection with any mediation hereunder. 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, shall be governed by Rule 408 of the Federal Rules of Evidence.

(d) Notwithstanding the foregoing, either party may seek equitable relief from a court of competent jurisdiction in Wilmington, Delaware, USA at any time in order to protect its Intellectual Property Rights and Confidential Information. Except for such an action to obtain equitable relief, neither party may commence an arbitration or 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.

(e) Thereafter, and subject to the equitable relief exception detailed above, the parties agree to resolve all Disputes solely by binding arbitration in Wilmington, Delaware, USA before a single arbitrator through the American Arbitration Association and in conducted accordance with its Commercial Arbitration Rules ("**Arbitrator**"), on an individual basis only (i.e., neither party may bring a claim in arbitration or in court as a class action or in a representative capacity, nor participate as a member in any such class or representative action). This Section is a written agreement to arbitrate governed by the Federal Arbitration Act. Each party shall pay their respective attorneys' fees. The parties agree that any dispute, mediation, and arbitration (including the materials, proceedings, and existence thereof) is Confidential Information.

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.

10.9 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.

10.10 FORCE MAJEURE. Except for the parties' confidentiality obligations and any infringement of NetBrain's Intellectual Property Rights attributable to Customer, its Affiliates, or its or their employees, contractors or agents, 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.

10.11 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.

10.12 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.

10.13 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.

10.14 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.

10.15 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.

10.16 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.

## ATTACHMENT A: SUPPLEMENTARY TERMS AND CONDITIONS

### 1. GERMAN SPECIFIC LICENSE GRANT

GRANT – ADDITIONAL REQUIREMENTS (GERMANY). If the NetBrain Affiliate with which the Customer concludes this Agreement is NetBrain Technologies GmbH, nothing in Section 2 of the Agreement 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 (if the Order includes Software installs) and Documentation, in writing by an officer of Customer. For the avoidance of doubt, Customer is prohibited from transferring or attempting to transfer any portions of this Agreement relating to 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. GERMAN SPECIFIC LIMITATION OF LIABILITY

IF THE NETBRAIN AFFILIATE WITH WHICH THE CUSTOMER CONTRACTS UNDER THIS AGREEMENT IS NETBRAIN TECHNOLOGIES GMBH, THE FOLLOWING SUPERSEDES ANY OTHER PROVISION RELATED TO THE SAME SUBJECT MATTER, INCLUDING, BUT NOT LIMITED TO, SECTION 8.2(a)-(b) OF THE AGREEMENT:

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.

### 3. DEVOPS AND PERSONAL EDITION

3.1 If provided for in an Order, 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, warranties, or indemnities 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 Support Services (provided that NetBrain may, in its sole discretion, provide limited Support Services on an ad hoc and discretionary basis), and NetBrain reserves the right to discontinue Customer’s right to use DE and PE at any time, without notice.

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

- (a) DE is limited to ten (10) Nodes; and
- (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.

3.3 Customer’s use of PE is subject to the following additional provisions:

- (a) PE is limited to twelve (12) Nodes;
- (b) PE displays only one map at a time; and
- (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.

## ATTACHMENT B: PRODUCT SPECIFIC TERMS AND CONDITIONS

### 1. QAPPS, DATA VIEW TEMPLATES, and RUNBOOKS.

1.1 The Programs and Documentation 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 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 Template**” 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.

1.2 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/>.

1.3 NetBrain makes no representations or warranties of any kind that the Qapps, DataView 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.

1.4 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.

1.5 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 Template, 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.



ATTACHMENT C:  
ADDITIONAL TERMS AND CONDITIONS FOR NETBRAIN SERVICE COMMITMENT -- ESCALATION  
PROCEDURES AND PROCESSES FOR PROGRAMS ERROR RESOLUTION

These service commitment terms (“**Service Terms**”) are Additional Terms to the NetBrain End User License Agreement – Subscription if they are specifically identified in an applicable Order as applying to that Order. In such case, NetBrain agrees that during the Subscription Period it will provide the following technical support services:

**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.

“**Severity Level**” shall mean the level of severity assigned to a reported Error, in accordance with the definitions set forth above.

**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.