

VMware, Inc. Support and Subscription Services “SnS” Terms and Conditions

VMware, Inc., a Delaware corporation, or VMware International Limited, a company organized under the laws of Ireland, as applicable (“**VMware**”), shall provide Technical Support and Subscription Services (as defined herein) (collectively, the “**Services**”), per the terms of this Agreement and as set forth at <http://www.vmware.com/support/services/> to Customer, for the specific Services level purchased. The applicable VMware entity, **Effective Date**, **Software**, and **Services** level will be set forth on the SnS order form, Customer’s purchase Order, or, if Customer has purchased support on a per incident basis (“**Per Incident**”), in the registration form completed by Customer upon such purchase (collectively the “**Order**”)

1. Definitions

- A. “**Technical Support**” means the provision of technical assistance by VMware to the Customer Support Administrator(s) with respect to installation, analysis of problem reports, and Errors, at the corresponding support level purchased by the Customer.
- B. “**Subscription Services**” means the provision of Major Releases, Minor Releases, Maintenance Releases, if any, to the Software, as well as corresponding Documentation to Customer’s License Administrator.
1. “**Major Release**” also known generally as an “Upgrade” means a generally available release of the Software that contains functional enhancements or extensions, designated by VMware by means of a change in the digit to the left of the first decimal point (e.g. **Software 5.0 >> Software 6.0**).
 2. “**Minor Release**” means a generally available release of the Software that introduces a limited amount of new features and functionality, designated by VMware by means of a change in the digit to the right of the decimal point (e.g. **Software 5.0>>Software 5.1**).
 3. “**Maintenance Release**” or “**Update**” means a generally available release of the Software that typically provides maintenance corrections or fixes only, designated by VMware by means of a change in the digit to the right of the second decimal point (e.g. **Software 5.0 >> Software 5.0.1**), or for certain Software, by means of a change in the digit of the Update number (e.g. **Software 5.0 Update 1**).
- C. “**Services Period**” means the period for which Customer has purchased the Services and any subsequent renewal periods and shall commence (a) for Software licenses for which Services are mandatory: on the date of shipment of the applicable Software license, and (b) for Software licenses for which Services are optional on the date of purchase of the Services
- D. “**Documentation**” means any user instructions, manuals or other materials, and on-line help files regarding the use of the Software, as revised by VMware from time to time, that are generally provided by VMware in connection with the Software
- E. “**Error**” means a failure in the Software to materially conform to the specifications as described in the applicable Documentation
- F. “**Services Fees**” means those fees that are applicable for the Services as specified in a corresponding VMware or reseller invoice
- G. “**License Administrator**” means the Customer-specified employee on the Order who is responsible for: (a) facilitating election, purchase, and, if applicable, renewal of the Services, (b) receiving and administering Software licenses, Major, Minor and Maintenance Releases from VMware, and (c) Customer adherence to the license restrictions of this Agreement. Customer may change its License Administrator upon reasonable advance written notice to VMware.
- H. “**Modified Code**” means any modification, addition and/or development of code scripts (whether created by VMware, Customer or any third party) that deviates from the predefined product code tree(s)/module(s) developed by VMware for production deployment and/or use, and specifically excludes customizable Software options made generally available by VMware and for which Services are available
- I. “**Open Source Software**” means components provided with the Software, for which the source code is generally available and are licensed under the terms of various published open source software license agreements or copyright notices accompanying such software components in addition to any vendor specific license terms provided with the Open Source Software.
- J. “**Software**” means one or more individual VMware software products or software product suites made generally available by VMware and specified in the Order Software does not include Third Party Products, Modified Code or customized deliverables that VMware creates specifically for Customer.

K. "Support Administrator" means the Customer-specified contact designated on the Order responsible for communicating and engaging VMware for Technical Support services with respect to problem reports. Customer's primary License Administrator is responsible for the administration of authorized Support Administrators via the VMware support website.

L. "Third Party Products" means any third party proprietary software or hardware that is manufactured by a party other than VMware or its affiliates and has not been incorporated into VMware Software or Services offerings of VMware or its affiliates.

2. Service Terms

2.1 Provision of Services. VMware shall provide the Services at the Service level purchased during the Services Period, subject to Section 2.2 below. Detailed information on service level objectives, response times, business hours and contact numbers is located at www.vmware.com/support.

2.2 End of Availability. VMware may, at its discretion, decide to retire Software and/or Services at any time upon notice ("End of Availability"). Notice of End of Availability, last date of general commercial availability and applicable support lifecycle policies and timelines for discontinuance shall be provided via the VMware Support Services website at www.vmware.com/support.

2.3 Requirements. Customer may purchase initial Services only for the most current, generally available release of the Software. Limited exceptions may apply for specific Software as provided for at www.vmware.com/support.

- (a) For all current and additional Software licenses purchased for a particular VMware Software product or suite, including those where SnS is not required at the time of purchase of the applicable Software license (including but not limited to Workstation and VMware vSphere Hypervisor), Customer must purchase and/or renew Services at the same Services level in a given functional discipline (e.g. Test, Development, QA, Production).
- (b) For most Software, a minimum of one (1) year of Services must be purchased. For Software-specific support requirements, refer to www.vmware.com/files/pdf/support/software_specific_support_requirements.pdf. Subject to Section 2.2, VMware may update Services terms after the first year of the Services Period with thirty (30) days advance notice to Customer of any changes deemed by VMware to have potential adverse and/or material impacts to the Customer. Upon any renewal, VMware's then current terms and conditions for the Services will apply. Except as otherwise expressly set forth herein or in the applicable Order, Services will automatically renew for successive one (1) year terms unless either party gives written notice of its intent not to renew at least thirty (30) days prior to the end of the current Services Term. A decision to terminate Services or otherwise not renew Services will not terminate the applicable Software licenses.
- (c) VMware, during the course of providing Technical Support, may be required to analyze whether or not a reported problem is related to Modified Code. Where VMware suspects that a problem may be related to Modified Code, VMware in its sole discretion, reserves the right to request that the Modified Code be removed. If VMware cannot directly identify the root cause of a problem, or reasonably suspects that the problem is related to Modified Code, Customer shall be informed that additional assistance may be obtained by Customer directly from various product discussion forums or via engagement for an additional fee with VMware's consulting services group.

2.4 Eligibility. Problems caused by the following situations are not included in Services but may be addressed separately upon request at VMware's then-current hourly rates for consulting, subject to the then-current standard consulting services terms and conditions:

- (a) accident, unusual physical, electrical or electromagnetic stress, neglect; misuse; failure of electric power, air conditioning or humidity control; failure of rotation media not furnished by VMware; operation of the Software with other media not in accordance with the manufacturer's specifications; or causes other than ordinary use; or
- (b) improper installation by Customer or use of the Software that deviates from any operating procedures as specified in the Documentation; or
- (c) actual or attempted modification, alteration or addition to the Software undertaken by Customer or any third party; or
- (d) Third Party Products, other than the interface of the Software with the Third Party Products, or
- (e) Modified Code; or
- (f) any customized deliverables created by VMware specifically for Customer as part of consulting services, or
- (g) any technical issue unrelated to an Error (please see the VMware Technical Support Guide available at www.vmware.com/support for examples)

2.5 Open Source Software Support. VMware's general policy is that a Customer is not entitled to receive Services for Open Source Software not provided with the Software package, unless VMware specifically makes available Services for such Open Source Software on its Services price list and as detailed at www.vmware.com/support. The VMware Open Source Project Support Policy is located at <http://www.vmware.com/support/policies> and shall govern performance of Services for Open Source Software.

To the extent VMware provides Services for Open Source Software, this Agreement shall apply, and VMware will provide Services for the Open Source Software, pursuant to the terms herein, provided such Open Source Software has not been modified by Customer, its employees or agents.

2.6 Customer Responsibilities. Customer's obligations regarding Services are subject to the following

- (a) Customer agrees to receive from VMware communications via e-mail, telephone, and other formats, regarding renewals, quotes, and other topics relating to Services (such as communications concerning an Error or other technical issue and the availability of new releases) Customer's Support Administrator shall cooperate to enable VMware to deliver the Services
- (b) Customer is solely responsible for the use of the Software by its personnel and shall properly train its personnel in the use and application of the Software
- (c) Customer shall promptly report to VMware all problems with the Software, and shall implement any corrective procedures provided by VMware reasonably promptly after receipt.
- (d) Customer is solely responsible for protecting and backing up the data and information stored on the computers on which the Software is used and should confirm that such data and information is protected and backed up before contacting VMware for Technical Support; VMware is not responsible for lost data or information in the event of Errors or other malfunction of the Software or computers on which the Software is used

3. Services Fees

3.1 Services Fee Schedule

- (a) Unless otherwise indicated on the Order, Services Fees are payable on the Effective Date or, in the case of a renewal term, no later than the date of commencement of the applicable Services Period, and due in accordance with Section 3.3 below. Services Fees are non-refundable upon payment.
- (b) The Services Fees, including renewals, are at the then-current list price. VMware may increase applicable Services Fees for renewals. If Customer elects not to renew the Services or, in the case of Software that may initially be purchased without Services, if Customer elects not to purchase the Services when Customer acquires the Software license, Customer may later re-enroll or enroll, as the case may be, for the Services, subject to Subsection 3.1(d) below
- (c) For any renewal or addition of Services, which requires a minimum purchase of one (1) year, Customer may elect to make Services for all or a portion of its Software licenses coterminous, in which case, VMware will prorate the applicable Services Fees for the current Services Period based on the number of full or partial months remaining in the current Services Period
- (d) If Customer purchases Services after acquiring the Software licenses, or had elected not to renew Services and later wishes to re-enroll in the Services, Customer must move to the then-current latest Major Release of the Software, and must pay:
 - (i) the applicable Services Fees for the current Services Period, , and
 - (ii) the amount of Services Fees that would have been paid for the period of time that Customer had not enrolled in the Services, and
 - (iii) a 20% reinstatement fee on the sum of the Services Fees in (i) and (ii).
- (e) In cases where Customer purchases a license to migrate up from one edition of the Software to another (e.g. VMware vSphere Standard to VMware vSphere Enterprise Plus), any unused period of the Services Period on the original license will be converted and used to extend the Services Period for the newly purchased upgraded license

3.2 Taxes. All Services Fees are exclusive of any taxes, duties, or similar charges imposed by any government. Customer shall pay or reimburse VMware for all federal, state, dominion, provincial, or local sales, use, personal property, excise, value added, withholding or other taxes, fees, or duties relating to the transactions contemplated by this Agreement (other than taxes on the net income of VMware)

3.3 Invoicing and Late Payments. All invoices issued hereunder by VMware are due and payable within thirty (30) days of the date of the invoice. All amounts that are not paid on time by Customer shall be subject to a late charge equal to one and one-half percent (1.5%) per month, or, if less, the maximum amount allowed by applicable law. If payment of any Fee is overdue, VMware may also suspend performance until such delinquency is corrected

4. Limited Warranty. VMware warrants that the Services to be performed hereunder will be done in a workmanlike manner and shall conform to industry standards. Upon Customer providing VMware with a reasonably detailed written notice to cure within thirty (30) days of occurrence of the nonconformance, VMware will re-perform the Services to achieve commercially reasonable conformance with the above warranty. TO THE MAXIMUM EXTENT MANDATED BY LAW, THIS WARRANTY IS GIVEN EXPRESSLY AND IN PLACE OF ALL OTHER WARRANTIES, STATUTORY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. TO THE

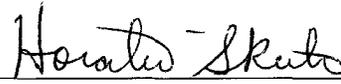
MAXIMUM EXTENT MANDATED BY LAW, THIS REMEDY WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO NONCONFORMANCE OF SERVICES

5. **Limitation of Liability.** TO THE MAXIMUM EXTENT MANDATED BY LAW, VMWARE SHALL NOT BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED UPON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, ARISING FROM ITS PERFORMANCE OR NON-PERFORMANCE UNDER THIS AGREEMENT. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO CUSTOMER. VMWARE'S LIABILITY UNDER THIS AGREEMENT WILL NOT, IN ANY EVENT, EXCEED THE SERVICES FEES PAID BY CUSTOMER TO VMWARE UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE DATE OF THE EVENT MOST DIRECTLY GIVING RISE TO THE CLAIM.

6. **Termination.** VMware may suspend performance of Services if Customer fails to meet its obligations as set forth under this Agreement. VMware may terminate Services if such failure continues for thirty (30) days after VMware's written request to meet these obligations. VMware may terminate the Agreement and all Services at any time if (1) it is discovered that Customer is currently in breach of its Software license restrictions, pursuant to Customer's Software license or (2) Customer is in material breach of this Agreement.

7. **Miscellaneous.** Customer may not assign or delegate this Agreement to any third party without the prior written consent of VMware. This Agreement shall be governed by the laws of the State of California without regard to conflict of laws principles. The parties consent to the exclusive jurisdiction of the state and federal courts located in Santa Clara County, California. This Agreement constitutes the entire agreement of the parties with respect to the provision of the Services by VMware to Customer, and supersedes all prior written or oral communications, understandings and agreements. This Agreement may not be amended by Customer except in a written document signed by both parties. Any waiver of the provisions of this Agreement must be in writing to be effective. Except as expressly set forth herein, no terms of any purchase order or other business form that Customer may use will affect the obligations of the parties under this Agreement, and any such purchase order or other business form of Customer which contains additional or conflicting terms are hereby rejected by VMware. Customer agrees that purchase orders do not have to be signed to be valid and enforceable. If any provision of this Agreement is found to be invalid or unenforceable, the remaining terms will continue to be valid and enforceable to the fullest extent permitted by law. The version of the Technical Support guide found at www.vmware.com/support is the governing version of such document; any translation into other languages is for convenience only. VMware may update the Technical Support guide periodically, without prior notice.

CITY OF GLENDALE, an Arizona
municipal corporation



Horatio Skeete, Acting City Manager

ATTEST:



Pamela Hanna, City Clerk (SEAL)

APPROVED AS TO FORM:



Craig Tindall, City Attorney

Attachment 1
VMware Support Programs and Subscription Services Fee Addendum

- (a) Annual Services Fees for initial Services, as well as renewals, if any, will be based on the following schedule, pursuant to Customer's elected level of Services for the Software, and subject to Subsection 1(c) below:

Services Level	Services Fee
Silver Support and Subscription ("SnS") (VMware Workstation only)	18% of the then-current list price of the Software (no longer available as of 1 April 2010)
Basic SnS	21% of the then-current list price of the Software
Production SnS	25% of the then-current list price of the Software
For Zimbra Products only- Zimbra Advantage and Zimbra Premium**	Zimbra Advantage - 16% of the then-current list price of the Software Zimbra Premium - 20% of the then-current list price of the Software

*The foregoing does not apply to term-based Software licenses which are covered in the table below.

** Zimbra products include but are not limited to, Zimbra Collaboration Suite, Zimbra Connector for Blackberry, Zimbra Connector for Outlook, Zimbra Collaboration Suite Appliance and Zimbra Desktop, see subsection (j) below for additional details on support offerings. The foregoing listing of Zimbra products may be modified from time to time at VMware's discretion.

- (b) A Customer that originally purchased Services from a VMware Authorized Service Provider and is renewing only Technical Support through the VMware Authorized Service Provider may purchase Subscription Services separately on a renewal basis from VMware. In this case, the renewal fee for such Subscription Services shall be fourteen (14%) of the list price of the Software at the time the Software was purchased. "Authorized Service Provider" means a third party that is authorized under contract by VMware to provide first and/or second level Technical Support for VMware products.
- (c) The prices of Services (initial as well as renewals, if any) for the Software and Services levels listed below are not priced based on a percentage of list price of such Software; such prices are as reflected in the then-current applicable VMware standard price list, and Service levels are defined in the Technical Support guide.

Software	Services Level
VirtualCenter for VMware Server (version 1.4)	Per Incident Support
VMware vCenter Converter Standalone	Per Incident Support
VMware vSphere Standard Edition	Basic and Production SnS
VMware vCenter Server 4 Foundation for vSphere	Basic and Production SnS
VMware Workstation	Per Incident Support
VMware Fusion	Subscription Services Only, No Technical Support, Per Incident Support, or Desktop Standard Support
VMware vSphere ESXi Single Server	Basic and Production SnS (for one year only at point of sale) or Per Incident Support
VMware ThinApp Suite VMware ThinApp Client	Basic and Production SnS
VMware Capacity Planner	Production SnS for worldwide partners only (complimentary web based support available for trained partners only)
VMware vSphere Essentials Edition	Per Incident Support
vFabric Products	Developer(*), Basic and Production SnS on Term Licenses

* as further detailed at www.vmware.com/support

- (d) Business Critical Support (BCS) is available for a fixed price (including renewals thereof), based on VMware's then-current list price, for an annual contract covering each supported BCS Customer Team. Additional technical contacts (including renewals thereof) beyond six may be added to the BCS Customer Team for a fixed annual fee. A discount of twenty (20) percent off the then-current list price for Business Critical Support for a Customer that has contracted for, and currently has, one or more VMware Technical Account Managers shall apply to Business Critical Support, including renewals thereof. A BCS Customer Team means a Customer team that (i) consists of no more than six technical contacts, (ii) has at least one individual who has passed the relevant certification examinations and has been certified by VMware as a VMware Certified Professional, (iii) is centrally responsible for managing and supporting the Customer's virtual infrastructure, (iv) develops and implements standards and processes for the management of all virtual systems supported, and (v) provides front line support for the virtual systems supported, making use of available technical repositories and experience to resolve known issues
- (e) Mission Critical Support (MCS) is available for a fixed price (including renewals thereof), based on VMware's then-current list price for an annual contract and is offered as a supplement to Production Support. MCS provides global, 24 X 7 support for Severity 1 issues as well as priority access to senior level Technical Support engineers for an unlimited number of Support Administrators. More details about the offering are available at www.vmware.com/support
- (f) Desktop Standard Support is available for certain products and is priced at a flat rate per license, with a minimum of ten (10) licenses. Desktop Standard Support services include Technical SnS Services delivered to a Desktop Support Customer Team. A Desktop Standard Support Customer Team shall: (i) consist of no more than four (4) technical contacts, (ii) provide front line support for the desktop and virtual systems supported, making use of available technical repositories and experience to resolve known issues
- (g) VMware Complimentary Update Service. For both the Fusion and Workstation products, VMware agrees to provide, for a period of eighteen (18) months from product purchase, Maintenance Releases and Minor Releases, if any, to Customer's License Administrator. This Complimentary Update Service does not include the provision of any Major Releases. Limited complimentary installation assistance will also be made for these products as further detailed at <http://www.vmware.com/support/services/complimentary.html>.
- (h) Customers may purchase Basic or Production Support only when a minimum of ten (10) licenses of VMware Workstation are purchased simultaneously
- (i) With respect to Services for Zimbra products, VMware shall offer only Zimbra Advantage and Zimbra Premium level support and subscription. Such Advantage and Premium Support offerings are distinct and different from VMware's Basic and Production Support and Subscription Services in several key areas, including but not limited to: support response times, business hours and coverage, management of support contacts, support processes, escalation and resolution issues, urgency definitions, support exclusions, upgrades, maintenance and end of life policies. Details regarding Advantage and Premium level support and subscription are as further detailed at http://www.zimbra.com/support/support_overview.html.

VMware Workstation 8.0

VMWARE END USER LICENSE AGREEMENT

PLEASE NOTE THAT THE TERMS OF THIS END USER LICENSE AGREEMENT SHALL GOVERN YOUR USE OF THE SOFTWARE, REGARDLESS OF ANY TERMS THAT MAY APPEAR DURING THE INSTALLATION OF THE SOFTWARE.

IMPORTANT-READ CAREFULLY BY DOWNLOADING, INSTALLING, OR USING THE SOFTWARE YOU (THE INDIVIDUAL OR LEGAL ENTITY) AGREE TO BE BOUND BY THE TERMS OF THIS END USER LICENSE AGREEMENT ("EULA") IF YOU DO NOT AGREE TO THE TERMS OF THIS EULA, YOU MUST NOT DOWNLOAD, INSTALL, OR USE THE SOFTWARE, AND YOU MUST DELETE OR RETURN THE UNUSED SOFTWARE TO THE VENDOR FROM WHICH YOU ACQUIRED IT WITHIN THIRTY (30) DAYS AND REQUEST A REFUND OF THE LICENSE FEE, IF ANY, THAT YOU PAID FOR THE SOFTWARE

EVALUATION LICENSE If You are licensing the Software for evaluation purposes, Your use of the Software is only permitted in a non-production environment and for the period limited by the License Key. Notwithstanding any other provision in this EULA, an Evaluation License of the Software is provided "AS-IS" without indemnification, support or warranty of any kind, expressed or implied.

1 DEFINITIONS

- 1 1 "Affiliate"** means, with respect to a party, an entity that is directly or indirectly controlled by or is under common control with such party, where "control" means an ownership, voting or similar interest representing fifty percent (50%) or more of the total interests then outstanding of the relevant entity (but only as long as such person or entity meets these requirements)
- 1 2 "Documentation"** means that documentation that is generally provided to You by VMware with the Software, as revised by VMware from time to time, and which may include end user manuals, operation instructions, installation guides, release notes, and on-line help files regarding the use of the Software
- 1 3 "Guest Operating Systems"** means instances of third-party operating systems licensed by You, installed in a Virtual Machine and run using the Software
- 1 4 "Intellectual Property Rights"** means all worldwide intellectual property rights, including without limitation, copyrights, trademarks, service marks, trade secrets, know how, inventions, patents, patent applications, moral rights and all other proprietary rights, whether registered or unregistered
- 1 5 "License"** means a license granted under Section 2.1
- 1 6 "License Key"** means a serial number that enables You to activate and use the Software
- 1 7 "License Term"** means the duration of a License as specified in the Order
- 1 8 "License Type"** means the type of License applicable to the Software, as more fully described in the Order
- 1 9 "Open Source Software" or "OSS"** means software components that are licensed under a license approved by the Open Source Initiative ("OSI") or similar open source or freeware license and are embedded in the delivered Software
- 1 10 "Order"** means a purchase order, enterprise license agreement, or other ordering document issued by You to VMware or a VMware authorized reseller that references and incorporates this EULA and is accepted by VMware as set forth in Section 4
- 1 11 "Product Guide"** means the current version of the VMware Product Guide at the time of Your Order, copies of which are found at www.vmware.com/download/eula (<http://www.vmware.com/download/eula>)
- 1 12 "Services Terms"** means VMware's then-current Support and Subscription Contract Terms and Conditions, copies of which are found at www.vmware.com/files/pdf/support/support_terms_conditions.pdf (http://www.vmware.com/files/pdf/support/support_terms_conditions.pdf)
- 1 13 "Software"** means the VMware Tools and the VMware computer programs listed on VMware's commercial price list to which You acquire a license under an Order, together with any software code relating to the foregoing that is provided to You pursuant to a support and subscription service contract and that is not subject to a separate license agreement
- 1 14 "Territory"** means the country or countries in which You have been invoiced, provided however, that if You have been invoiced within any of the European Economic Area member states, You may deploy the corresponding Software throughout the European Economic Area
- 1 15 "Third Party Agent"** means a third party delivering information technology services to You pursuant to a written contract with You
- 1.16 "Virtual Machine"** means a software container that can run its own operating system and execute applications like a physical machine
- 1 17 "VMware"** means VMware, Inc., a Delaware corporation, if You are purchasing Licenses or services for use in the United States and VMware International Limited, a company organized and existing under the laws of Ireland, for all other purchases
- 1 18 "VMware Tools"** means the suite of utilities and drivers, Licensed by VMware under the "VMware Tools" name, that can be installed in a Guest Operating System to enhance the performance and functionality of a Guest Operating System when running in a Virtual Machine

2 LICENSE GRANT

2 1 Scope of License Subject to the terms and conditions of this EULA, VMware grants You, during the License Term, a non-exclusive, non-transferable License to use the Software, in executable code form only, within the Territory, for Your internal operations in accordance with (a) the Documentation, (b) the License Type for which You have paid the applicable fees, (c) other applicable limitations set forth in the Order. The License to the Software is limited to the quantities specified in each applicable Order.

2.2 Third Party Use Under the License granted to You in Section 2.1 above, You may permit Your Third Party Agents to access, use and/or operate the Software on Your behalf for the sole purpose of delivering services to You, provided that You will be fully responsible for Your Third Party Agents' compliance with terms and conditions of this EULA and any breach of this EULA by a Third Party Agent shall be deemed to be a breach by You

2.3 Permitted Copies You may make one copy of the Software for archival purposes only. The copy shall (a) be kept within Your possession or control, (b) include all titles, trademarks, and copyright and restricted rights notices in the original, and (c) be subject to this EULA. You may not otherwise copy the Software without VMware's prior written consent.

2.4 Benchmarking. You may use the Software to conduct internal performance testing and benchmarking studies. You may only publish or otherwise distribute the results of such studies to third parties as follows: (a) if with respect to VMware's Workstation or Fusion products, only if You provide a copy of Your study to benchmark@vmware.com prior to distribution, (b) if with respect to any other Software, only if VMware has reviewed and approved of the methodology, assumptions and other parameters of the study (please contact VMware at benchmark@vmware.com to request such review and approval) prior to such publication and distribution.

2.5 VMware Tools You may distribute the VMware Tools (whether or not as part of the Virtual Machine You create with the Software) to third parties solely when installed in a Guest Operating System to enhance its performance and functionality when running in a Virtual Machine, provided that You will be fully responsible for such third parties' compliance with the terms and conditions of this EULA, and any breach of this EULA by any such third party shall be deemed to be a breach of this EULA by You.

2.6 Open Source Software Notwithstanding anything herein to the contrary, Open Source Software is licensed to You under such OSS's own applicable license terms, which can be found in the `open_source_licenses.txt` file, the Documentation or as applicable, the corresponding source files for the Software available at www.vmware.com/download/open_source.html.

These OSS license terms are consistent with the license granted in Section 2, and may contain additional rights benefiting You. The OSS license terms shall take precedence over this EULA to the extent that this EULA imposes greater restrictions on You than the applicable OSS license terms.

3 RESTRICTIONS, OWNERSHIP

3.1 Restrictions You acknowledge that the Software and the structure, organization and source code of the Software constitute valuable trade secrets of VMware. Accordingly, except as expressly permitted in Section 2 or as otherwise authorized by VMware in writing, You will not and will not permit any third party to (a) sell, lease, license, distribute, sublicense or otherwise transfer in whole or in part the Software or Documentation to any third party, (b) decompile, disassemble, reverse engineer, or otherwise attempt to derive source code from the Software in whole or in part, (c) copy the Software, except for archival purposes, as set out in Section 2.3, (d) create, develop, license, install, use, or deploy any software or services to circumvent, enable, modify or provide access, permissions or rights which violate the technical restrictions of the Software as described in this EULA, (e) translate, modify or create derivative works based upon the Software, (f) permit any use of or access to the Software by any third party, (g) remove any product identification, proprietary, copyright or other notices contained in the Software, or (h) operate the Software on behalf of or for the benefit of any third party, including the operation of any service that is accessed by a third party, except that for the purposes of this Section 3.1 (h), You may use the Software to deliver hosted services to Your Affiliates.

3.2 Decompilation Notwithstanding the foregoing, decompiling the Software is permitted to the extent the laws of the Territory give You the express right to do so to obtain information necessary to render the Software interoperable with other software, provided, however, You must first request such information from VMware (at info@vmware.com) provide all reasonably requested information to allow VMware to assess Your claim, and VMware may, in its discretion, either provide such interoperability information to You impose reasonable conditions, including a reasonable fee, on such use of the Software, or offer to provide alternatives to ensure that VMware's proprietary rights in the Software are protected and to reduce any adverse impact on VMware's proprietary rights.

3.3 Ownership The Software and Documentation, all copies and portions thereof, and all improvements, enhancements, modifications and derivative works thereof, and all Intellectual Property Rights therein, are and shall remain the sole and exclusive property of VMware and its licensors. Your rights to use the Software and Documentation shall be limited to those expressly granted in this EULA and any applicable Order. No other rights with respect to the Software or any related Intellectual Property Rights are implied. You are not authorized to use (and shall not permit any third party to use) the Software, Documentation or any portion thereof except as expressly authorized by this EULA or the applicable Order.

3.4 Guest Operating Systems Certain Software allows Guest Operating Systems and application programs to run on a computer system. You acknowledge that You are responsible for obtaining and complying with any licenses necessary to operate any such third-party software.

4 ORDER Your Order is subject to this EULA. No Orders are binding on VMware until accepted by VMware. Orders for Software are deemed to be accepted upon VMware's delivery of the Software included in such Order. Orders issued to VMware do not have to be signed to be valid and enforceable.

5 AUDIT RIGHTS.

5.1 Records You will, during the License Term for any Software licenses acquired under this EULA (and for a period of two (2) years from the expiration of the applicable License Term), maintain accurate records of your use of the Software sufficient to demonstrate Your compliance with the terms of this EULA and all Orders.

5.2 Audit Rights During the period in which the You are obligated to maintain such records, VMware, or its third party auditor, may upon reasonable notice to You, audit such records to verify that You have (a) used the Software solely in the manner authorized herein, (b) paid all applicable license fees, and (c) otherwise complied with the terms of this EULA and all Orders. VMware may conduct no more than one (1) audit in any twelve (12) month period. Audits will be conducted during normal business hours and VMware will use commercially reasonable efforts to minimize the disruption of Your normal business activities. VMware, and any third-party auditor, shall not have physical access to Your computing devices in connection with any such audit, without Your prior written consent. You will reasonably cooperate with VMware and/or its third-party auditor and will promptly pay directly to VMware any underpayments revealed by such audit. You will promptly reimburse VMware for all reasonable costs and expenses incurred by VMware for such audit if (i) such audit reveals an underpayment by You of more than five percent (5%) of the fees payable by You to VMware for the period audited, or (ii) such audit reveals You have materially failed to maintain accurate records of Your use of the Software.

6 SUPPORT AND SUBSCRIPTION SERVICES Except as expressly specified in the Product Guide, VMware does not provide any support or subscription services for the Software under this EULA. You have no rights to any updates, upgrades or extensions or enhancements to the Software developed by VMware unless you separately purchase VMware support or subscription services. These support or subscription services are subject to the Services Terms.

7. WARRANTIES

7.1 Software Warranty VMware warrants to You that the Software will, for a period of ninety (90) days following delivery ("Warranty Period"), substantially conform to the applicable Documentation, provided that the Software (a) has been properly installed and used at all times and in accordance with the applicable Documentation and (b) has not been modified or added to by persons other than VMware or its authorized representative. VMware will, at its own expense and as its sole obligation and Your exclusive remedy for any breach of the foregoing warranty, either replace the applicable Software or correct any reproducible error in the Software reported to VMware by You in writing during the Warranty Period. If VMware determines that it is unable to correct the error or replace the Software, VMware will refund to You all License fees actually paid by You, in which case the License for the applicable Software and Your right to use such Software will terminate.

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8 INTELLECTUAL PROPERTY INDEMNIFICATION

8.1 Defense and Indemnification Subject to the remainder of this Section 8, VMware shall defend You against any third party claim that the Software infringes any patent, trademark or copyright of such third party or misappropriates a trade secret (but only to the extent that such misappropriation is not a result of Your actions) under the laws of (a) the United States and Canada, (b) the European Economic Area, (c) Australia, (d) New Zealand, (e) Japan, or (f) the People's Republic of China, to the extent that such countries are part of the Territory for the License ("Infringement Claim") and indemnify You from the resulting costs and damages finally awarded against You to such third party by a court of competent jurisdiction or agreed to in settlement, provided that You (i) promptly provide VMware with notice of such Infringement Claim, (ii) allow VMware sole control over the defense thereof and related settlement negotiation, and (iii) reasonably cooperate in response to VMware requests for assistance. You may not settle or compromise any Infringement Claim without the prior written consent of VMware.

8.2 Remedies Should the Software become, or in VMware's opinion be likely to become, the subject of an Infringement Claim, VMware will, at VMware's option and expense either (a) procure the rights necessary for You to make continued use of the affected Software in accordance with this EULA, (b) replace or modify the affected Software to make it non-infringing, or (c) terminate the License to the affected Software and discontinue the related support services, and, upon Your certified deletion of the affected Software, refund (i) the fees paid by You for the License to the affected Software, less straight-line depreciation over a three (3) year useful life beginning on the date such Software was delivered, and (ii) any pre-paid service fee attributable to related support services to be delivered after the date such service is stopped. Nothing in this Section 8.2 shall limit VMware's obligation under Section 8.1 to defend and indemnify You, provided that You replace the allegedly infringing Software upon VMware's making alternate Software available to You and/or You discontinue using the allegedly infringing Software upon receiving VMware's notice terminating the affected License.

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9 LIMITATION OF LIABILITY

9.1 Limitation of Liability TO THE MAXIMUM EXTENT MANDATED BY LAW, IN NO EVENT WILL VMWARE AND ITS LICENSORS BE LIABLE FOR ANY LOST PROFITS OR BUSINESS OPPORTUNITIES, LOSS OF USE, LOSS OF REVENUE, LOSS OF GOODWILL, BUSINESS INTERRUPTION, LOSS OF DATA OR ANY OTHER INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES UNDER ANY THEORY OF LIABILITY, WHETHER BASED IN CONTRACT, TORT, NEGLIGENCE, PRODUCT LIABILITY, OR OTHERWISE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO YOU. VMWARE'S AND ITS LICENSORS' LIABILITY UNDER THIS EULA WILL NOT, IN ANY EVENT, REGARDLESS OF WHETHER THE CLAIM IS BASED IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, EXCEED THE LICENSE FEES YOU PAID FOR THE SOFTWARE, IF ANY. THE FOREGOING LIMITATIONS SHALL APPLY REGARDLESS OF WHETHER VMWARE OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE.

9.2 Further Limitations. VMware's licensors shall have no liability of any kind under this EULA and VMware's liability with respect to any third party software embedded in the Software shall be subject to Section 9.1. You may not bring a claim under this EULA more than eighteen (18) months after the cause of action arises.

10 TERMINATION

10.1 License Term This EULA will terminate in its entirety upon the termination of the License Term unless terminated earlier under this Section 10.

10.2 Termination for Breach VMware may terminate this EULA in its entirety effective immediately upon written notice to You if (a) You breach any provision in Section 3 and do not cure the breach within ten (10) days after receiving written notice thereof from VMware, (b) You fail to pay any portion of the fees under an applicable Order within ten (10) days after receiving written notice from VMware that payment is past due, (c) You breach any other provision of this EULA and do not cure the breach within thirty (30) days after receiving written notice thereof from VMware, or (d) You commit a material breach that is not capable of being cured

10.3 Termination for Insolvency VMware may terminate this EULA in its entirety effective immediately upon written notice to You if You (a) terminate or suspend your business, (b) become insolvent, admit in writing Your inability to pay Your debts as they mature, make an assignment for the benefit of creditors, or become subject to control of a trustee, receiver or similar authority, or (c) become subject to any bankruptcy or insolvency proceeding

10.4 Effect of Termination If VMware terminates this EULA under this Section 10 (a) all Licensed rights to all Software granted to You under this EULA will immediately cease to exist, and (b) You must promptly discontinue all use of all Software, and (destroy all copies of the Software and all License Key(s)) and return, or if requested by VMware, destroy, any related VMware Confidential Information in Your possession or control and certify in writing to VMware that You have fully complied with these requirements Sections 1 (Definitions), 2.6 (Open Source Software), 3 (Restrictions, Ownership), 5.1 (Records), 5.2 (Audit Rights), 7.2 (Disclaimer of Warranties), 9 (Limitation of Liability), 10 (Termination), 11 (Confidential Information) and 12 (General) will any survive termination of this EULA

11. CONFIDENTIAL INFORMATION.

11.1 Definition "Confidential Information" means information or materials provided by one party ("Discloser") to the other party ("Recipient") which are in tangible form and labeled "confidential" or the like, or, information which a reasonable person knew or should have known to be confidential. The following information shall be considered Confidential Information whether or not marked or identified as such (a) License Keys, (b) information regarding VMware's pricing, product roadmaps or strategic marketing plans, and (c) non-public materials relating to the Software

11.2 Protection Recipient may use Confidential Information of Discloser, (a) to exercise its rights and perform its obligations under this EULA, or (b) in connection with the parties' ongoing business relationship. Recipient will not use any Confidential Information of Discloser for any purpose not expressly permitted by the EULA, and will disclose the Confidential Information of Discloser only to the employees or contractors of Recipient who have a need to know such Confidential Information for purposes of the EULA and who are under a duty of confidentiality no less restrictive than Recipient's duty hereunder. Recipient will protect Confidential Information from unauthorized use, access, or disclosure in the same manner as Recipient protects its own confidential or proprietary information of a similar nature but with no less than reasonable care

11.3 Exceptions Recipient's obligations under Section 11.2 with respect to any Confidential Information will terminate if Recipient can show by written records that such information (a) was already known to Recipient at the time of disclosure by Discloser (b) was disclosed to Recipient by a third party who had the right to make such disclosure without any confidentiality restrictions, (c) is, or through no fault of Recipient has become generally available to the public, or (d) was independently developed by Recipient without access to, or use of, Discloser's Information. In addition, Recipient will be allowed to disclose Confidential Information to the extent that such disclosure is required by law or by the order of a court of similar judicial or administrative body, provided that Recipient notifies Discloser of such required disclosure promptly and in writing and cooperates with Discloser, at Discloser's request and expense, in any lawful action to contest or limit the scope of such required disclosure

11.4 Data Privacy You agree that VMware may process technical and related information about Your use of the Software which may include internet protocol address, hardware identification, operating system, application software, peripheral hardware and non-personally identifiable Software usage statistics to facilitate the provisioning of updates, support, invoicing or online services and may transfer such information to other companies in the VMware worldwide group of companies from time to time. To the extent that this information constitutes personal data, VMware shall be the controller of such personal data. To the extent that it acts as a controller, each party shall comply at all times with its obligations under the local legislation applicable in the Territory for the protection of individuals with regard to the processing of personal data. Collected data is subject to VMware's Privacy Policy at <http://www.vmware.com/help/privacy.html> (<http://www.vmware.com/help/privacy.html>)

12 GENERAL

12.1 Assignment This EULA and any Orders, and any of Your rights or obligations thereunder, may not be assigned subcontracted or transferred by You, in whole or in part, whether voluntary, by operation of contract, law or otherwise without the prior written consent of VMware. Any attempted assignment or transfer in violation of the foregoing will be null and void. Subject to the foregoing, this EULA will be binding upon and will inure to the benefit of the parties and their respective successors and assigns

12.2 Notices Any notice delivered by VMware to You under this EULA will be delivered via mail, email or fax

12.3 Waiver The waiver of a breach of any provision of this EULA shall not constitute a waiver of any other provision or any subsequent breach

12.4 Severability If any provision of this EULA is held to be illegal, invalid or unenforceable, the provision will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remaining provisions of this EULA will remain in full force and effect

12.5 Compliance with Laws; Export Control, Government Regulations. Each party shall comply with all laws applicable to the actions contemplated by this EULA. You acknowledge that the Software is of United States origin, is provided subject to the U.S. Export Administration Regulations, may be subject to the export control laws of the applicable territory, and that diversion contrary to applicable export control laws is prohibited. You represent that (1) you are not, and are not acting on behalf of, (a) any person who is a citizen, national, or resident of, or who is controlled by the government of any country to which the United States has prohibited export transactions, or (b) any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons, or the U.S. Commerce Department Denied Persons List or Entity List, and (2) you will not permit the Software to be used for, any purposes prohibited by law including, any prohibited development, design, manufacture or production of missiles or nuclear, chemical or biological weapons. The Software and accompanying documentation are deemed to be "commercial computer software" and "commercial computer software documentation", respectively, pursuant to DFAR Section 227.7202 and FAR Section 12.212(b), as applicable. Any use, modification, reproduction, release, performing, displaying or disclosing of the Software and documentation by the U.S. Government shall be governed solely by the terms and conditions of this EULA

12.6 Construction. The headings of sections of this EULA are for convenience and are not to be used in interpreting this EULA. As used in this EULA, the word "including" means "including but not limited to."

12.7 Governing Law. This EULA is governed by the laws of the State of California, United States of America, unless mandated by other law. The United Nations Convention for the International Sale of Goods shall not apply.

12.8 Third Party Rights. Other than as expressly set out in this EULA, this EULA does not create any rights for any person who is not a party to it, and no person who is not a party to this EULA may enforce any of its terms or rely on any exclusion or limitation contained in it.

12.9 Product Guide. In addition to the above sections, Your use of the Software is subject to the terms and conditions of the Product Guide, which is incorporated herein by reference.

12.10 Order of Precedence. In the event of conflict or inconsistency among the Product Guide, this EULA and the Order, the following order of precedence shall apply: (a) the Product Guide, (b) this EULA and (c) the Order. With respect to any inconsistency between this EULA and an Order, the terms of this EULA shall supersede and control over any conflicting or additional terms and conditions of any Order, acknowledgement or confirmation or other document issued by You, unless the parties execute a written agreement expressly indicating: (i) that such Order shall modify this EULA, or (ii) that the terms of such Order shall supersede and control in the event of any inconsistency.

12.11 Entire Agreement. This EULA, including accepted Orders and any amendments hereto, and the Product Guide contain the entire agreement of the parties with respect to the subject matter of this EULA and supersede all previous or contemporaneous communications, representations, proposals, commitments, understandings and agreements, whether written or oral, between the parties regarding the subject matter hereof. This EULA may be amended only in writing signed by authorized representatives of both parties.

12.12 Contact Information. Please direct legal notices or other correspondence to VMware, Inc., 3401 Hillview Avenue, Palo Alto, California 94304, United States of America. If You have any questions concerning this EULA, please send an email to info@vmware.com (<mailto:info@vmware.com>).

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