



Nexenta End User License Agreement (EULA)

BY DOWNLOADING AND INSTALLING, COPYING OR OTHERWISE USING THE PRODUCT, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS EULA, INCLUDING, WITHOUT LIMITATION, THE EXPORT CONTROL RESTRICTIONS SET FORTH HEREIN. YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS OF THIS EULA, YOU MAY NOT DOWNLOAD, INSTALL, COPY OR USE THE PRODUCT.

1. DEFINITIONS

"Cloud Services Platform" means "Amazon Web Services, Inc.," which is authorized by Company to offer Software Subscriptions.

"Community (DevOps) Edition" means a limited functionality perpetual version of the Product, if any, designated as such and which is made available without charge by Company.

"Company" means Nexenta by DDN, Inc. and its affiliated companies.

"Documentation" means the generally available documentation provided with the Product and the specific terms of Your Quote, as applicable.

"Enterprise Edition" means a perpetual version of the Product designated as such and which is made available by Company for the applicable fees with the specific functionality You have licensed.

"EULA" means this Nexenta End User License Agreement and an applicable Quote, if any. In the event of a conflict between the terms of this EULA and an applicable Quote, the latter shall control and govern.

"License Key" means a document (in physical or electronic format) provided by Company or its authorized third party vendors that identifies: (i) the Product, including edition, licensed to You; (ii) the machine signature of the computer on which use of the Product is enabled; (iii) the codes that initialize use of such computer; and, (iv) the License Term, if applicable.

"License Term" means the period during which the Product may be used by You, commencing on the date of issuance of Your License Key and subject to Your compliance with the terms and conditions of this EULA continuing (a) in the case of the Enterprise Edition and the Community (DevOps) Edition licenses, in perpetuity, and (b) in the case of the Trial Edition licenses, for the period specified by Company when You register the Product or acquire Your License Key.

"Product" means the applicable Nexenta software product that You are licensing and includes all associated applications, plug-ins and adapters that are provided and enabled, and any bug fixes, patches and maintenance releases provided by Company. The Product specifically excludes (a) any features that are not enabled by the License Key corresponding to the edition You have licensed, (b) any Third Party Software, and (c) any other current or future editions or any separately priced Company products containing substantially new functionality and features that may be developed or offered from time to time.



"Quote" shall mean a quote issued by Company and accepted by You by execution or by issuance of a purchase order referencing such quote.

"Site" means Nexenta by DDN, Inc. website: <<http://www.nexenta.com/>>

"Software Subscription" or "Subscription" means a period of time in which You are entitled (subject to any required fee payments and Your compliance with this EULA) to use, access, and install the specified Product and Documentation up to the maximum quantities, capacities or other limitations you have licensed and only in connection with enabling your use of the Cloud Services Platform services (whether You consume or use the full Subscription) and not for distribution or use separate from the Cloud Services Platform services.

"Storage Space" means the total amount of disk storage that is managed by the Product but excluding disk storage occupied by the Product's operating system or as otherwise determined by Company.

"Third Party Software" means any separate third-party software which may be distributed or bundled with the Product.

"Third Party Vendor" means a Company authorized reseller.

"Trial Edition" means a time-limited version of the Product designated as such and which is made available without charge by Company with the specific functionality You have licensed.

"You" means the natural person or the entity that is agreeing to be bound by this EULA, their employees and third party contractors that provide services to You that You shall cause to be bound by this EULA prior to use of the Product. The individual entering into or otherwise accepting this EULA on behalf of You hereby represents that such individual is Your employee or agent and has authority to enter into this EULA on behalf of You.

2. TERMS AND CONDITIONS

2.1. Specific License Terms and Conditions for Enterprise Edition, Community (DevOps) Edition and Trial Edition. With respect to Enterprise Edition, Community (DevOps) Edition and Trial Edition licenses, Company grants You a non-exclusive, non-sublicensable, non-transferable, perpetual (except as to Trial Edition licenses), revocable (in the event of a breach by You) world-wide license for a user designated by You to use the Product (in object code format) during the License Term, subject to the terms and conditions of this EULA and in accordance with the Documentation. Subject to any further limitations set forth in this EULA and the Documentation, You may install, use or deploy the Products up to the maximum quantities, capacities or other limitations as You have licensed and for which You have paid the applicable fees. The Products may not otherwise be shared or used concurrently on different computers, except in compliance with the foregoing. The Enterprise Edition, Community (DevOps) Edition and Trial Edition licenses must be activated with a License Key that can be obtained by registering the Product with the Company.

If You have acquired a Community (DevOps) Edition license, the total amount of Storage Space is limited as specified on the Site and is subject to change without notice. The Community (DevOps) Edition may ONLY be used for educational, academic and other non-commercial purposes expressly excluding any commercial usage. The Trial Edition licenses may ONLY be used for the sole purposes of evaluating the suitability of the Product for licensing of the Enterprise Edition for a fee. If You have obtained the



Product under discounted educational pricing, You are only permitted to use the Product for educational and academic purposes only and such license expressly excludes any commercial purposes. You cannot use a Community (DevOps) Edition license or a Trial Edition license for any production purposes.

2.2 Specific License Terms and Conditions for Software Subscriptions. Subject to the terms of this Agreement, payment of all fees and Your compliance with the Cloud Services Platform terms, Company grants You a personal, non-exclusive, worldwide, limited, non-transferable and terminable right to access, execute, and use the Subscriptions (including downloading and installing certain Product updates and components to Your device to enable the Subscriptions) for Your internal business purposes or otherwise only as strictly permitted below. A separate, fully paid license is required for each instance in use either separately or concurrently when using the Subscription.

Use of the Subscription or any of its components outside of the scope of this Agreement constitutes a material breach and You agree to promptly pay to Company any additional use fees when notified by Company or the Cloud Services Platform, as applicable. Company has no obligation to deliver Product to You but may provide Product and updates to enable the Software Subscription or otherwise provide Support.

If You are using the Subscription to provide a service to Your customers, You must comply fully at all times with the following requirements: (i) You and Your customers and affiliates and subsidiaries must comply with this Agreement and the associated Cloud Services Platform terms and You shall be financially responsible for a breach; (ii) You must require any user of Your service (including Your subsidiaries and affiliates) to agree to terms that limit both Company's and its suppliers' liability in a manner substantially similar to and no less protective than this Agreement; (iii) You must obtain all legally required consents regarding the storage, use, transfer, or handling of any third party data; (iv) You must use the Subscription in a manner that complies with any and all laws and regulations, including but not limited to data protection regulations; (v) You must indemnify, defend, and hold harmless Company, each of its affiliates (as well as the officers, directors, and employees of each Company entity) and Company agents from and against any claim, fine, loss, or action arising from Your breach of this Agreement or the breach of any Cloud Services Platform terms and You must either require Your subsidiaries and affiliates to do the same or provide indemnity on their behalf; (vi) You must provide support to Your customers without obligating Company or the Cloud Services Platform to provide any support; and (vii) You must permit audit(s) by Company or its suppliers or licensors to confirm Your compliance with this Agreement.

2.3. General Terms and Conditions for All Licenses (Including Subscriptions).

2.3.1 The Product is licensed, not sold. Except as expressly licensed under this Agreement, all rights are reserved by Company.

2.3.2 You may license the Product either through Company or a Third Party Vendor. You may license the Product via a Subscription through the Cloud Services Platform only. When You license the Product, then the applicable terms and conditions of this EULA, along with the terms and conditions provided by such Third Party Vendor or the Cloud Services Platform (if applicable), will govern such purchase. To the extent that such Third Party Vendor or the Cloud Services Platform terms conflict with the terms of this EULA, as between You and Company, this EULA will control.



2.3.3. You agree that You will NOT without the express written authorization of Company (a) copy, sell, sublicense, or otherwise transfer the Product to any third party; (b) remove any titles, trademarks or trade names, copyright notices, legends, or other proprietary markings on or in the Product; (c) except to the extent expressly permitted by applicable law, and to the extent that the Company is not permitted by that applicable law to exclude or limit the following rights, You will not decompile, disassemble, reverse engineer, or otherwise attempt to derive source code from the Product, in whole or in part; (d) disable, circumvent or de-install any computer system license management routines, access codes or control programs, or (e) modify or create derivative works of the Product. You agree that upon a breach of the covenants above, Company shall have the right, without notice or demand to disable the Product or otherwise limit its functionality.

2.3.4. Company may update, modify or discontinue offering the Product (except to the extent such obligation is set forth in a valid and existing Subscription), discontinue offering support and maintenance for the Product (except to the extent such obligation is set forth in a valid and existing support agreement or Subscription) or revise the Documentation at any time without prior notice to You. If Company delivers a revision of the Product, You agree and acknowledge that Company shall have no responsibility for testing that the Product is compatible with previously delivered versions of the Product, other than to one (1) prior minor version, if any (designated as e.g., version 2.0 to 2.1). All prices mentioned on the Company Site are subject to change without notice.

2.3.5. Product Descriptions; Pricing; Errors. Company attempts to be as accurate as possible and eliminate errors in the Product and Documentation. However, Company does not warrant that the Product and the Documentation is accurate, complete, reliable, stable, defect free, current, or error-free. In the event of an error, Company reserves the right to correct such error at any time.

2.3.6. Third Party Software. The Third Party Software is separately licensed and governed exclusively by the applicable license agreement accompanying, included or referenced with such software packages ("Third Party Terms"). You agree to comply with the Third Party Terms. COMPANY HEREBY DISCLAIMS ANY AND ALL WARRANTIES EXPRESS OR IMPLIED FROM ANY THIRD PARTIES REGARDING ANY THIRD PARTY SOFTWARE, AND THE USE OF ANY OR ALL THIRD PARTY SOFTWARE IN CONNECTION WITH THE PRODUCT, INCLUDING (WITHOUT LIMITATION) ANY WARRANTIES OF SATISFACTORY QUALITY OR FITNESS FOR A PARTICULAR PURPOSE. NO THIRD PARTY LICENSORS OF THIRD PARTY SOFTWARE SHALL HAVE ANY LIABILITY FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION LOST PROFITS), HOWEVER CAUSED AND WHETHER MADE UNDER CONTRACT, TORT OR OTHER LEGAL THEORY, ARISING IN ANY WAY OUT OF THE USE OR DISTRIBUTION OF ANY THIRD PARTY SOFTWARE OR THE EXERCISE OF ANY RIGHTS GRANTED UNDER EITHER OR BOTH THIS AGREEMENT AND THE LEGAL TERMS APPLICABLE TO ANY THIRD PARTY SOFTWARE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

3. FEES

3.1. Payment of Fees. In consideration for the license granted by Company under this EULA, You shall pay Company the fees as set forth in the applicable Quote or otherwise quoted to You in writing. All amounts due by You to Company and not paid within thirty (30) days of the due date shall bear interest at the lower of the rate of one and one-half percent (1½ %) per month or the highest rate allowed by law, from the date due until the date payment is received by Company.



3.2. Taxes. You shall, in addition to the other amounts payable under this EULA, pay all sales, use, excise, value added or other taxes, federal, state or otherwise, however designated, which are levied or imposed by reason of the transactions contemplated by this EULA (excepting Company's corporate franchise and net income taxes) ("Tax"). If Company is required to pay any Tax, You must reimburse Company for such amounts. You agree to indemnify Company for any Tax and related costs, interests, and penalties paid or payable by Company for Your use of the Product or Subscription.

3.3. Compliance Audit. You agree to implement reasonable controls to ensure compliance with the intended use of the Product authorized by this EULA. Company reserves the right to have a compliance audit performed, no more often than once every 12 months, of Your deployment and use of the Product at any time during Your normal business hours at Your principal place of business, upon no less than five (5) business days written notice and at Company's expense, by inspecting records, information and systems that are directly relevant to such compliance or verification. If the audit discloses material non-compliance, You shall promptly pay to Company any additional use fees identified by Company, calculated in accordance with Company's price list, and the reasonable costs of conducting such audit, if any. The audit and any results thereof or information learned shall be maintained as confidential information.

3.4. Data Capture. You acknowledge and agree that Company shall have access (remotely or otherwise) to the Product and the right to capture data relating to Your use of the Product for the purpose of (i) performing diagnostics of the Product in response to a request of You for support service or a believed issue by Company, (ii) monitoring Your usage of the Product to ensure that the number of licenses and procedures are equal to the authorized number of the same, and (iii) to otherwise capture, compile or analyze any non-personally identifiable data or information resulting from Your use of the Products in the form and content as may be determined by Company from time to time. Such data or information collected by Company shall be solely owned by Company and may be used by Company for any lawful business purpose.

4. MAINTENANCE AND SUPPORT

4.1. You shall be entitled to receive the support and maintenance for the use of the Product and the Third Party Software (collectively, "Support") during the applicable support period to the extent set forth on the Site and at the support level for which You have paid a separate additional fee. No Support is provided for Trial Edition and Community (DevOps) Edition licenses.

4.2. You acknowledge that Company has no obligation to (i) continue offering Support after expiration of the applicable support period, (ii) provide updates for other than the current release of the Product, (iii) issue updates, upgrades or bug fixes at any time or on any regular schedule and Company shall develop and issue updates, upgrades or bug fixes in its sole and absolute discretion, (iv) provide any support or maintenance unless You have provided complete and accurate documentation of the issue and the Company is able to replicate the issue, or (v) provide any Support with respect to any hardware issues, including, without limitation, resulting from use of any hardware that does not meet Company minimum specifications.

4.3. No Support of Modifications. Any modifications of the Product and any Third Party Software will not be supported by the Company unless indicated otherwise by expressed written authorization. Company will not be liable for any modifications to the Product, or any Third Party Software included with the



Product, or any errors or damages resulting from such modifications. COMPANY DISCLAIMS ALL WARRANTIES WITH RESPECT TO THE USE OF THE THIRD PARTY SOFTWARE.

4.4. UNIX shell. You agree that You will not use UNIX shell which constitutes part of the Third Party Software to administer or reconfigure the Product unless pre-approved by the Company. Any administration or reconfiguration of the Product shall be in accordance with the Documentation. Using UNIX shell without authorization of the Company will not be supported, and the Company will not be liable for any errors or damages resulting from such usage.

5. OWNERSHIP; CONFIDENTIALITY

5.1. Company and its licensors retains all right, title, and interest in and to the Product, Documentation and License Keys and in all related copyrights, trade secrets, patents, trademarks, and any other intellectual and industrial property and proprietary rights, including registrations, applications, renewals, and extensions of such rights. Except for the limited license expressly granted herein, this EULA does not grant You any rights to intellectual property rights in or to the Product. Any suggested modifications or improvements to the Product submitted to Company by You become Company's exclusive property to exploit or to not exploit as the Company solely deems appropriate without necessity for remuneration or attribution to You.

5.2. You acknowledge that the Product, License Keys, and any benchmarking data and related information mentioned in Section 5.3 contains trade secrets and confidential material and You agree to maintain all such information in confidence and apply security measures no less stringent than the measures which You apply to protect Your own like information, but not less than a reasonable degree of care, to prevent their unauthorized disclosure and use.

Subject to any restrictions imposed by applicable law, the period of confidentiality shall be indefinite. You agree that You shall not use any such information other than in normal use of the Product under the licenses granted in this Agreement.

5.3. This Agreement does not prevent You from using the Product for internal benchmarking purposes. However, You shall treat any and all benchmarking data relating to the Product, and any other results of Your use or testing of the Product which are indicative of its performance, efficacy, reliability or quality, as confidential information and You shall not disclose such information to any third party without the express written permission of Company.

6. LIMITED WARRANTY

6.1. Except as to any Trial Edition and Community (DevOps) Edition licenses, Company warrants to You that, for a period of thirty (30) days after Your initial installation of the Product or initial commencement of Your Subscription period, the unmodified portions of the Product shall conform substantially to the then current Documentation.

AS TO ANY DEFECTS DISCOVERED AFTER THE THIRTY-DAY PERIOD, THERE IS NO WARRANTY OR CONDITION OF ANY KIND. COMPANY DOES NOT PROVIDE ANY WARRANTY OR CONDITIONS OF ANY KIND FOR TRIAL EDITION AND COMMUNITY (DEVOPS) LICENSES.

Any updates to the Product, including without limitation, those provided after the expiration of such 30-day period are not covered by any warranty or condition, express, implied or statutory. To the extent



that the Product is derived from third-party software or licensed from third parties, no such third party warrants the Product, assumes any liability regarding use of the Product or undertakes to furnish You any support or information relating to the Product. You shall be solely responsible for the choice of proper hardware and all hardware maintenance, including periodic inspections, adjustments and repair.

6.2. Exclusive Remedy for Breach. If the Product fails to conform to the warranty in Section 6.1, You must notify Company within a reasonable time and in no event more than fifteen (15) days after the discovery of the nonconformity. Company will investigate and, in the event of a breach of warranty, will provide within a reasonable time and at Company's option, in its sole discretion, one of the following: (a) use commercially reasonable efforts to correct any reproducible error in the Product constituting a breach of the warranty at no additional charge, or (b) replacement of any nonconforming Product with conforming Product. THE REMEDY SELECTED BY COMPANY IN ACCORDANCE WITH THIS PARAGRAPH SHALL BE YOUR EXCLUSIVE AND SOLE REMEDY FOR ANY BREACH OF WARRANTY.

6.3. NO OTHER WARRANTIES. EXCEPT AS EXPRESSLY PROVIDED IN SECTION 6.1, COMPANY DOES NOT WARRANT THAT YOUR USE OF THE PRODUCT WILL BE FREE OF DEFECT, STABLE, ERROR-FREE OR UNINTERRUPTED AND THE PRODUCT IS PROVIDED TO YOU ON AN "AS IS" OR "AS AVAILABLE" BASIS WITHOUT ANY REPRESENTATIONS, WARRANTIES OR CONDITIONS OF ANY KIND, WHETHER EXPRESS, IMPLIED, OR STATUTORY AND WHETHER ARISING OUT OF A COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE. YOU ASSUME ALL RISKS ASSOCIATED WITH USE OF THE SUBSCRIPTION TOGETHER WITH THE CLOUD SERVICES PLATFORM ASSOCIATED SERVICES OR PRODUCTS, INCLUDING BUT NOT LIMITED TO DATA LOSS OR DATA BREACH. COMPANY MAKES NO WARRANTY THAT THE SOFTWARE SUBSCRIPTION (INCLUDING SUBSCRIPTIONS THAT ARE DEPENDENT ON THE CLOUD SERVICES PLATFORM SERVICES OR PRODUCTS) WILL BE UNINTERRUPTED, TIMELY OR ERROR FREE. COMPANY EXPRESSLY DISCLAIMS, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, MERCHANTABILITY, NON-INFRINGEMENT, TITLE AND FITNESS FOR A PARTICULAR PURPOSE OR USE.

7. INDEMNIFICATION

7.1. IP Infringement Indemnification. Expressly subject to Section 9.1, and except as to any Trial Edition and Community (DevOps) Edition licenses, Company agrees to defend You and Your directors, shareholders, officers and employees, in any claim, action or suit brought or threatened and based on an allegation that the Product infringes a US, Canadian or European Union copyright, trade secret or validly issued patent right of a third party (that is not affiliated with You), including reasonable attorneys' fees. Company will also pay all damages finally awarded therein against You or settlement agreed upon with Company. You shall promptly notify Company of such action and give Company authority, information, and assistance (at Company's expense) for the defense of such suit or proceeding and Company shall have sole control of the defense or settlement of any claim or suit. Company shall have no liability or obligation hereunder for any infringement based on or resulting from (a) the combination or use of the Product with other programs, components or products to the extent arising from the combination or use, if the infringement would not have occurred but for the combination; (b) any modification of the Product by anyone other than Company or a party acting on its behalf, (c) the use of other than the most recent version of the Product if the infringement or claim would have been avoided by use of the most recent version; or (d) use of the Product in any way not contemplated under this EULA. Notwithstanding the foregoing, if any Product becomes, or in Company's opinion is likely to become, the subject of a claim of infringement, Company will, at its option: (1) procure for You the right to continue using the Product; (2) replace the Product with a non-infringing



product substantially complying with the Product's specifications; or (3) modify the Product so it becomes non-infringing and performs in a substantially similar manner to the original Product. Upon failure of the foregoing, at Company's option, it may require You to cease any infringing use of the Product and Licensor or its agents will refund the fees paid Licensor for the infringing product, less a reasonable allowance for use. YOUR SOLE AND EXCLUSIVE REMEDIES AND COMPANY'S SOLE AND EXCLUSIVE LIABILITIES FOR INTELLECTUAL PROPERTY INFRINGEMENT CLAIMS ARE SET FORTH IN THIS SECTION.

8. TERMINATION

8.1. Termination. Company may terminate this EULA immediately and without notice if You fail to comply with any term of this EULA. Company has the option to terminate (or permit the Cloud Services Platform to terminate) individual instances when used in excess of your actual license rights, for non-payment or otherwise used in a manner not permitted by the Cloud Services Platform terms. You may terminate this EULA immediately and by destroying the Product together with all copies, modifications, and merged portions thereof in any form. Either party shall have the right to terminate this EULA as to any Trial Edition licenses or Community (DevOps) Edition licenses for any reason at any time. Either party shall have the right to terminate this EULA in the event the other party (i) terminates or suspends its business, (ii) becomes subject to any bankruptcy or insolvency proceeding under Federal or state statute, (iii) becomes insolvent or subject to direct control by a trustee, receiver or similar authority, or (iv) has wound up or liquidated, voluntarily or otherwise.

8.2. Effect of Termination. In the event of termination, You must destroy all copies of the Product and/or cease use of the Software Subscription, as applicable. The parties' rights and obligations which, by their nature, would continue beyond the termination of this EULA, including but not limited to those rights and obligations of the parties set forth in Sections 1 (Definitions), 2.3, 3 (Fees), 4.2, 5 (Ownership; Confidentiality), 6.3, 8 (Termination), 9 (Limitations of Liability) and 10 (General) will survive such termination, cancellation or expiration.

9. LIMITATIONS OF LIABILITY

9.1. REGARDLESS OF WHETHER ANY REMEDY SET FORTH HEREIN FAILS OF ITS ESSENTIAL PURPOSE OR OTHERWISE, IN NO EVENT WILL COMPANY, ITS LICENSORS OR RESELLERS, OR THE THIRD PARTY VENDORS BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY LOST PROFITS, LOST REVENUE, LOST OR CORRUPTED DATA, INTERRUPTION OF BUSINESS, GOODWILL, ANTICIPATED SAVINGS, PROCUREMENT OF SUBSTITUTE GOODS AND/OR SERVICES OR OTHER SPECIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF THIS EULA OR THE USE OR INABILITY TO USE THE PRODUCT OR ANY DOCUMENTATION SUPPLIED THEREWITH, EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES AND WHETHER OR NOT SUCH LOSS OR DAMAGES ARE FORESEEABLE. IN NO EVENT WILL COMPANY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS EULA OR THE PRODUCT EXCEED THE GREATER OF THE FEES ACTUALLY RECEIVED BY COMPANY FROM YOU FOR THE PRODUCT AT ISSUE OR TEN DOLLARS (\$10). THE EXISTENCE OF ONE OR MORE CLAIMS WILL NOT ENLARGE THIS LIMIT. THIS SECTION 9.1 DOES NOT LIMIT ANY LIABILITY FOR BODILY INJURY OF A PERSON, DEATH, OR PHYSICAL DAMAGE TO PROPERTY OR FOR FRAUDULENT MISREPRESENTATION. FURTHER, COMPANY IS NOT RESPONSIBLE FOR LOSSES, DAMAGES OR CLAIMS ATTRIBUTABLE TO ANY THIRD PARTY ACTS, OMISSIONS, NEGLIGENCE OR INTENTIONAL ACTS OF ANY KIND IN CONNECTION WITH YOUR USE OF THE PRODUCT.



9.2. Disclaimer of Tort Liability. The foregoing warranties and remedies are EXCLUSIVE, and You waive and release all other warranties, obligations, and liabilities of Us and all other remedies, claims, and rights that You may have relating in any way to the Product covered by this EULA, whether arising from contract, warranty, strict liability or tort or from Company's negligence, tort, or other fault, including claims for loss of or damage to the Product.

9.3 Basis of Bargain. The warranty disclaimer and limitation of liability set forth above are fundamental elements of the basis of this agreement. Company would not be able to provide the Product on an economic basis without such limitations. The warranty disclaimer and limitation of liability inure to the benefit of Company's distributors, resellers and suppliers.

10. GENERAL

10.1. Entire Agreement; Waiver; Severability. This EULA constitutes the entire and only agreement between the parties for the Product and all other prior negotiations, representations, agreements, and understandings are superseded hereby. No failure of Company to exercise or enforce any of its rights under this EULA will act as a waiver of those rights. This EULA and the terms hereof may only be modified or any rights under it waived by a written document executed by the party against which it is asserted. If any provision of this EULA is found illegal or unenforceable, it will be enforced to the maximum extent permissible, and the legality and enforceability of the other provisions of this EULA will not be affected.

10.2. Software Copyright Information and Notices. Software copyright information and other related open source software details are included as part of notices in the Documentation or other documentation published by Company (e.g. NOTICES.TXT or NOTICES.PDF)

10.3 Data Privacy. You have sole responsibility for personal data managed or stored using the Software Subscription and agree to comply with all applicable data privacy laws. Company assumes no responsibility or liability for any personal data (including third party personal data) that You choose to manage and/or store using the Subscription. Sole responsibility for the personal data lies with You. It is Your data and Your responsibility to protect and manage the data in accordance with applicable data privacy laws. Company does not request nor need access to any of Your personal data. Further, data may be stored with the Cloud Services Platform for which different terms may govern the management of and access to the data. Selection of the Cloud Services Platform is Your responsibility and You should carefully consider the risks when using the Cloud Services Platform. Company is not and will not be responsible for any data loss or errors, omissions, or violations of applicable privacy laws or regulations by the Cloud Services Platform or its suppliers. Company's most current privacy policy is found on the Site.

10.4. United States Government End Users. For any Product licensed directly or indirectly on behalf of a unit or agency of the United States Government, this paragraph applies. Company's proprietary software embodied in the Product: (a) was developed at private expense and is in all respects Company's proprietary information; (b) was not developed with government funds; (c) is Company's trade secret for all purposes of the Freedom of Information Act; (d) is a commercial item and thus, pursuant to Section 12.212 of the Federal Acquisition Regulations (FAR) and DFAR Supplement Section 227.7202, Government's use, duplication or disclosure of such software is subject to the restrictions set forth by the Company.



10.5. Attorneys' Fees. In the event of any arbitration or legal proceeding arising out of or relating to this EULA, the arbitrator or court in such proceeding shall have discretion to award the prevailing party's reasonable and actually incurred attorneys' fees and costs in such action or proceeding, including the costs of enforcement of any judgment.

10.6. Publicity. Upon receipt of Your written approval, You grant Company the right to use Your name and logo and to otherwise refer to You as a customer in promotional material (including, but not limited to, on the Site and in case studies, advertising, press and similar public disclosures in any medium or format) relating to Company and Product. You, in Your sole discretion, can revoke this right by submitting a written request via email to marketing@nexenta.com, <<mailto:marketing@nexenta.com>> requesting to be excluded from certain or all such promotional materials (which shall be effective within 30 days) and Company shall make no further reference to You.

10.7. Compliance with Laws; Export Control Restrictions. You agree to comply with all applicable federal, state and local laws with respect to your use of the Products or Software Subscription. You acknowledge and agree that the Products, Software Subscriptions, technical data and/or services ("Items"), are subject to U.S. and other export controls, import, customs, U.S. antiboycott and economic sanctions laws ("Export Control Laws"). You will comply with all applicable Export Control Laws and not provide any Items to anyone in a country or other destination that is subject to a United States Government export embargo (currently Cuba, Iran, North Korea, Sudan, Syria and the Crimean Region) (an "Embargoed Destination"), to a representative of an Embargoed Destination, or to persons or for purposes prohibited under the Export Control Laws. Prohibited end-uses include the research on or development of chemical, biological or nuclear weapons, unmanned air vehicles or missiles, or nuclear explosive or fuel cycle activities. In addition to any other remedy it may have, Company may terminate this EULA immediately and without notice, and cancel the download, activation and/or provision of any maintenance or other customer service involving any Item if (a) Company has not received all export-related documentation requested by Company or (b) Company believes that such activity may violate any Export Control Laws or Company's own compliance policies. If You access the Site, or purchase, download, or activate Items from the Website, You represent that You are not in any Embargoed Destination and that You are not a person or entity (or owned by one or more entities) that has/have been sanctioned or otherwise listed by the United States on a prohibited persons list issued by the U.S. Departments of the Treasury, Commerce or State. You shall indemnify Company for all losses, costs, claims, damages and expenses (including attorneys' fees and expenses) arising from Your violation or alleged violation of any applicable federal, state or local law, including without limitation, any Export Control Law.

10.8. Disputes. This EULA shall be governed, construed and enforced in accordance with the laws of the United States of America and of the State of California, excluding that body of laws known as conflict of laws. The parties expressly agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply. All disputes arising out of or relating to this EULA will be exclusively resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA Rules") under confidential binding arbitration held in Santa Clara County, California. To the fullest extent permitted by applicable law, no arbitration under this EULA will be joined to an arbitration involving any other party subject to this EULA, whether through class arbitration proceedings or otherwise. Any litigation relating to this EULA shall be subject to the jurisdiction of the Federal Courts of the Northern District of California and the state courts of the State of California, with venue lying in Santa Clara County, California. The cost and expense of arbitration will initially be shared equally by the parties to the arbitration, subject to an award to the prevailing party pursuant to Section 10.5. The



decision or award of the arbitrator will be final and binding upon the parties, and to the same extent and to the same degree as if the matter had been adjudicated by a court of competent jurisdiction and will be enforceable under the Federal Arbitration Act. If required by Company's agreement with a third party licensor, Company's licensor shall be a direct and intended third party beneficiary of this Agreement and may enforce it directly against You, along with any additional applicable license terms (including any software provided for your use to enable the Product which is provided by or for the Cloud Services Platform).

10.9. Assignment. You shall not assign or otherwise transfer the Product, the Software Subscription or this EULA, or any rights or duties hereunder, to anyone, including any parent, subsidiaries, affiliated entities or third parties, without Company's prior written consent, which consent shall not be unreasonably withheld. For the purposes of this Section, if You are not a publicly traded company, a change in the persons or entities that control fifty percent (50%) or more of Your equity securities or voting interest shall be considered an assignment. Company shall have the right to assign this EULA or delegate its duties hereunder.

10.10. English Language. This EULA has been prepared in the English Language and the English language shall control its interpretation.

10.11. Limitation on Actions. Any cause of action by You against Company with respect to this EULA must be commenced within one (1) year after the discovery thereof or it shall be barred.

10.12. Force Majeure. Except for the parties' obligations to make payments hereunder, neither party shall be responsible for delay or failure in performance caused by any government act, law, regulation, order or decree, by communication line or power failures beyond its control, or by fire, flood or other natural disasters or by other causes beyond its reasonable control, nor shall any such delay or failure be considered to be a breach of this EULA.

If You have any questions about this EULA or Product, or if You want to contact Company for any reason, please email sales@nexenta.com. <<mailto:sales@nexenta.com>>

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