

## Unitrends, Inc.

### Software and Hardware Maintenance and Technical Support Agreement

This Software and Hardware Maintenance and Technical Support Agreement and all exhibits and attachments hereto (this "Agreement") is between Unitrends, Inc., a Delaware corporation with offices at 200 Wheeler Road, Burlington, MA 01803 ("Unitrends") and the customer organization purchasing support services ("Customer").

#### 1. DEFINITIONS

**1.1. Administrative Contact:** means Customer's designee responsible for the Unitrends relationship and allocation of Technical Contacts within Customer's organization. This is a non-technical role in the relationship; the Administrative Contact cannot open Cases but is authorized to escalate existing Cases unless such Administrative Contact is also a Technical Contact (as defined hereunder).

**1.2. Architectural Release:** means a new version of the Supported Software that delivers fundamentally modified system architecture in addition to improvements or enhancements of existing features and/or functionality to the Supported Software; Professional Services are typically required to upgrade from prior Releases.

**1.3. Case:** means the documented tracking of a specific Problem or question initiated by a Technical Contact via telephone, e-mail, chat or the Customer Portal.

**1.4. Custom:** means a configuration, deployment, patch or other non-standard solution which is not included in the Supported Software.

**1.5. Customer Support Portal:** means the internet portal site designated by Unitrends to which Customer may direct Problems or questions.

**1.6. Current Release:** means the Release which represents the most recent distribution of an Architectural Release, Major Release or Minor Release. For example, the Current Release as of October 1st, 2013 is 7.2.0-x. In the event of an Architectural Release to 8.0.0-x or a Major Release to 7.3.0-x or a Minor Release to 7.2.1-x, such Release would replace 7.2.0-x as the Current Release.

**1.7. Documentation:** means the written user documentation and video tutorials provided by Unitrends for use with the Software and Hardware and designated by Unitrends as user documentation.

**1.8. Effective Date:** means the date upon which the term of the Agreement commences as specified on the applicable Unitrends quote.

**1.9. Enhancement:** means a new feature or functionality not available in the current Supported Software or Supported Hardware release, tracked as a Request for Enhancement.

**1.10. Fix:** means the repair or replacement of object or executable code versions of the Supported Software or the repair or replacement of hardware component(s) to the Supported Hardware designed to remedy a Problem.

**1.11. Hardware:** means the Unitrends-supplied computer hardware only, excluding any third party equipment, software, supplies or accessories included with such hardware and attached, networked or otherwise connected non-Unitrends supplied hardware devices, provided to Customer in accordance with the terms of the applicable Unitrends quote.

**1.12. Local Time:** means the time zone associated with the location of the applicable Supported Hardware.

**1.13. On-Site Support:** means the technical support provided at Customer's site(s) by Unitrends engineers or qualified representatives trained and skilled to diagnose and remedy reported Problems.

- 1.14. Problem:** means an error in the Supported Software or Supported Hardware that causes it not to conform in all material respects to the Documentation; provided, however, that Problems exclude those exclusions specified elsewhere in this Agreement, including without limitation Section 4.3 and Section 6.
- 1.15. Problem Resolution:** means the use of commercially reasonable efforts to correct a Problem.
- 1.16. Release:** means a general release version of the Software containing feature function enhancements. A Release may be an Architectural Release, Bug-fix Release, Major Release or Minor Release. General form of the release is X.yy.z –x where X represents an Architectural Release; yy represents a Major Release; z represents a Minor Release; and x represents a Bug-fix Release.
- 1.17. Bug-fix Release:** means a Revision of the Supported Software designed to correct a Problem.
- 1.18. Minor Release:** means a Revision of the Supported Software that delivers minor improvement, incremental features or enhancements of existing features, and/or functionality to the Supported Software.
- 1.19. Major Release:** means a Revision of the Supported Software that delivers significant improvements or enhancements of existing features and/or functionality to the Supported Software.
- 1.20. Request for Enhancement (“RFE”):** means a requested change or addition to the features and functions of the Supported Software or Supported Hardware.
- 1.21. Revision:** means the interim version of a Release containing code correction and product quality improvements.
- 1.22. Software:** means the Unitrends-supplied computer software, in object code format only, including any Updates provided to Customer by Unitrends.
- 1.23. Software Updates (or Updates):** means subsequent Releases, Revisions, Fixes, Workarounds and Enhancements to the Software that are generally made available at no additional charge by Unitrends to its customers entitled to receive Technical Support. Updates do not include any Releases, Revisions, Fixes, Workarounds or Enhancements, or any other improvements, options, new features, new functionality modules, extensions or new products for which Unitrends elects to charge separately.
- 1.24. Supported Software:** means the unmodified Current Release of the Software.
- 1.25. Supported Hardware:** means Hardware which is purchased from an authorized Unitrends distributor or reseller, is unmodified, and remains in a Unitrends-approved configuration.
- 1.26. Technical Contact(s):** means Customer’s designated technical support contact(s). Customer must provide the names and contact information for Technical Contacts to Unitrends prior to accessing the Customer Support Portal and submitting any Customer requests.

**1.27. Technical Support (or Support):** means the technical support services expressly specified in Sections 2, 3 and 4 of this Agreement to be provided on the Supported Software and Supported Hardware by Unitrends personnel or the personnel of Unitrends' authorized resellers or distributors.

**1.28. Unitrends Support Center Access Level:** means the support level purchased by the Customer. The Unitrends Support Center Access Levels are described in the Unitrends Support Services Guide available at the Unitrends Customer Support Portal.

**1.29. Workaround:** means a temporary solution or Bug-fix that restores operational capability without severely compromising the performance of the Supported Software or integrity of the operating system or data. Workarounds may include changes to configuration parameters or operational processes.

## **2. TECHNICAL SUPPORT SERVICES**

**2.1. Scope of Technical Support:** During the Term of this Agreement, Unitrends will exercise commercially reasonable efforts to resolve Problems reported by the Customer in the Supported Software or the Supported Hardware in accordance with the provisions of this Agreement. Technical Support will be provided only to authorized Technical Contact(s) identified by Customer in accordance with the then-current Unitrends policy and will consist only of telephone assistance, access to web-based self-help and web-based resources, and Fixes as deemed necessary by Unitrends for the Supported Software and Supported Hardware provided by Unitrends in accordance with Section 3 and Section 4.

**2.2. Support Center Access Level:** Unitrends will provide Technical Support to the Customer at the Unitrends Support Center Access Level the Customer has selected and purchased.

**2.3. On-Site Support Costs:** Except for On-Site Support, for the sole purpose of diagnosing and repairing Problems on Supported Hardware, Unitrends may, in its sole discretion, provide Technical Support at Customer's site at Customer's request, subject to Customer paying Unitrends its then-current fees for such on-site services, plus Unitrends reasonable living and travel expenses incurred to provide such on-site services.

**2.4. Support Services Handbook:** Details of the process for Customer to use to contact Unitrends support to submit Problems and Unitrends' Problem resolution objectives can be found in the Unitrends Support Services Handbook made available to Customer at the Customer Support Portal as the same may be updated from time to time by Unitrends in its sole discretion (the "Unitrends Support Services Handbook"), provided, that any update shall not decrease the Customer's support entitlements from those set forth in this Agreement.

## **3. SOFTWARE SUPPORT**

**3.1. Support:** Unitrends will provide Technical Support only for Supported Software. Updates, Fixes, Workarounds and Releases will be made available for download by Customer at the Unitrends Customer Support Portal.

**3.2. Updates:** Updates for the Supported Software are included with Technical Support and shall be provided to the authorized Technical Contact identified by Customer in accordance with the then-current Unitrends Support Services Handbook.

**3.3. Update Releases and Required Upgrades:** Unitrends reserves the right to release Software Updates that may require upgrades or replacement of Supported Hardware. If and when this occurs, if Customer has paid for continuous Technical Support coverage, Customer will be provided special Hardware-only upgrade pricing. If Customer has not paid for continuous Technical Support coverage, Customer will not be entitled to receive this special Hardware-only upgrade pricing.

**3.4. Professional Services:** Customer may request that Unitrends perform Professional Services for Customer and, if Unitrends agrees to provide such Professional Services, Unitrends reserves the right to charge its then-current rates for such Professional Services. Professional Services may include, without limitation, to assistance installing Software Updates, upgrading Supported Hardware, installing the Supported Hardware and configuring the Supported Software in the Customer's environment or configuring additional servers in the Customer's environment (collectively, "Professional Services"). Professional Services are provided by Unitrends pursuant to a separate written agreement (the "Unitrends Professional Services Agreement") and Customer will be required to enter into Unitrends' Professional Services Agreement and a Statement of Work thereunder prior to Unitrends performing any Professional Services for Customer. If Unitrends agrees to provide Professional Services requested by Customer, Unitrends will submit to Customer a Statement of Work describing, among other things, the responsibilities of the parties, the Professional Services requirements, and an estimate of the fees payable by Customer for such Professional Services.

**3.5. Custom Solutions:** Unitrends may provide, at its discretion and if feasible, Custom solutions to meet a Customer's unique business requirements. Custom solutions are provided by Unitrends pursuant to the Unitrends Professional Services Agreement and Customer will be required to enter into Unitrends' Professional Services Agreement and a Statement of Work thereunder prior to Unitrends providing any Custom solutions for Customer. If Unitrends agrees to provide Custom solutions requested by Customer, Unitrends will submit to Customer a Statement of Work describing, among other things, the responsibilities of the parties, the Custom solution requirements, and an estimate of the fees payable by Customer for such Custom solution. Customer must authorize, in writing, the implementation of the Custom solution before Unitrends will implement the Custom solution. Any Custom solution implemented for a Customer remains Custom, is not covered by Technical Support, and is supported by Unitrends as a one-off solution at Unitrends' then-current Professional Services rates, until such time, if any, as the features or functions provided by the Custom solution is included by Unitrends, in its sole discretion, as a part of the Supported Software.

## **4. HARDWARE SUPPORT**

**4.1. Support:** Unitrends will provide Technical Support only for Supported Hardware. Customer must maintain Supported Hardware in a controlled environment typical to business critical servers, including an uninterruptible power supply (UPS) and a cooled environment to avoid overheating.

**4.2. Problem Resolution:** Resolution of Problems on Supported Hardware includes only the replacement or repair of defective parts which arise from manufacturers' defects or normal wear and tear in the ordinary course of business. The following is not covered by Technical Support:

- Reconditioning of Supported Hardware, or major overhauls to Supported Hardware
- Updates to Customer's Supported Hardware that are necessary to use a Software Update or Release
- Updates to Customer's Supported Hardware necessary to expand capacity, processing speed or memory of the Supported Software or Supported Hardware to accommodate Customer's business requirements
- Replacement of Supported Hardware damaged as a result of accident, improper use or maintenance
- Problems that are not reproducible by Unitrends

**4.3. Support Coverage and Out of Scope Items:** If Unitrends determines that any actions not covered by Technical Support are necessary to return Supported Hardware to working condition, Unitrends will submit to Customer an estimate of the needed actions and their related costs at Unitrend's then-current rates for such services. If the Customer does not authorize the actions recommended by Unitrends, then Unitrends may, at its option, discontinue Technical Support for the Supported Hardware under this Agreement and refund any unused portion of the applicable Technical Support fees for the Supported Hardware to Customer.

**4.4. Extended Support Policy and End of Life (EOL) Policy:** Unitrends Recovery Series appliances and other Unitrends hardware products are subject to the Extended Support Policy at 3 years after the Customer's purchase date. Hardware products in Extended Support incur an increase in support and maintenance costs at the time of Support Renewal. At 8 years past the Customer's purchase date, hardware products are considered End of Life (EOL) and will no longer be supported.

## **5. FEES, PAYMENT TERMS AND TAXES**

**5.1. Fees:** In consideration for the Technical Support provided under this Agreement, Customer agrees to pay the Technical Support fees due for Technical Support to Unitrends in advance and in accordance with the payment terms set forth on the applicable Unitrends' quote.

**5.2. On-Site Support Fees:** Except for On-Site Support that Unitrends elects to provide to diagnose and repair Problems on Supported Hardware, Customer agrees to pay fees and expenses to Unitrends at its then-current Professional Services rates for Customer requested visits to Customer's site by Unitrends for On-Site Support or otherwise during the Term of this Agreement.

**5.3. Renewal Fees:** If this Agreement is renewed, renewal fees for Technical Support will be Unitrends then-current fees for Technical Support at the time of renewal.

**5.4. Renewal after Lapse:** If there is a lapse in Technical Support due to failure to renew this Agreement, termination of this Agreement, or nonpayment of fees, Unitrends will reinstate Technical Support only after Customer enters into a new Technical Support agreement and pays all fees that would have been payable by Customer if Customer had purchased Technical Support during the period of the lapse (the "Lapsed Fees"), plus a reinstatement fee equal to 20% of the Lapsed Fees. To ensure that there is no lapse in Technical Support, Customer must pay all renewal fees prior to the expiration date of this Agreement.

**5.5. Payment Terms:** Invoices are due and payable thirty (30) days from Customer's receipt of Unitrends' invoice. In the event that any invoice is not paid when due, Customer will be subject to a late fee at the rate of one and one-half percent (1.5%) per month on the outstanding amount or the maximum rate permitted by law, whichever is less, and Unitrends may elect to suspend all Technical Support services to Customer until all outstanding invoices are paid.

**5.6. Taxes:** Customer will bear and be responsible for (i) the payment of all taxes, duties and like charges (collectively "Taxes") associated with the services performed hereunder (other than taxes based on Unitrends' net income) however designated, including value added and withholding taxes and/or the like, which are levied or based upon the fees payable for Technical Support or otherwise upon this Agreement and (ii) keeping all records and/or impounding or paying all Taxes and any other charges required by and imposed by any authority resulting from this Agreement.

## **6. LIMITATIONS OF SUPPORT AND OTHER ERRORS**

**6.1. Limitations:** Unitrends will have no obligation to provide Technical Support for Supported Software or Supported Hardware: (i) Supported Hardware or Supported Software that has been modified by other than Unitrends or its authorized contractors, resellers or distributors or which has been combined, integrated or bundled with non-Unitrends hardware or software; (ii) Software that is not Supported Software and Hardware that is not Supported Hardware; (iii) Hardware that is not supplied by Unitrends; (iv) Problems caused, directly or indirectly, by negligence, abuse or misapplication, use of the Supported Software or Supported Hardware other than as is specified in the applicable Unitrends documentation, or other causes beyond the control of Unitrends including, but not limited to damage caused by fire, lightning, accident, flood, or other similar causes, unsuitable physical environment and improper service by someone other than Unitrends or a Unitrends authorized contractor, reseller or distributor; or (v) any third party software or hardware. Unitrends will not be responsible for any changes, including without limitation the cost of any changes, to Customer's hardware or software which may be necessary to use the Supported Software or Supported Hardware due to a Release, Fix, Workaround or Update.

**6.2. Out of Scope Items:** If Unitrends determines, at its discretion, that a Problem reported by Customer may not be due to Unitrends' Supported Software or Supported Hardware, Unitrends will so notify Customer, who then may either: (i) instruct Unitrends in writing to proceed with Problem determination at Customer's expense, as further provided below; or (ii) advise Unitrends in writing that Customer does not wish Unitrends to proceed with Problem determination at Customer's expense. If Customer does not advise Unitrends of either (i) or (ii) within ten (10) business days of Unitrends' notification, Customer shall be deemed to have advised Unitrends not to pursue the Problem determination. Unitrends shall have no liability to Customer for any Problem which is not due to Unitrends' Supported Software or Hardware or any Problem that Customer advises, or is deemed to have advised, Unitrends not to pursue.

**6.3. Customer Responsibilities:** If Customer requests that Unitrends proceed with Problem determination at Customer's possible expense, Customer must provide authorization in writing. If Customer authorizes Unitrends to proceed and Unitrends subsequently determines that the Problem was not caused by Unitrends' Supported Software or Supported Hardware, Customer will compensate Unitrends for all work performed in connection with such determination on a time and materials basis, plus reasonable related expenses incurred therewith, at Unitrends then-current rates for such services.

## 7. OWNERSHIP

**7.1. Rights of Unitrends:** Customer acknowledges that Unitrends provides services to other customers of Unitrends and agrees that nothing in this Agreement will be deemed or construed to prevent Unitrends from carrying on such business. All right, title and interest in and to all work product created by Unitrends under the terms of this Agreement, including, without limitation, all Enhancements, Fixes, Workarounds, Releases, Updates, Custom solutions, modifications, improvements, changes, know-how, methodologies, and all other work product and all intellectual property rights therein and thereto, however discovered, will be the sole and exclusive property of Unitrends.

**7.2. Support Requests:** Customer may, from time to time, make known to Unitrends suggestions, RFEs, techniques, support requests, Problems, know-how, comments, feedback or other input to Unitrends with respect to the Supported Hardware and/or Supported Software (collectively, "Suggestions"). Unless otherwise agreed to in writing by the parties with respect to any Suggestion, Unitrends shall have a royalty-free, worldwide, irrevocable, perpetual license to use, disclose, reproduce, license, distribute and exploit any Suggestion without restriction or obligation of any kind, on account of confidential information, intellectual property rights or otherwise, and may incorporate into its Hardware or Software or a new product or service any work product or other development incorporating or derived from any Suggestion.

**7.3. License Grant:** Any Enhancements, Fixes, Workarounds, Releases, Updates, Custom solutions modifications, improvements, changes, know-how, methodologies, and all other work product delivered to Customer and incorporated into the Supported Software is licensed to Customer as part of the Supported Software subject and pursuant to the Unitrends end user license agreement applicable to the Supported Software.

## 8. RELATIONSHIP OF THE PARTIES

**8.1. Independent Contractors:** Unitrends is an independent contractor and services performed hereunder will in no way be construed to constitute Unitrends as an agent, partner, or employee of Customer for any purpose whatsoever.

**8.2. Designated Services Providers:** If in the course of performance under this Agreement, Unitrends reserves the right to delegate, assign or subcontract all of its responsibilities hereunder to a third party most appropriate to provide the Technical Support; provided, however, that such third party providers will enter into an agreement with Unitrends at least as protective of Customer as this Agreement and Unitrends shall be responsible for any breach of this Agreement by such third party providers.

## 9. CONFIDENTIAL INFORMATION

## 9.1.

**Confidential Information:** means all terms and information identified or otherwise designated as being confidential by the disclosing party at the time of disclosure or which a reasonable person would understand to be confidential by the nature of the information and the manner in which it was disclosed, including without limitation: (i) each party's business or financial information and plans; and (ii) the terms of this Agreement. Confidential Information of Unitrends includes without limitation the Software, the Hardware, the Enhancements, Releases, Fixes, Workarounds, Updates, Suggestions and Custom solutions and any and all other product and product roadmap information provided hereunder. "Confidential Information" will not include information that the receiving party can evidence by its written records (i) was known prior to receipt from the disclosing party, without any obligation of confidentiality; (ii) becomes known to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (iii) becomes publicly known or otherwise publicly available, except through a breach of this Agreement; or (iv) is independently developed by the receiving party without use of or reference to the disclosing party's Confidential Information.

**9.2. Protection of Confidential Information:** Each party will protect the other's Confidential Information from unauthorized dissemination and use the same degree of care that such party uses to protect its own like information, but in no event less than a reasonable degree of care. Each party agrees to take appropriate action by instruction, agreement or otherwise with its employees, agents and contractors allowed access to the Confidential Information to satisfy its obligations under this Section 9. Neither party will disclose to third parties the other's Confidential Information without the prior written consent of the other party. Neither party will use the other's Confidential Information for purposes other than those necessary to directly further the purposes of this Agreement. Notwithstanding the foregoing, a receiving party may disclose Confidential Information to the extent such party is legally compelled to disclose such Confidential Information provided, however, that prior to any such compelled disclosure, it gives the disclosing party reasonable prior written notice to permit the disclosing party to contest such disclosure and/or obtain a protective order, and such disclosure is otherwise limited to the required disclosure as confirmed by legal counsel.

**9.3. Specific Performance:** If the receiving party discloses or uses (or threatens to disclose or use) any Confidential Information in breach of this Section 9, the disclosing party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.

## 10. TERM, RENEWAL AND TERMINATION

**10.1. Term:** The Licensee will be bound for the entire Term of this Agreement. "Term" is defined as the period of time beginning on the Effective Date and ending on the date set forth in the quote, statement of work, purchase order, or other document that describes the commercial terms, services and/or deliverables licensed under the Agreement ("Order Form"), or, if later, the expiration date of any Order Form. If the Order Form does not contain a termination date, the Term shall be deemed to end on the later of the three-year anniversary of the Effective Date and the expiration date of any Order Form. Except as otherwise specified in an Order Form, at the end of any Term, subscriptions will automatically renew for additional Terms equal to the greater of the expiring Term length or three (3) years, unless either party gives the other party notice of non-renewal at least 30 days and no more than 60 days before the end of the relevant Term. Except as otherwise specified in an Order Form, pricing during any automatic renewal Term will be the same as that during the immediately preceding Term plus an increase not to exceed five percent (5%) plus any increase in the Consumer Price Index published by the U.S. Bureau of Labor Statistics during the immediately prior year, in Unitrends's sole discretion.

**10.2. [RESERVED].**

**10.3. Termination for Breach:** Unitrends may suspend or terminate this Agreement if Customer fails to timely pay any undisputed fees as provided in this Agreement, or breaches any provision of this Agreement or the applicable Software license agreement or Hardware purchase agreement, and such breach is not remedied within thirty (30) days after Customer receives written notice of the breach. If Customer disputes any fees invoiced for services hereunder, Customer shall notify Unitrends within thirty (30) days of receipt of the applicable invoice and shall pay the undisputed portion of the invoice. If Customer fails to notify Unitrends of a dispute within such thirty (30) day period, Customer waives any and all

rights to later dispute the invoice.

**10.4. Termination for Bankruptcy:** Unitrends may terminate this Agreement immediately if Customer ceases to do business in the ordinary course, becomes insolvent, or Customer files or has filed against it any action under any federal, state or other applicable bankruptcy or insolvency law, which is not dismissed or otherwise favorably resolved within thirty (30) days of such event.

**10.5. Termination of Technical Support:** Unitrends will have the right to terminate Technical Support with respect to any Supported Software or Supported Hardware by providing written notice of such election at least ninety (90) days prior to the termination of Technical Support for such Supported Software or Supported Hardware, provided that Unitrends no longer generally provides Technical Support for such Supported Software or Supported Hardware, or no longer provides the specific services previously offered, and pays Customer a pro-rata refund of any prepaid fees for the Technical Support being discontinued.

**10.6. Survival of Terms:** The following terms will survive any expiration or termination of this Agreement: Definitions; Fees, Payment Terms, and Taxes; Ownership; Relationship of the Parties; Confidential Information; Term, Renewal and Termination; Warranty Disclaimer; Limitation of Liability; Miscellaneous.

## **11. WARRANTY DISCLAIMER**

**11.1. Software and Hardware Warranty Disclaimer:** All Software and materials related thereto are subject exclusively to the warranties set forth in the applicable Software license agreement. All Hardware and materials related thereto are subject exclusively to the warranties set forth in the applicable Hardware purchase agreement. No warranty is made under this Agreement with respect to the Software or the Hardware.

**11.2. Services Warranty Disclaimer:** Technical Support is provided “as is” and without warranty and all Updates, Releases, Fixes, Workarounds, Enhancements, and Custom solutions and any other work product and services provided hereunder are provided “as is” and without warranty. Unitrends may solicit RFE’s from Customer or Customer may request an RFE, however, this in no way commits Unitrends to implement any RFE’s or to develop any Enhancements. In addition, Technical Support is limited to assisting Customer with current production Supported Software and Supported Hardware.

**11.3. UNITRENDS HEREBY DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, STATUTORY, OR OTHERWISE, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. UNITRENDS DOES NOT GUARANTEE THAT PROBLEMS WILL BE ABLE TO BE FIXED OR THAT ANY WORKAROUND, FIX, ENHANCEMENT, RELEASE, UPDATE OR CUSTOM SOLUTION WILL REMEDY ANY PROBLEMS REPORTED BY CUSTOMER. No oral or written information or advice given by Unitrends, its resellers, dealers, distributors, agents, representatives or employees shall create any warranty or in any way increase any warranty provided herein. If applicable law requires any warranties other than the foregoing, all such warranties are limited in duration to thirty (30) days from the date of delivery of the service or work that is the subject matter of the claim. Some jurisdictions do not allow the exclusion of implied warranties, so the above exclusion may not apply. The warranty provided herein gives you specific legal rights and Customer may also have other legal rights that vary from jurisdiction to jurisdiction. The limitations or exclusions of warranties, remedies or liability contained in this Agreement shall apply to you only to the extent such limitations or exclusions are permitted under the laws of the jurisdiction where Customer is located.**

## **12. LIMITATION OF LIABILITY**

**TO THE MAXIMUM EXTENT PERMITTED BY LAW, NEITHER UNITRENDS NOR ITS SUPPLIERS SHALL BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE, COVER OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR THE INABILITY TO**

USE HARDWARE OR SOFTWARE OR TO ACCESS DATA, DOWNTIME, LOSS OF BUSINESS, LOSS OF PROFITS, LOSS OF REVENUES, LOSS OF USE, LOSS OR CORRUPTION OF DATA, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, BUSINESS INTERRUPTION OR THE LIKE), ARISING OUT OF THE USE OF, OR INABILITY TO USE, THE HARDWARE OR SOFTWARE, THE TECHNICAL SUPPORT PROVIDED HEREUNDER, OR ANY WORK PRODUCT OR OTHER SERVICES PROVIDED HEREUNDER OR OTHERWISE RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT, AND BASED ON ANY THEORY OF LIABILITY INCLUDING BREACH OF CONTRACT, BREACH OF WARRANTY, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE, EVEN IF UNITRENDS OR ITS REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH DAMAGES WERE FORSEEABLE, AND EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. TO THE MAXIMUM EXTENT PERMITTED BY LAW, UNITRENDS' TOTAL LIABILITY TO CUSTOMER FOR ACTUAL DAMAGES FOR ANY CAUSE WHATSOEVER WILL BE LIMITED TO THE AMOUNT PAID BY CUSTOMER OR RESELLER, IF ORDERED THROUGH A RESELLER, FOR THE TECHNICAL SUPPORT SERVICES THAT CAUSED SUCH DAMAGE IN THE TWELVE MONTHS IMMEDIATELY PRIOR TO THE DATE THE CAUSE OF ACTION AROSE. The Limitation of Liability set forth above is a fundamental element of the basis of the agreement between Unitrends and Customer. Unitrends and its suppliers would not be able to provide the Technical Support on an economic basis without such limitations.

### 13. MISCELLANEOUS

**13.1. Governing Law; Jurisdiction:** This Agreement will be governed by the laws of the Commonwealth of Massachusetts, without regard to its principles of conflict of laws. The parties expressly disclaim the application of the United Nations Convention on Contracts for the International Sale of Goods. The parties hereto agree to submit all disputes hereunder to the state and federal courts located in Suffolk County, Massachusetts and consent to the exclusive jurisdiction and venue of such courts and expressly waive any objection to the jurisdiction or convenience of such courts. THE PARTIES IRREVOCABLY WAIVE ANY RIGHT TO A TRIAL BY JURY. The English language version of this Agreement shall govern.

**13.2. Assignment:** Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this Agreement in its entirety (including all Order Forms), without consent of the other party, to a majority-owned affiliate or in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets, stock or business to which this Agreement relates. Customer shall provide notice to Unitrends upon completion of any permitted assignment. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

**13.3. Waiver:** Failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision.

**13.4. Severability:** If for any reason a court of competent jurisdiction finds any provision of this Agreement, or portion thereof, to be unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement will continue in full force and effect.

**13.5. Force Majeure:** Except for the obligation to make payments, nonperformance of either party will be excused to the extent performance is rendered impossible due to causes beyond such party's reasonable control.

**13.6. Notices to Unitrends:** Any notice, report, approval or consent required or permitted hereunder to Unitrends will be in writing and will be deemed to have been given if: (i) delivered personally; (ii) mailed by registered air mail postage prepaid; or (iii) sent by facsimile followed by a hard-copy confirmation, to the addresses of Unitrends set forth below or as may be otherwise designated by Unitrends from time to time.

**If to Unitrends:** **Unitrends, Inc.**  
200 Wheeler Road

Burlington, MA 01803  
Attention: Legal Department

With a copy to: Unitrends, Inc.  
7 Technology Circle, Suite 100  
Columbia, SC 29203  
Attention: Vice President Customer Success

**13.7. Section Headings:** The Section headings contained herein are for convenience of reference only and will not be considered as substantive parts of this Agreement.

**13.8. Interpretation:** In construing or interpreting this Agreement, the word “or” will not be construed as exclusive, and the word “including” will not be limiting. The parties agree that this Agreement will be fairly interpreted in accordance with its terms without any strict construction in favor of or against either party, and that ambiguities will not be interpreted against the drafting party. The use of the singular or plural form will include the other form and the use of the masculine, feminine or neuter gender will include the other genders. No other person or company shall be third party beneficiaries to this Agreement.

**13.9. Attorney’s Fees:** The prevailing party in any action to enforce this Agreement will be entitled to recover costs and expenses including reasonable attorney’s fees.

**13.10. Entire Agreement:** The provisions of this Agreement and the terms of the applicable end user license agreement for the Software and the purchase agreement for the Hardware are incorporated herein by reference, constitute the entire Agreement between the parties with respect to the subject matter hereof, and this Agreement supersedes all prior and contemporaneous agreements, understandings or representations, oral or written, regarding the subject matter hereof. Customer agrees that any varying or additional terms contained in any purchase order or other written notification or document issued by Customer shall be of no effect and all such terms or conditions shall be null and void.

**13.11. Amendments.** Unitrends may make changes to this Agreement from time to time with at least thirty (30) days prior notice to Customer via the Customer Support Portal. Continued use of Technical Support by Customer and its Users after any such changes constitutes Customer’s acceptance of the new Agreement. If Customer does not agree to the revised Agreement, Customer may terminate this Agreement by providing written notice to Unitrends within thirty (30) days of Unitrends’ posting the revised Agreement to the Customer Support Portal and Unitrends shall refund any pre-fees paid by Customer for Technical Support.

**13.12. Authorized Distributors and Resellers.** Unitrends authorized distributors and resellers do not have the right to make modifications to this Agreement or to make any additional representations, commitments, or warranties binding on Unitrends.