

## AccelOps Online License Agreement

THE FOLLOWING ARE THE TERMS AND CONDITIONS OF AN END USER LICENSE AGREEMENT ("AGREEMENT") WITH ACCELOPS, INC. ("ACCELOPS").

IF THE SOFTWARE PRODUCT IS DOWNLOADED, AND/OR IF THE SERVICE IS INITIATED FROM OUR OFFICIAL WEBSITE (FOR TRIAL USE OR PAID USE), AND/OR IF THE SOFTWARE IS INSTALLED FROM A COMPACT DISK ACCOMPANYING OUR OFFICIAL PRODUCT PACKAGE -

BY CLICKING ON THE "ACCEPT" BUTTON THAT FOLLOWS THIS AGREEMENT, YOU ("CUSTOMER") ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTOOD ALL THE THEN CURRENT TERMS OF THIS AGREEMENT AND THAT YOU CONSENT TO BE BOUND BY, AND ARE BECOMING A PARTY TO, THIS CURRENT AGREEMENT.

IF YOU DO NOT ACCEPT (OR CANNOT COMPLY WITH ALL OF) THESE TERMS, THEN CLICK ON THE "DO NOT ACCEPT" BUTTON, AND BY DOING SO, YOU WILL INDICATE THAT YOU DO NOT ASSENT TO THIS AGREEMENT. IF YOU SELECT THE "NO" BUTTON AT THE END OF THIS AGREEMENT, YOU IMMEDIATELY MUST, CEASE ALL USE OF THE SOFTWARE PRODUCT OR SERVICE.

[CLICK HERE TO READ THE TERMS AND CONDITIONS]

<<ACCEPT>> <<<DO NOT ACCEPT>>

NOTE: IF THESE TERMS ARE CONSIDERED AN OFFER BY ACCELOPS, ACCEPTANCE IS EXPRESSLY LIMITED TO THESE TERMS. ANY WRITTEN AGREEMENT THAT IS IN FORCE BETWEEN THE CUSTOMER AND ACCELOPS SHALL SERVE TO SUPERSEDE THE TERMS IN THIS AGREEMENT.

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<<< TERMS AND CONDITIONS >>>

Terms and Conditions

Unless a prior written agreement between the Customer and AccelOps is in force which shall serve to supersede the terms and conditions below, this End User License Agreement ("Agreement") is made as of now (the "Effective Date") by and between AccelOps, Inc. ("AccelOps"), a Delaware corporation, having its principal place of business at 2905 Stender Way, Suite 48, Santa Clara, CA 95054, and the YOU, the Customer.

### 1. Definitions

**"Account"** is the billing account that maintains the record of all Product and Service purchases and respective licenses for a Customer.

**"Collector"** is a Virtual Appliance Product that enables the collection of operational data at one network or physical site location and the transmission of said data to a Virtual Appliance Product at another location.

**"Community Services"** are Product features and online capabilities made available to licensed and unlicensed users to facilitate the exchange of user-consented and user-authorized information. Use of Community Services may require acceptance of separate terms and conditions.

**"Confidential Information"** is, except as otherwise specified below, any information pertaining to the Software, End User Documentation, Services, Developments, release plans, Customer operating environment, event and configuration data, or any other information that is marked as confidential or proprietary or that is disclosed verbally and identified as confidential or proprietary at the time of disclosure by the disclosing party.

**"Devices"** are unique, network-addressable devices within a Customer's environment, including physical and virtual network devices and servers with their respective operating systems and applications, that are referenced in a Product Schedule and specified in a Performance Parameter.

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**“Control”** is the possession, directly or indirectly, of the power to determine the direction of the management and operating policies of an entity.

**“Customer”** is the person or entity identified above that is executing this Agreement with AccelOps.

**“Developments”** are any enhancements, improvements, know-how or techniques developed by AccelOps in the course of providing Product(s) or Professional Services to Licensee.

**“Emergency Fix”** is a Fix to an Error that may not be generally available to all AccelOps customers.

**“End User Documentation”** is on-line information, help files, Specifications and operating manuals included with the Product and/or Service or supplied and updated by AccelOps on its website, which describe the features and use of the associated Product or Service.

**“Error”** is a verifiable failure of the Software that is reproducible by AccelOps and that causes the Product to not conform to the specifications of such Product Model during the Subscription Period. However, “Error” does not include any such failure that is caused by: (i) the use or operation of the Product with any other software or in an environment other than that intended or recommended by AccelOps, (ii) the use, installation or operation of the Product other than in accordance with the published Specifications in effect at the time of use, (iii) modifications to the Product not made or authorized by AccelOps, (iv) any bug, defect or error in any third-party software, hardware or operating environment used with or communicating to the Product or Service, or (v) any other failure of such other software or hardware to conform to its published specifications.

**“EULA”** is the End User License Agreement defined in this Agreement.

**“Events Per Second”** or **“EPS”** is a Performance Parameter that determines approximately how many messages or operational events locally generated from Devices can be received and processed by the Software in a second, as referenced within the Product Schedule.

**“Fee”** is the total dollar amount charged to the Licensee and payable to AccelOps.

**“Fix”** is a remedy to an Error that is applied or deployed by AccelOps, either directly or indirectly.

**“Force Majeure”** is any unforeseeable or exceptional circumstance, such as a natural disaster, interruption in power or civil disturbance, that is beyond a party’s control and that directly impacts the ability of that party to perform its obligations under this Agreement.

**“Licensee”** is the Customer that executes the EULA and abides to the terms and conditions defined in this Agreement, along with any affiliated entity that Controls, is Controlled by, or is under common Control with Licensee, provided all such entities ordering or using Software licensed under this Agreement have agreed in writing to be bound by the terms and conditions of this Agreement.

**“License Number”** is the specific Product reference identification designated by AccelOps in accordance with the Product(s) defined in the Product Schedule.

**“Licensed User”** is an employee or consultant of Licensee who is authorized by Licensee to access and use the Product..

**“Maintenance”** is all Updates and Upgrades provided by AccelOps to the Customer during the Subscription Period described herein and defined in a Product Schedule.

**“Material Breach”** is a failure on the part of a party to meet its obligations under this Agreement or to remedy said failure, as defined within this Agreement, with the exception of any failures due to Force Majeure.

**“Model or SKU”** is an AccelOps Product with specified and published Performance Parameters programmed within the Software.

**“Online Data Analysis”** is a Performance Parameter that determines approximately how many bytes of stored Customer data can be viewed and analyzed by the Software as referenced within a Product Schedule.

**“Performance Parameter(s)”** are capacity characteristics programmed within the Software and associated with a license that references a Product Model.

**“Product(s) or Licensed Product”** is any AccelOps Products and/or Services, at their respective Model

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Performance Parameters, that Licensee is authorized to utilize during the Subscription Period as set forth in a Product Schedule.

**“Product Schedule”** is the Product purchase order(s) from the Customer or Customer-accepted Order Form(s), attached to this Agreement as Exhibit B, that references AccelOps’ then-current, published SKUs and that defines the scope of a Product license, the Subscription Period, the Professional Service, the Product Model and respective Fees.

**“Professional Service(s)”** are consulting services defined within a Product Schedule and performed by AccelOps or agents authorized by AccelOps.

**“Restricted Releases or Trial Product”** is any Software, Product or related documentation that is developed and designated by AccelOps as “Alpha, Beta, Test Release or Trial Product.” Any such Software, Product or documentation (i) is to be considered experimental, (ii) may contain errors, (iii) IS PROVIDED TO THE LICENSEE BY ACCELOPS ON AN AS-IS BASIS WITH NO WARRANTY OF ANY KIND, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING BUT NOT LIMITED THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, and (iv) is only available to those who have been selected by AccelOps and have elected to use such Software, Product or documentation and have agreed to any additional terms and conditions required by AccelOps.

**“Service, Software as a Service, SaaS”** is a portion of Software Product to be used locally by the Customer at the Customer-premise, as well as the AccelOps hosted service used by the Customer through access and data transmission to a datacenter and respective Software Product managed by AccelOps and its suppliers, who maintain the Software and Customer’s data.

**“Software”** is a machine executable copy of the computer programs, in object code format, which comprises the Product licensed by AccelOps to Licensee as set forth in this Agreement, including all Fixes, Updates and Upgrades thereto provided to Licensee by AccelOps within the Subscription Period and pursuant this Agreement.

**“Specifications”** are any current Software Product functionality and operating requirements published in AccelOps’ End User Documentation with respect to the Product Licensed by Customer and maintained by AccelOps.

**“Subscription Period”** is the length of time agreed to by the Customer and AccelOps that allows the Customer to License and use the Product and subsequently receive Support and Maintenance as set forth in a Product Schedule.

**“Support” or “Technical Support”** is technical assistance provided by AccelOps to Customer during the Subscription Period defined in a Product Schedule.

**“Unit or Quantity”** is the number of SKUs or Models licensed by the Customer.

**“Update”** is any additional or replacement Software or documentation that adds minor Product features, functions, Error corrections, and that is are developed by AccelOps and, in AccelOps discretion, designated as an Update available to all Customers.

**“Upgrade”** is any additional or replacement Software or documentation that adds major Product features, functions, Error corrections, and that is developed by AccelOps and, in AccelOps discretion, designated as an Upgrade available to all Customers.

**“Virtual Appliance”** is the Software Product used locally by the customer at the customer-premise, whereby the Customer shall provide the necessary hardware and software to operate the Software Product according to Specifications.

## 2. License

- 2.1. Subject to the terms and conditions of this Agreement, AccelOps hereby grants Customer a non-exclusive, non-transferable, non-sublicenseable license to use the Product under the specified Product Model(s), Performance Parameters, Subscription Period and fully paid Fees set forth in the Product Schedule, and to install and use the Product Software (in object code form only), at the

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- Licensee's site(s), solely for the internal operational business purposes of the Customer and in accordance with the accompanying End User Documentation.
- 2.2. The substance of these license terms also is presented to the Customer and Licensed User during initial purchase and/or subsequent access to and use of the AccelOps' Software Product and Service - see Exhibit A. However, if there is any conflict between the license terms displayed during such use and the terms contained in this signed Agreement, the terms of this signed Agreement are to control.
  - 2.3. Within a reasonable time after AccelOps' receipt of a Customer-executed End User License Agreement, Product Schedule and Fee, AccelOps will establish an Account for Customer and will issue an Account ID and License Number(s) to Customer to be used to operate each instance of the Product. License Number(s) will be used to activate an instance of the Product and to enable the Customer to receive respective Product Support and Maintenance. AccelOps will send this License Number as well as Account details to those Customer contacts designated in the Product Schedule.
  - 2.4. Customer shall complete a Product registration by providing current, complete and accurate information as prompted during the registration process, including a valid email address (username) and password that Customer is responsible to protect. Customer is solely responsible for any and all activities that occur using Customer's Account access. By completing the registration process, Customer consents to receive all subsequent communication by electronic or written means from AccelOps. That communication may include legal notices and other information about the Account, Product, Services, promotion, request for feedback or other similar information.
  - 2.5. If Customer licenses the Service Provider edition of the Product as referenced in the Product Schedule, then the Customer will be able to (i) sell and provide services associated with the direct use of the product, (ii) distribute the Collector portion of the Product, (iii) use the Product to provide services to third parties, and (iv) add Customer's trademarks and service marks to pre-defined areas of the Product. All other terms of this Agreement remain unchanged, and Customer acquires no other right or interest in any Product or Service nor any expectation to their continued availability, except as expressly set forth in this Agreement.
  - 2.6. AccelOps reserves the right to include means within the Software to limit the Licensee's use of the Product and to limit the Model's Performance Parameters according to the specifications within the Product Schedule.
  - 2.7. Except as may be expressly set forth herein and in a Product Schedule, AccelOps reserves all rights and does not grant Customer any additional licenses of any kind.
  - 2.8. Except as may be expressly set forth herein or in a separately executed agreement, Customer shall not (i) operate the Product in a manner not conforming to Product Specifications, (ii) reproduce, modify, translate or create any derivative work of all or any portion of the Products, (iii) sell, rent, lease, loan, provide, distribute or otherwise transfer all or any portion of the Software, (iv) reverse engineer, reverse assemble or otherwise attempt to gain access to the source code of all or any portion of the Products or to gain and share AccelOps' trade secrets, (v) use the Software for third-party training, commercial time-sharing or service bureau use or use the Software to provide services to third parties, (vi) remove, alter, cover or obfuscate any copyright notices, trademark notices or other proprietary rights notices placed or embedded on or in the Products, (vii) unbundle any component of the Products, (viii) cause or permit any third party to do any of the foregoing, or (ix) falsely provide information within the Account.
  - 2.9. AccelOps shall not be required to provide any Support or Maintenance if in the judgment of AccelOps (i) Customer has not adhered to the terms of the license conveyed by this Agreement, (ii) any Errors reported by Customer do not conform to the definition of "Error" provided herein, (iii) Customer is not operating the most recent applicable Update or Upgrade or the immediately preceding Update or Upgrade made available by AccelOps, (iv) Customer fails to make any required

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Fee payment or otherwise elects to terminate this Agreement (as per Section 10), (v) the Subscription Period has expired, or (vi) the Product is a Restricted or Trial Release that the Customer elected to utilize.

- 2.10. Customer acknowledges that information necessary to achieve interoperability of the Software with other programs may be available upon request.
- 2.11. Customer may make a reasonable number of copies of the Software solely for their inactive back-up and archival purposes and as conveyed in the End User Documentation; provided that all such copies are the exclusive property of AccelOps and its suppliers and further provided that all such copies include all copyright and other intellectual property right notices that appear on the original.
- 2.12. Customer acknowledges that the Software contains or is provided with copyrighted software of AccelOps' suppliers as identified in associated documentation or other printed materials ("Third Party Software"), which are obtained under a license from such suppliers. Customer's use of any Third Party Software is subject to – and Customer shall comply with – any applicable restrictions and other terms and conditions set forth in such documentation or printed materials, and further subject to the terms of this Agreement. A list of Third Party Software that accompanies the Software is available from AccelOps.

### **3. Fee**

- 3.1. In consideration of the License Product, respective Support and Maintenance, and any additional Professional Services provided by AccelOps to the Customer, the Customer shall pay AccelOps in full all Fees, inclusive of the Perpetual Fee, in the amounts and in accordance with the payment terms as defined in the Product Schedule.
- 3.2. All invoices are due and payable in US Dollars as defined in the Product Schedule.
- 3.3. Upon AccelOps' request prior to initial purchase, or if the Customer is delinquent in payment in excess of 90 days, the Customer will complete an AccelOps' credit application.
- 3.4. Overdue payments shall bear interest at the lesser of one and one half percent (1.5%) per month or the maximum rate allowed under applicable law. Customer shall pay all costs of collection of delinquent invoices, including attorney's fees and court costs.
- 3.5. The Customer shall, in addition to the other amounts payable under this Agreement, pay all applicable taxes, however designated, which are levied or imposed by reason of the transactions contemplated by this Agreement, excluding only taxes based on AccelOps' net income.
- 3.6. Licensee shall maintain complete and accurate records regarding Licensee's use of the Software and shall make such information available to AccelOps upon reasonable advanced notice. Should AccelOps, directly or through independent audit, conclude that the Licensee's use of the Software is found to be greater than provided under this Agreement, the Customer will be invoiced and must immediately pay for the additional use and the unpaid license fees which shall be payable in accordance with this Agreement, as well as all reasonable audit costs.

### **4. Support**

- 4.1. AccelOps will use commercially reasonable efforts to provide Support to its Customers during the term of this Agreement in a professional manner in accordance with industry standards.
- 4.2. AccelOps shall provide the following Support for the Product:
  - 4.2.1. Online technical support, such as online technical support case management and knowledge base, is available through AccelOps' support website;
  - 4.2.2. Telephone support available by calling AccelOps' telephone number listed on the AccelOps website; and
  - 4.2.3. Email support available by emailing to the address [support@AccelOps.net](mailto:support@AccelOps.net).

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- 4.3. Online technical support case management and email support is available twenty-four (24) hours a day, seven (7) days a week, and three hundred and sixty-five (365) days a year. Any additional Support details are defined within the Product Schedule.
- 4.4. Telephone support is available during extended business hours defined at 6:00am to 6:00pm, U.S. Pacific standard time, during business work days Monday through Friday excluding United States public holidays. Any additional Support details are defined within the Product Schedule.
- 4.5. AccelOps shall respond to all support inquiries within the same or next business day depending on the issue severity as defined in Section 5.4. AccelOps' Support will fully depend on the Customer to provide AccelOps with at least the following information:
  - 4.5.1. Customer company name,
  - 4.5.2. Licensed User contact name, number and email address,
  - 4.5.3. License Number, and
  - 4.5.4. Question, enhancement requests, or should their be an Error, all details regarding such Error.
- 4.6. Additional Support information is available at the AccelOps website within an online AccelOps Customer Support Guidelines document that is subject to change, including the level of support provided to Customers using Community Services, Restricted Releases or Trial Product.

### **5. Maintenance**

- 5.1. AccelOps will use commercially reasonable efforts to provide Maintenance to its Customers during the term of this Agreement in a professional manner in accordance with industry standards.
- 5.2. During the Subscription Period, AccelOps, in its determination, will provide to Customer Updates and Upgrades at the same time that it provides those Updates and Upgrades to its other customers under similar Maintenance terms. Some functionality provided in Updates and Upgrades may not apply to all Models and Services, including Restricted Release or Trial Product. Updates and Upgrades will be made available to the Customer within the AccelOps website or may be automatically applied as part of the Service.
- 5.3. AccelOps reserves the right to offer modified versions of its Product or Services, including subsequent versions and Upgrades that contain new features or functions as new Products or Services for additional consideration.
- 5.4. AccelOps will provide commercially reasonable, advance notice to the Customer on applicable Updates.
- 5.5. AccelOps shall use commercially reasonable efforts to correct Errors as determined and verified by AccelOps. Error levels and resolution parameters are as follows:
  - 5.5.1.P1 – Product is impaired to the extent that it does not operate. Following AccelOps' verification of a P1 Error, AccelOps will use commercially reasonable, continuous effort to provide an Emergency Fix or workaround for the Error. AccelOps' Support staff will reply to the Customer within 2 hours and will provide periodic status updates. An official solution to the P1 Error will be included in the next Update or Emergency Fix.
  - 5.5.2.2 – Product operates, but a feature has a problem resulting in a better than moderate impact on functionality. Following AccelOps' verification of a P2 Error, AccelOps will use commercially reasonable effort to provide an Emergency Fix or workaround for the Error. AccelOps' Support staff will reply to the Customer within 8 hours and will provide periodic status updates. An official solution to the P2 Error will be included in the next Update or Upgrade.
  - 5.5.3.P3 – Product operates with a minor problem or a Customer requests a feature enhancement. Following AccelOps' verification of a P3 Error or receipt of a feature enhancement request, AccelOps will assess the Error or enhancement request within a

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reasonable time and will use commercially reasonable effort to identify a possible solution or enhancement to be included in an Update or Upgrade, as determined by AccelOps, and as time permits within AccelOps' development cycle. Support will reply to the Customer within the next business day.

- 5.6. In order for AccelOps to remedy certain Errors, Customer must provide:
  - 5.6.1. Customer company name,
  - 5.6.2. Licensed User contact name, number and email address,
  - 5.6.3. License Number, and
  - 5.6.4. Question, enhancement requests, or should their be an Error, all details regarding such Error.
- 5.7. AccelOps Support will determine publicly released Error corrections and enhancement reference documentation with each Update or Upgrade.

### **6. Ownership**

- 6.1. All Licensed Software Product is licensed and not sold. Title to and ownership of the Software Product and any associated documentation, and any Updates, Upgrades, Developments, or additional parts thereof, and all copyright, patent, trade secret, trademark and other intellectual property rights embodied in the Products, are and will remain the property of AccelOps.
- 6.2. All suggestions or feedback provided by Customer or its employees or agents to AccelOps with respect to the Products, including any Developments specifically as a result of Professional Services, are and will remain AccelOps' property and are to be deemed Confidential Information of AccelOps.
- 6.3. Licensee acknowledges that any breach of its obligations with respect to the proprietary rights of AccelOps or its licensors may cause AccelOps or its licensors irreparable injury for which there may be inadequate remedies at law. Therefore, in the event of such breach or of the threat of such breach, AccelOps and its licensors will be entitled to equitable relief, in addition to all other remedies available to them, without the payment of any bond.

### **7. Confidentiality**

- 7.1. The parties acknowledge that each party may have access to the other party's Confidential Information. The parties agree, both during the term of this Agreement and for a period of three (3) years after termination or expiration, to hold each other's Confidential Information in confidence. The parties agree not to make each other's Confidential Information available in any form to any third party (other than their respective employees, consultants or agents under nondisclosure obligations) or to use each other's Confidential Information for any purpose other than as contemplated by this Agreement. Each party agrees to take commercially reasonable steps to ensure that Confidential Information is not disclosed, used or distributed by its employees or agents in violation of the provisions of this Section 7.
- 7.2. Notwithstanding any provision contained in this Agreement, neither party shall be required to maintain in confidence any of the following information: (i) information which, at the time of disclosure to the receiving party, is in the public domain; (ii) information which, after disclosure, becomes part of the public domain, with no breach of this Agreement; (iii) information which was in the receiving party's possession at the time of disclosure by the disclosing party, and which was not acquired, directly or indirectly, from the disclosing party; (iv) information which the receiving party can demonstrate resulted from its own research and development, independent of disclosure from the disclosing party; or (v) information which the receiving party receives from third parties, provided such information was not obtained by such third parties from the disclosing party on a confidential basis.

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- 7.3. Notwithstanding the obligation not to disclose the Confidential Information of the other party, a party may disclose Confidential Information to the extent necessary to comply with applicable law or a court order, provided the other party is given reasonable notice of such law or order to attempt to preclude or limit such production.
- 7.4. Each party acknowledges that any breach of its obligations with respect to the Confidential Information of the other party or of such party's licensors, if any, may cause such other party irreparable injury for which there may be inadequate remedies at law. Therefore, in the event of such breach or of the threat of such breach, the injured party and its licensors, if any, will be entitled to equitable relief, in addition to all other remedies available to them, without the payment of any bond.
- 7.5. ANY SEPARATE AGREEMENT REGARDING THE SPECIFIC DISCLOSURE AND PROTECTION OF CONFIDENTIAL INFORMATION, IF EXECUTED BY BOTH PARTIES, SHALL SERVE TO SUPERSEDE THIS SECTION 7.

### **8. Indemnity**

- 8.1. AccelOps shall indemnify, defend and hold Customer, its officers, directors, and employees harmless from any and all claims, liabilities, damages which result from any third party action alleging that the Products infringe any valid U.S. patent, copyright, trademark, trade secret or other proprietary rights of any third party. AccelOps shall pay all settlements entered into, and all final judgments and costs (including reasonable attorneys' fees and court costs) awarded against Customer in connection with such action after AccelOps has exhausted all reasonable appeals it may desire to exercise and has approved, in writing, the terms of any settlement. If any Product, or parts thereof, becomes, or in AccelOps' opinion may become, the subject of an infringement claim, AccelOps may, at its option, (i) procure for Customer the right to continue using such Products, (ii) modify or replace such Products with substantially equivalent non-infringing products, or (iii) require the return of such Products and refund to Customer a pro-rata portion of the purchase price of such Products based on a twelve-month straight line amortization of the purchase price.
- 8.2. AccelOps has no indemnification obligations with respect to any third-party action alleging the infringement of any valid U.S. patent, copyright, trademark, trade secret or other proprietary rights of any third party, where such claims arise out of or are related to:
  - 8.2.1. The use of any Products, or any part thereof, in combination with products not supplied by AccelOps,
  - 8.2.2.2 – The use of any subsequently superseded or modified release of the Products that, if Updated or Upgraded to the then-current release, would have avoided infringement, or
  - 8.2.3. P3 – The unauthorized or void use of any Product.
  - 8.2.4. In such event that any of the above conditions exist, then the Customer shall defend AccelOps and its officers, directors and employees against any such action, and the Customer shall pay all settlements entered into, and all final judgments and costs (including reasonable attorneys' fees and court costs) awarded against such party in connection with such action.
- 8.3. Each party's indemnification obligations shall be subject to the indemnified party:
  - 8.3.1. Notifying the indemnifying party promptly in writing of such action,
  - 8.3.2.2 – Giving the indemnifying party exclusive control and authority over the defense or settlement of such action,
  - 8.3.3. Not entering into any settlement or compromise of any such action without the indemnifying party's prior written consent, and
  - 8.3.4. Providing all reasonable assistance to the indemnifying party (provided that the indemnifying party reimburses the indemnified party for its out-of-pocket expenses

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incurred in providing such assistance).

8.4. THIS SECTION 8 STATES THE ENTIRE LIABILITY OF ACCELOPS AND CUSTOMER FOR ANY INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS.

### **9. Limited Warranty and Disclaimer**

- 9.1. Any limited warranty for the Products, and AccelOps' sole and exclusivity liability thereunder, is as set forth herein. Specific, additional, limited warranty terms regarding the Service Levels Agreement for AccelOps' Service, excluding Community Services, is attached as Exhibit C, solely for Customers who have purchased the Product as a Service.
- 9.2. Notwithstanding anything herein or otherwise to the contrary, AccelOps makes no warranty with respect to any third-party software products provided under this Agreement. Customer's sole remedy with respect to such third party products shall be pursuant to the original licensor's warranty, if any, to Customer, to the extent permitted by the original licensor.
- 9.3. EXCEPT FOR ANY EXPRESS LIMITED WARRANTIES FROM ACCELOPS IN SUCH DOCUMENTATION, THE PRODUCTS ARE PROVIDED "AS IS", AND ACCELOPS AND ITS SUPPLIERS MAKE NO WARRANTY, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, WITH RESPECT TO PRODUCTS OR SERVICES OR ANY PART THEREOF, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR THOSE ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE. NEITHER ACCELOPS NOR ANY OF ITS SUPPLIERS WARRANT THAT THE PRODUCTS OR SERVICES OR ANY PART THEREOF WILL MEET CUSTOMER'S REQUIREMENTS OR BE UNINTERRUPTED, OR ERROR-FREE, OR THAT ANY ERRORS IN THE PRODUCTS OR SERVICES WILL BE CORRECTED. SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES SO THE ABOVE EXCLUSIONS MAY NOT APPLY TO CUSTOMER. ACCELOPS' LIMITED WARRANTY GIVES CUSTOMER SPECIFIC LEGAL RIGHTS. CUSTOMER MAY ALSO HAVE OTHER RIGHTS, WHICH VARY FROM STATE/JURISDICTION TO STATE/JURISDICTION.

### **10. Term and Termination**

- 10.1. The term of this Agreement begins on the Effective Date and continues for the period set forth in the Product Schedule, unless renewed, modified or earlier terminated as defined herein. All notice of renewal, modification or termination must be given in form and as required under Section 14.4.
- 10.2. The Customer can change the Product Schedule terms of this Agreement by issuing a Subscription Modification Order, which, upon acceptance by AccelOps in its sole discretion, will modify the term of this Agreement as defined in a Product Schedule.
- 10.3. Either the Customer or AccelOps may terminate this Agreement and/or an applicable Product Schedule at any time due to the other party's Material Breach by submitting notice of termination in writing to the other party at least twenty (20) days prior to the effective date of such termination, provided the complained-of breach is not corrected within that twenty-day period. If Customer terminates the Agreement due to Material Breach, the customer remains obligated to pay in full all unpaid Fees and professional services up to the date of its notice to AccelOps.
- 10.4. Upon any termination, Customer must destroy all copies of the Software, End User Documentation and Confidential Information. The duties and obligations of the parties with respect to proprietary rights, intellectual property rights, non-disclosure and confidentiality, indemnification and limitation of liability will survive and remain in effect, notwithstanding the termination or expiration of this Agreement.

### **11. Limitation of Liability**

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11.1. EXCEPT FOR SECTION 7, IN NO EVENT SHALL ACCELOPS, CUSTOMER OR ACCELOPS' SUPPLIERS BE LIABLE TO THE OTHER OR ANY THIRD PARTY FOR COSTS OF PROCUREMENT OF SUBSTITUTE PRODUCTS OR SERVICES, LOST PROFITS, DATA OR BUSINESS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY (WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE). IN ANY EVENT CUSTOMER'S RECOVERY FOR ANY AND ALL DAMAGES, LOSSES AND CAUSES OF ACTION AND CUMULATIVE LIABILITY ARISING UNDER THIS AGREEMENT SHALL NOT EXCEED THE AGGREGATE DOLLAR AMOUNT PAID BY CUSTOMER AND RECEIVED BY ACCELOPS DURING THE SUBSCRIPTION PERIOD DURING WHICH THE CLAIM AROSE, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

### **12. Export Control**

12.1. Customer acknowledges and agrees that the United States Export Administration Act and its respective regulations may impose restrictions and controls in regards to the Products provided under this Agreement. Customer warrants that it will not export or re-export any Products provided under this Agreement into any country in violation of such controls or any other laws, rules or regulations of any country, state or jurisdiction.

### **13. Data Protection Laws and Federal Government Restrictions**

- 13.1. The use of certain Product and/or Services may be subject to data protection and data privacy laws and regulations in various jurisdictions. AccelOps neither accepts nor undertakes responsibility for determining any party's compliance with any such laws or regulations. The Customer is solely responsible for determining such compliance.
- 13.2. This sub-section only applies to United States federal government agency customers. As defined in FAR section 2.101, DFAR section 252.227-7014(a)(1) and DFAR section 252.227-7014(a)(5) or otherwise, the Software and associated documentation are "commercial items," "commercial computer software" and/or "commercial computer software documentation." Consistent with DFAR section 227.7202, FAR section 12.212 and other sections, any use, modification, reproduction, release, performance, display, disclosure or distribution thereof by or for the U.S. Government shall be governed solely by the terms of this Agreement and shall be prohibited except to the extent expressly permitted by the terms of this Agreement.

### **14. Miscellaneous**

- 14.1. This Agreement is to be governed by and interpreted in accordance with the laws of the State of California, U.S.A. without reference to conflicts of laws principles and excluding the United Nations Convention on Contracts for the International Sale of Goods. The parties consent to the exclusive jurisdiction of, and venue in, the state and federal courts located in Santa Clara County, California, U.S.A.
- 14.2. Customer shall not transfer, assign or delegate this Agreement or any rights or obligations hereunder, whether voluntarily, by operation of law or otherwise, without the prior written consent of AccelOps (except as expressly set forth in Section 2.6, which shall not unreasonably be withheld). AccelOps may assign this Agreement to any successor by way of merger, acquisition or sale of all or substantially all of assets relating to this Agreement. AccelOps or any successor may assign all or part of the right to payments under this Agreement. Any assignment or transfer of this Agreement made in contravention of the terms hereof is null and void. Subject to the foregoing, the terms and conditions of this Agreement are binding upon and inure to the benefit of the parties

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- and of their respective heirs, successors, assigns and legal representatives.
- 14.3. This Agreement, together with the attached Product Schedule that has been executed by both parties and references this Agreement, constitutes the entire agreement between the parties with respect to the subject matter hereof, and merges all prior negotiations and drafts of the parties with regard thereto. This Agreement may be executed in counterparts. A facsimile of a signed copy of this Agreement received from Licensee may be relied upon as an original, and if there is any inconsistency between such facsimile and a subsequently received hard copy, the facsimile shall prevail. Unless otherwise expressly accepted by AccelOps in writing, the terms and conditions of any purchase order, or any other document submitted by Licensee that conflicts with or in any way purports to amend this Agreement, are hereby specifically objected to and are of no force or effect. This Agreement may not be modified or amended other than by an agreement in writing signed by all parties hereto, or as otherwise authorized hereunder under notice provisions detailed in Section 14.4. Failure, delay or partial failure to exercise any part of this Agreement shall not constitute a waiver of such obligation, right, remedy, power or privilege, unless said waiver is in effect by way of written mutual agreement between the parties.
- 14.4. If any of the provisions of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable under any applicable statute or rule of law, such provision shall, to that extent, be deemed omitted. All notices, requests or other communications between the parties that are permitted or required under this Agreement must be in writing by duly authorized representatives and are to be deemed to have been duly given, made and received on the date when delivered (personally, by courier service such as Federal Express, or by other messenger), according to the prevailing United States Pacific Standard Time date on the timestamp of an e-mail when received by e-mail at [billing@AccelOps.net](mailto:billing@AccelOps.net) or when deposited in the United States mail, certified mail, postage prepaid, return receipt requested, addressed as set forth above. Any party may alter the address to which communications or copies are to be sent by giving Notice of such change of address in conformity with the provisions of this paragraph for the giving of notice.

This Agreement, containing terms, conditions and respective Product Schedule and Exhibits A, B, and C referenced herein, comprise the entire agreement ("Agreement") agreed to between the Customer and AccelOps regarding use of the Software, Products and Services.

### Exhibit A: Trial Product

Should the Customer download, access or use Trial or Evaluation Product, where by no written agreement between AccelOps and the Customer is in force, the Product or Service:

- (i) is being provided to the Licensee by AccelOps on an as-is basis with no warranty of any kind, express, implied, statutory or otherwise, including but not limited the warranties of merchantability and fitness for a particular purpose, and
- (ii) is only available to those who have been selected or have elected to use and have agreed to additional terms and conditions online at [www.AccelOps.net](http://www.AccelOps.net).

### Exhibit B: Product Schedule

COMPANY/USER/LICENSEE:

- Contact details must be current within the Account maintained by AccelOps, Inc.

PRODUCT/SERVICE

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Product Model, with Respective Performance Parameter details, is referenced within the Account maintained by AccelOps, Inc. If Trial Product, Product Model will be the then current Trial Product Model offered at the time the Customer accepts the End User License Agreement.

### SUBSCRIPTION TERM:

Subscription period, which may reference a trial, subscription or perpetual license, is referenced within the Account

### PAYMENT TERM:

All Fees are referenced within the Account maintained by AccelOps, Inc.

AccelOps shall be entitled to rely upon email requests for additional Products or Services, and when accepted by AccelOps (as evidenced by confirming email communication or by the commencement by AccelOps of the request, the Customer shall be liable for all additional charges related thereto.

Billing. For billing and account inquiries, the customer should contact the billing department.

Hours: 9am to 5pm PST, Monday through Friday, excluding U.S. national holidays

Phone: 408.970.9668

Email: [billing@AccelOps.net](mailto:billing@AccelOps.net)

Sales. For sales inquiries, the customer should contact the sales department.

Hours: 7am to 5pm PST, Monday through Friday, excluding U.S. national holidays

Phone: 408.970.9668

Email: [info@AccelOps.net](mailto:info@AccelOps.net)

### Exhibit C: Service Level Agreement

(Exclusively for those Customers who have purchased or are in Trial of the AccelOps Software-as-a-Service Product)

AccelOps provides its Product as a hosted Service. The following is the limited warranty for the AccelOps' Service and details the sole and exclusive service levels, remedy and liability herein.

#### **1. Service Definition**

In addition to the definitions provided in the End User License Agreement, the following definitions apply to this Exhibit.

**"Availability or Available"** is (i) the ability of a Customer and its Licensed End Users to access and retrieve data from the AccelOps Hosting Infrastructure, (ii) the ability for the Software Product used locally by the Customer at the Customer-premise to capture and transmit data to be received by AccelOps Hosting Infrastructure, (iii) the receipt, processing and storage of Customer data by the AccelOps Hosting Infrastructure and in accordance with Performance Parameters as defined in the Product Schedule and (iv) the ability of a Customer to pass incoming and outgoing TCP/IP traffic through the AccelOps Hosting Infrastructure to and from the IP transit provider (Internet backbone).

**"Community Data"** is information that the Customer specifically designates and authorizes for public use.

**"Customer Issues"** is (i) the use or operation of the Product by the Customer with any other software or in an environment other than that intended or recommended by AccelOps, (ii) the use, installation or operation of the Product other than in accordance with the published Specifications or the latest Update

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or Upgrade in effect at the time of use by the Customer, its employees, its agents or contractors, (iii) Customer modifications to the Product not made or authorized by AccelOps, (iii) any bug, defect or error in other third-party software, operating environment, or hardware used with or communicating to the Product or Service by the Customer or any other failure of such other software or hardware to conform to its published Specifications, (iv) any issues associated with Customer-provided software, hardware or network equipment located on the Customer's premise or at a facility or entity that provides hosting services for the Customer, or (v) issues associated with Customer-provided or Customer-leased local areas networks or ISP connections.

Factors within AccelOps' **"Direct Control"** are network services provided by an Internet Service Provider (ISP) circuit termination point on the router in AccelOps' designated data center (e.g. public Internet connectivity), the AccelOps Hosting Infrastructure, and all Software Product(s) provided by AccelOps as part of its Service. Notwithstanding the above, factors outside AccelOps' Control, including (i) IP transit provider (backbone) failure, denial of service or similar attacks directed at the AccelOps Hosting Infrastructure, (ii) all Customer-owned or operated software, hardware, network devices and Internet connectivity (commonly know as the "last mile") failures, (iii) all faults with Customer's sources which provide operating data, and (iv) Customer operator errors or Product abuse, any of which result or contribute to the Service being degraded or unavailable, are specifically excluded and will not be used to calculate Service Availability.

**"AccelOps Hosting Infrastructure"** is the infrastructure of network devices, servers, applications and storage designated and managed by AccelOps within an AccelOps' designated data center.

**"Service Availability"** is a percentage, determined each month within the Subscription Period, calculated as  $((h-x)*100)/h$  whereby "h" is the total Service hours in a given calendar month and "x" is the total number of hours in that calendar month that the Service is not Available. This calculation will be pro rated in any month in which the Service commences on any day other than the first day of the month. Service Maintenance and Emergency maintenance are excluded from Service Availability calculations.

**"Service Maintenance"** consists of ad hoc or regularly scheduled Fixes, Updates and Upgrades to the Service performed by AccelOps or its designated service providers. Additional details are provided in Section 3.1.

**"Service, Software as a Service, SaaS, Hosted Service, OnDemand"** is a portion of Software Product to be used locally by the Customer at the Customer-premise, as well as the AccelOps hosted service used by the Customer through access and data transmission to a data center and respective Software Product managed by AccelOps and its suppliers who maintain the Software and Customer's data. The above definition excludes Community Services.

### **2. Service Maintenance**

- 2.1. AccelOps, in its determination, will provide Service Customers Updates and Upgrades during the AccelOps may take its Service temporarily offline to conduct routine maintenance and to release Updates and Upgrades during a predefined maintenance window, the schedule for which either is provided via advance notice to Customer or is published on the AccelOps website.
- 2.2. Service Maintenance typically occurs during off-peak hours, but is not limited to, each Friday at 10:00 p.m. Pacific Standard Time through Sunday at 4:00 a.m. Pacific Standard Time. AccelOps will use commercially reasonable efforts to minimize the length of a given maintenance window. The Software Product that is installed by the Customer on the Customer premise has been designed to utilize local storage to preserve collected operational data during Service Maintenance. Guidance for storage capacity to support local data collection during Service Maintenance is available in the End User Documentation
- 2.3. Under certain circumstances, AccelOps may need to perform Emergency Maintenance, such as an ad hoc security patch installation or hardware replacement. At such time, AccelOps will use

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- commercially reasonable efforts to minimize Service interruption (“Emergency Maintenance”).
- 2.4. AccelOps will advise Service Customers as to upcoming ad hoc or regularly scheduled Service maintenance and any schedule changes whenever possible in a timely manner. AccelOps may change its Service Maintenance at any time during the Subscription Period, upon reasonable advance notice to the Customer.

### **3. Service Data and System Protection**

- 3.1. AccelOps staff has executed an agreement regarding confidentiality and protection of intellectual property. AccelOps, its employees and designated contractors will adhere to a Customer’s confidentiality agreement as executed between AccelOps and the Customer. The Customer hereby authorizes AccelOps to use commercially reasonable means to maintain the integrity and availability of Customer data being processed and stored by the AccelOps Service.
- 3.2. The AccelOps Hosting Infrastructure utilizes commercially reasonable service and security best practices and designated hosting providers which operate a data center facility that has passed a SAS-70 Type II audit. The hosting provider, not AccelOps, is solely responsible to maintain SAS-70 Type II audit standards. All changes, access to, and monitoring of the production environment are subject to AccelOps-approved processes that include physical access, system security hardening, service optimization, regular vulnerability assessment and resolution, infrastructure patches, Software Updates and Upgrades, data snapshots, and high availability measures. Audit logs for our Service are maintained and regularly reviewed. Specific and reasonable audit details may be provided at AccelOps’ sole discretion under non-disclosure terms upon a Customer’s request.
- 3.3. AccelOps and its designated hosting providers utilize such security measures as Firewalls, Intrusion Detection Systems, encryption, system and application-level access controls, data recovery capabilities and respective audit logging to protect Service access and access to Customer data. AccelOps Software Products residing on the customer premise transmits operational data to the AccelOps Service using commercially proven encryption technologies.
- 3.4. All access to the AccelOps Service and to specific Customer data requires authentication that is available only to persons and systems with a prior-approved need for specific Customer-data access.
- 3.5. Only AccelOps and its agents under non-disclosure terms will access specific Customer data (and respective product configuration and internal operating details) for the purpose of Support and Maintenance.
- 3.6. AccelOps shall make snapshots of the Customer data for the purpose of data protection. If a problem occurs (e.g. in the event of an internal system crash), AccelOps shall recover the last snapshot of the Customer’s data as soon as operating conditions have been reasonably validated after the problem is declared.

### **4. Service Data Use**

- 4.1. The use of certain Product and/or Services may be subject to data protection laws or regulations in various jurisdictions. The Customer is responsible for determining compliance with said laws or regulations.
- 4.2. Since the AccelOps Product and/or Service processes and stores certain information about the Customer, including its network, users and services, (“Information”) through respective operational data, the Customer has agreed to allow AccelOps to process and store that information.
- 4.3. The Customer further agrees that AccelOps may monitor the Information to improve its Products and Services, as long as the resulting information is processed in aggregate with other customer data and does not disclose any customer origin.
- 4.4. The Customer agrees to exchange Community Data with others where the Customer has

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specifically identified, designated and authorized such Community Data.

- 4.5. AccelOps reserves the title, ownership and all rights and interest to any intellectual property or work product resulting from its use and analysis of Customer Information and Community Data.

### **5. Service Availability Guarantee**

- 5.1. AccelOps shall provide ninety-nine point five percent (99.5%) Service Availability each month during the Subscription Period to its Service Customers to the extent that such provision of the Service is within AccelOps' Direct Control.
- 5.2. Service Availability shall not include any such failure or impact that is caused by Service Maintenance, Force Majeure or Customer Issues.
- 5.3. AccelOps will notify the Customer directly on any failure to meet the above service availability guarantee.
- 5.4. The Service Availability Guarantee does not apply to Customers using Restricted Release or Trial Product.

### **6. Service Remedy**

- 6.1. If AccelOps is unable to meet Service Availability for a given calendar month as per the Product Schedule and exceptions noted herein, the Customer will be entitled to a credit ("Service Credit").
- 6.2. If Service Availability percentage is between ninety-nine point five percent (99.5%) and ninety-five percent (95%), then AccelOps shall apply a credit for current or future Service to the Customer's Account equal to three percent (3%) of the then-current monthly Fee, as defined in the Product Schedule.
- 6.3. If Service Availability percentage is below ninety-five percent (95%), then AccelOps shall apply a credit for current or future Service to the Customer's Account equal to five percent (5%) of the then-current monthly Fee, as defined in the Product Schedule.
- 6.4. The Service Credit shall be applied to any open invoice due AccelOps by the Customer, except for any Fees for Professional Services. In the event that the Service Credit is in excess of such open or future invoices, or if no open invoices exist, then AccelOps will apply a credit to the Customer's Account that will extend the Service Subscription Period according to the current Product Schedule for the applicable excess amount.
- 6.5. No Service Credit will be awarded to the Customer for any failure to meet the Service Availability Guarantee due to any Force Majeure. In the event that a Force Majeure prevents AccelOps from meeting ninety-five percent (95%) Service Availability for greater than fourteen (14) days in any six (6) month period within the Subscription Period, the Customer's sole remedy shall be to either: (i) accept an automatic extension to the Customer's current Subscription Period equivalent to the length of consecutive Service outage days due to Force Majeure, or (ii) terminate this Agreement and cease Service on thirty (30) days prior written notice to AccelOps, whereby upon such termination notice, the Customer will receive a refund from AccelOps of any unused portion of the then current Fee (excluding fees associated with Professional Services) for the Service.
- 6.6. For any events of Force Majeure, Service termination or Service degradation, the Liability Limitation (Section 10 within the End User License Agreement) remains in effect.
- 6.7. AccelOps will be the sole and final judge as to any Customer dispute regarding the availability guarantee and respective remedy.
- 6.8. HIS SECTION DEFINES ACCELOPS' SOLE AND EXCLUSIVE LIABILITY AND THE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES FOR A PROBLEM WITH OR INTERRUPTION OF THE ACCELOPS SERVICE.
- 6.9. THERE IS NO WARRANTY NOR RESPECTIVE LIABILITY AND REMEDY FOR CUSTOMER'S USE OF RESTRICTED RELEASE OR TRIAL PRODUCT.

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