



## CHANNEL END USER TERMS (Global excluding Germany)

These Channel End User Terms ("Terms") set forth the direct terms and conditions between NetApp, Inc., NetApp B.V., or any of their affiliates ("NetApp") and Channel End User Customer ("Customer") in connection with NetApp Products and Services purchased or licensed, as applicable by Customer from a NetApp authorized reseller, unless Customer has entered into a separate agreement with NetApp in connection with such Products or Services applicable to purchases from a NetApp authorized reseller. By purchasing such Products and Services, Customer agrees to be bound by these Terms. NetApp and Customer may each be referred to as a "Party" or collectively, as the "Parties."

### 1. DEFINITIONS

**1.1. Cloud Data Service(s).** A NetApp cloud service made available to customers on demand via the internet. A complete list of NetApp Cloud Data Services subject to the Cloud Data Services Terms referenced herein can be accessed at: the How-to-Buy Site (defined below).

**1.2. Confidential Information.** All information, whether written, oral or in any other tangible or intangible medium disclosed by or on behalf of the Disclosing Party (as defined below) to the Receiving Party (as defined below) for purposes arising out of or in connection with these Terms, that (a) in the case of information in tangible form, is marked "confidential" or "proprietary" or with words with similar import at the time of disclosure; (b) in the case of any information disclosed orally, visually or in any other intangible form is designated "confidential" or "proprietary" at the time of disclosure, and if disclosed orally, is summarized in reasonable detail in a writing delivered to the Receiving Party within 30 days of disclosure; or (c) by its nature or the circumstances surrounding disclosure should reasonably be considered confidential or proprietary; and will include any reproduction of such information in any form or medium, or any part of such information. Confidential Information will not include any information that: (a) is already known to the Receiving Party without restrictions at the time of disclosure; (b) is or becomes known to the general public through no act or omission of the Receiving Party in breach of these Terms; (c) is disclosed to the Receiving Party by a third party who is not, to the knowledge of the Receiving Party, in breach of an obligation of confidentiality; or (d) is independently developed by employees and/or contractors of the Receiving Party who did not have access to, and without use of, the Disclosing Party's Confidential Information.

**1.3. Documentation.** NetApp supplied technical documentation describing the features and functions of the associated Products.

**1.4. Functional Data.** Data and data elements collected by NetApp Software systems configuration which, as applicable, pertains to the Software environment, usage or performance of Software and components managed by Software, or which is generated as a result of NetApp providing Cloud Data Services, which informs NetApp in the development, deployment, operations, maintenance, and securing of such Services. Functional Data does not contain Customer Information (as defined in Exhibit C) or Personal Information.

**1.5. Hardware.** NetApp-branded hardware, including its components and spare parts, but excluding any firmware and Third-Party Branded Products.

**1.6. How-to-Buy Site.** <http://netapp.com/us/how-to-buy/stc.html>.

**1.7. NetApp Cloud Provider.** A third party authorized by NetApp to offer or enable the use of the Cloud Data Services as part of such provider's cloud-based services.

**1.8. Personal Information.** Information relating to, directly or indirectly, an identified or identifiable natural person or household, which includes, but is not limited to, name, postal address, telephone number, and email address, electronic network information, Customer records, and other

information as described in the NetApp Privacy Policy, which can be accessed at <https://www.netapp.com/us/legal/privacypolicy/index.aspx>.

**1.9. Products.** Hardware, Software, associated Documentation and any Third-Party Branded Products.

**1.10. Professional Services.** NetApp's consulting, installation, implementation and other services that are not Support Services to be provided by or on behalf of NetApp.

**1.11. Services.** NetApp's Support Services, Professional Services and/or Cloud Data Services.

**1.12. Software.** NetApp-branded software in object code format including (as applicable) operating system software, protocols, firmware, backup and recovery, disaster recovery, storage efficiency and management software.

**1.13. Support Services.** NetApp's generally available technical support and maintenance services for Products to be provided by or on behalf of NetApp.

**1.14. Third-Party Branded Products.** Any hardware or software that is manufactured, developed, licensed, or otherwise made available by any entity other than NetApp and is distributed by NetApp for use in conjunction with Hardware and Software.

### 2. SOFTWARE LICENSE

**2.1. License Grant.** Subject to these Terms and any limitations or restrictions set forth in the corresponding Documentation or order documentation from the NetApp authorized reseller, NetApp grants to Customer a personal, non-exclusive, non-transferable, worldwide, limited, and revocable license, without the right to sublicense, to (a) install and use the Software for Customer's internal business purposes, and (b) use the Documentation in support of Customer's use of the Software. The Software associated with Customer's license is either bundled with a specific storage controller identified by a unique serial number ("Controller-based"), or is independent of a storage controller ("Standalone"), and is one or more of the following license types: (a) "Life-of-controller": Controller-based licenses granted for the period of time during which Customer's controller is operable; (b) "Perpetual": Standalone licenses granted in perpetuity; (c) "Term": Controller-based licenses or Standalone licenses granted for a fixed period; or (d) "Capacity": Controller-based licenses or Standalone licenses granted for a specified amount of storage capacity or usage which may be measured as "raw" or "provisioned" storage capacity, number of hosts or other measure of usage, as specified in the Documentation. Certain license types may require the enablement and use of NetApp's remote support diagnostic systems. Each storage controller deployed in a cluster or a high-availability pair or group must have the same Controller-based licenses as the other storage controllers in that cluster, high-availability pair, or group. Subject to NetApp's prior written agreement, and in the context of non-disruptive operations within a cluster, Customer may deploy storage controllers with different Controller-based licenses and failover from one storage controller to another for the time required to remedy a failure,

provided that all storage controllers in the cluster have the same level of Support Services in effect at all times.

**2.2. License Restrictions.** Customer will not, nor will Customer allow any third party to: (a) use the Software in breach or excess of any limitations (e.g., the types, quantities, user limits, time limits, capacity limits) and other usage attributes related to the associated Software licenses or other limitations prescribed by NetApp in these Terms or the associated order documentation; (b) reverse engineer, decompile, or disassemble the Software or otherwise reduce it to human-readable form except to the extent required for interoperability purposes under applicable law or as expressly permitted in open-source licenses; (c) remove or conceal any Product identification, proprietary, intellectual property, or other notices in the Software and Documentation; (d) use the Software and Documentation to perform services for third parties in a service bureau, managed services, commercial hosting services, or similar environment unless (i) the Software has been obtained from a NetApp Cloud Provider, (ii) is used in conjunction with a NetApp Cloud Provider service, or (iii) otherwise agreed to in writing by NetApp; (e) assign or otherwise transfer, in whole or in part, the Software or Documentation licenses to another party or Controller-based licenses to a different storage controller unless otherwise agreed to in writing by NetApp; (f) install Controller-based licenses on, or use them with, third-party hardware or any second-hand or grey market hardware that Customer has not purchased from NetApp or a NetApp authorized reseller; (g) modify, adapt, or create a derivative work of the Software or Documentation; or (h) publish or provide any Software benchmark or comparison test results.

**2.3. Third-Party Licenses.** Customer represents and warrants that it has obtained and/or will obtain all applicable third-party licenses necessary to operate any third-party software required in connection with the use of the Products and for NetApp to freely and without interruption perform the Services hereunder.

**2.4. Software Notices.** Notwithstanding other statements in this Section 2, third-party software components, including free, copyleft and open source software components, if any, embedded in Software ("Third-Party Embedded Software") are distributed in compliance with the particular licensing terms and conditions attributable to such Third-Party Embedded Software. Copyright notices and licensing terms and conditions applicable to Third-Party Embedded Software are available for review with the Software Documentation at <https://mysupport.netapp.com/> or may be included on the media on which Customer receives the Software, within a "NOTICE" file (e.g., NOTICE.PDF or NOTICE.TXT) or included within the downloaded files, and/or reproduced within the materials or Documentation accompanying the Software.

**2.5. Unauthorized Use.** Use of the Software outside of the scope of the applicable license terms constitutes a material breach, and Customer agrees to promptly pay upon notice any applicable additional license fees.

**3. SERVICES SUPPLEMENTAL TERMS.** Customer may purchase Support Services, Professional Services, and/or Cloud Data Services pursuant to these Terms as well as the Support Services Terms, Professional Services Terms and Cloud Data Services Terms, as applicable, located on the How-To-Buy Site.

#### **4. DIRECT WARRANTY**

**4.1. Hardware Warranty.** NetApp warrants that the Hardware will materially conform to the Documentation for a period of 3 years from the date of delivery, unless otherwise specified in the applicable Documentation ("Hardware Warranty Period"). In the event of any material non-conformity in the Hardware during the Hardware Warranty Period that is reproducible and verifiable, NetApp will, in its sole discretion and at its own expense, repair or replace the Hardware, or refund the amounts received by NetApp for the non-conforming Hardware. Replacement parts will be warranted for the remainder of the Hardware Warranty Period in effect for the original Hardware purchased, unless otherwise mandated by applicable law. For purposes of this Section 4.1, delivery is made pursuant to the applicable

trade term specified on the NetApp quotation to the NetApp authorized reseller or as agreed to by NetApp.

**4.2. Software Warranty.** NetApp warrants for a period of 90 days from date of first delivery of the Software or such other minimum period required under applicable law ("Software Warranty Period") that (a) the Software will materially conform to the then-current Documentation; and (b) the Software media will be free from physical defects. NetApp does not warrant that Customer's use of the Software will be error-free or uninterrupted. In the event of any material non-conformity in the Software during the Software Warranty Period that is reproducible and verifiable, NetApp will, in its sole discretion and at its own expense, repair or replace the Software, or refund the amounts received by NetApp for the non-conforming Software. This warranty does not cover software, other items, or any services provided by persons other than NetApp or a NetApp authorized reseller. For the purposes of this Section 4.2, if Software is pre-installed on the Hardware, delivery is made pursuant to the applicable trade term specified on the NetApp quotation to the NetApp authorized reseller or as agreed to by NetApp. If the Software is not pre-installed on the Hardware, then for the purposes of this Section 4.2, delivery is made when NetApp makes the enabling key available to a Customer or, if an enabling key is not required, otherwise makes such Software available for download or use by the Customer. Software that is obtained for use solely in conjunction with a NetApp Cloud Provider's services is provided "AS IS" and without warranty of any kind. Customer assumes all risks arising from the use of such Software together with a NetApp Cloud Provider's offering.

**4.3. Support and Professional Services Warranty.** NetApp warrants that while providing Support Services or Professional Services, such Services will be performed in a professional and workmanlike manner consistent with generally accepted industry practices. In the event of a breach of the foregoing warranty, NetApp will re-perform such Services.

**4.4. Limitations.** NetApp will not be liable under the foregoing warranties for claims arising from Customer's, Customer's subcontractor's, or any unauthorized third person's misuse, neglect, improper installation or testing, attempts to repair, or any other cause beyond the range of the intended use. The Hardware warranty will become void if a Hardware component is installed as an add-on to, or replacement for the original Hardware, without NetApp's prior written approval. The Software warranty will become void if the Software is modified or otherwise used in violation of the Software license terms set forth in Section 2, except as authorized in writing by NetApp.

**4.5. Exclusive Warranties.** TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE FOREGOING WARRANTIES ARE CUSTOMER'S SOLE AND EXCLUSIVE WARRANTIES AND REMEDIES. NETAPP SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

#### **5. INTELLECTUAL PROPERTY RIGHTS AND PROTECTION**

**5.1. General.** The Software and related Documentation is licensed, not sold, to Customer. It is protected by intellectual property laws and treaties worldwide, and contains trade secrets, in which NetApp and its licensors reserve and retain all rights not expressly granted to Customer. No right, title, or interest to any trademark, service mark, logo, or trade name of NetApp or its licensors is granted to Customer.

**5.2. IP Claims.** Subject to the terms and conditions of this Section, NetApp will defend or settle any claim brought by a third party against Customer that Hardware, Software, and Documentation sold and delivered by or for NetApp to Customer under these Terms (individually or collectively, "Covered Product(s)") infringe any patent, trademark, or copyright ("IP Claim"). NetApp will pay settlement amounts or, if applicable, damages and costs finally awarded by a court of competent jurisdiction (collectively, "Damages") against Customer to the extent such Damages are specifically attributable to the IP Claim, provided that Customer: (a) promptly notifies NetApp in writing of the IP Claim; (b) provides information and assistance to

NetApp to defend such IP Claim; and (c) provides NetApp with sole control of the defense or settlement negotiations.

**5.3. Remedies.** NetApp may, at its option, substitute or modify the applicable Covered Product(s), or the relevant portion thereof, so that it becomes non-infringing; procure any necessary license; or replace the applicable Covered Product(s). If NetApp determines that none of these alternatives is reasonably available, then Customer may cease using and, if applicable, return the Covered Product(s) and NetApp will refund Customer's purchase price for such Covered Product(s).

**5.4. Exclusions.** Notwithstanding anything to the contrary in these Terms, NetApp has no obligation or liability for any IP Claim related to the Covered Product(s) that arises from or relates to: (a) NetApp's compliance with, or use of, designs, specifications, inventions, instructions, or technical information furnished by or on behalf of Customer; (b) modifications to the Covered Product(s) made by or on behalf of Customer without NetApp's prior written authorization; (c) Customer's failure to upgrade or use a new version of the Covered Product(s), to make a change or modification requested by NetApp, or to cease using the Covered Product(s) if requested by NetApp; (d) the Covered Product(s), or any portion thereof, in combination with any other product or service (including a NetApp Cloud Provider's services); (e) Third-Party Branded Products; or (f) any content or information stored on or used by Customer or a third party in connection with a Covered Product.

**5.5. Entire Liability.** Notwithstanding anything to the contrary in these Terms, this Section 5 states NetApp's entire liability and Customer's sole and exclusive remedies for IP Claims.

## 6. CONFIDENTIALITY

**6.1. General.** Each Party ("Disclosing Party") may, in connection with these Terms, disclose Confidential Information to the other Party ("Receiving Party"). Confidential Information will remain the exclusive property of the Disclosing Party. Each Party will have the right to use the other's Confidential Information solely for the purpose of fulfilling its obligations under these Terms. The Receiving Party agrees to disclose the Disclosing Party's Confidential Information only to those employees or agents who have a need to know in furtherance of these Terms and who are required to protect such Confidential Information against unauthorized disclosure under terms no less restrictive than those set forth herein. The Receiving Party will protect the Confidential Information from unauthorized use, access, or disclosure in the same manner as it protects its own proprietary information of a similar nature, and in any event with at least a reasonable degree of care.

**6.2. Period of Disclosure.** Each Party's obligations regarding the other Party's Confidential Information will expire 3 years from the date of disclosure.

**6.3. Legally Compelled Disclosure.** The Receiving Party may disclose the Disclosing Party's Confidential Information to the extent such disclosure is required pursuant to a judicial or administrative proceeding, provided that, unless prohibited by applicable law, the Receiving Party gives the Disclosing Party prompt written notice thereof and the opportunity to seek a protective order or other legal remedies.

**6.4. Return/Destruction.** Upon the Disclosing Party's written request, all Confidential Information (including all copies thereof) of the Disclosing Party will be returned or destroyed, unless the Receiving Party is required by law to retain such information, and the Receiving Party will provide written certification of compliance with this Section.

## 7. LIMITATION OF LIABILITY

**7.1. Liability Exclusions.** To the extent permitted by applicable law, regardless of the basis of the claims (e.g., whether in contract, tort (including negligence), statute, products or strict liability, or any other form of action), in no event will NetApp or its suppliers or subcontractors be liable to Customer for special, incidental, exemplary, indirect or consequential damages; downtime costs; loss or corruption of data; loss of revenues,

profits, goodwill, or anticipated savings; procurement of substitute goods and/or services; interruption of business; Customer's failure to comply with applicable "non-erasable" and "non-rewriteable" U.S. government regulations; or Customer's failure to obtain any applicable third-party licenses necessary to operate any third-party software required in connection with the use of the Products and for NetApp to freely and without interruption perform the Services. This exclusion is independent of any remedy set forth in these Terms.

**7.2. Cumulative Liability.** To the extent permitted by applicable law, NetApp's liability to Customer is limited to direct damages in an amount not to exceed US\$1,000,000. This limitation is cumulative and not per incident.

**7.3. Exceptions.** The limitations set forth in Sections 7.1 and 7.2 will not apply to liability for claims arising from: (a) death or bodily injury caused by a Party's negligence or gross negligence; (b) willful misconduct or fraud; (c) any other liability which cannot be excluded under applicable law; or (d) IP Claims under Section 5.

## 8. COMPLIANCE WITH LAWS

**8.1. Compliance.** Each Party will comply with all applicable laws and regulations.

**8.2. Export.** Customer acknowledges that Products and Services supplied under these Terms are subject to controls under the laws and regulations of the United States, the European Union and other countries as applicable, and that Products and Services may include export and import of controlled technologies, including without limitation encryption technology. Customer agrees to comply with such laws and regulations and represents and warrants that it: (a) will not, unless authorized by U.S. export licenses or other government authorizations, directly or indirectly import, export, re-export or divert Products and Services to (or use Products and Services in) countries subject to U.S. embargoes or trade sanctions programs; (b) is not a party, nor will it import, export, re-export or divert to a party, identified on any government export exclusion lists, including but not limited to the U.S. Denied Persons, Entity, and Specially Designated Nationals Lists; and (c) will not use Products, Services or technology for any purposes prohibited by United States law, including without limitation the development, design, manufacture, or production of nuclear, missile, chemical or biological weaponry or other weapons of mass destruction. Customer agrees to provide NetApp with destination end use and end user (i.e., Customer name or business division using the Products) information upon NetApp's request. Customer will obtain all required authorizations, permits, or licenses to export, re-export or import, as required. Customer agrees to obligate, by contract or other similar assurances, the parties to whom it re-exports or otherwise transfers Products and Services to comply with all obligations set forth herein.

**8.3. Anti-Bribery.** Each Party will comply with all applicable country laws relating to anti-corruption or anti-bribery, including but not limited to the requirements of the U.S. Foreign Corrupt Practices Act, as amended, the U.K. Bribery Act, and legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

**8.4. Privacy.** In the event Customer provides NetApp with access to Personal Information in order for NetApp to provide Products or Services hereunder, the Parties will ensure that such Personal Information is disclosed and handled in accordance with all applicable data protection laws and the confidentiality provisions set forth in Section 6 of these Terms. Article 28 (1) of the European Union General Data Protection Regulation ("GDPR") requires an agreement between a controller and processor, and between a processor and sub processor, that processing of Personal Information be conducted in accordance with technical and organizational measures that meet the requirements of the GDPR and ensure the protection of the rights of data subjects. To the extent NetApp acts as a data processor of Personal Information on behalf of Customer: (a) additional terms and conditions applicable to NetApp acting in a role as a data processor are set forth at the How to Buy Site; and (b) NetApp will not retain,

use, or disclose such Personal Information for any purpose other than providing or improving Products or Services in accordance with these Terms. NetApp certifies that it understands the foregoing restrictions and will comply with them.

## 9. MISCELLANEOUS

**9.1. Term and Termination.** These Terms are effective until terminated as provided below. Customer may terminate these Terms at any time upon written notice to NetApp. NetApp may terminate these Terms immediately upon written notice to Customer if Customer commits a material breach of these Terms, including failure to remit payments when due (whether payable to NetApp or its authorized third-party financing partners in connection with an Approved Financing Agreement, described below) and, in the event that the breach is remediable, fails to remedy it within 30 days of NetApp's written notice requiring Customer to do so. Upon termination of these Terms, all rights to use the Software and Documentation cease and Customer will, at NetApp's request, promptly return or destroy all copies of the Software and Documentation, including any license enablement keys in Customer's possession or under Customer's control, unless the license granted to Customer under Section 2.1 is a perpetual license and Customer remains in full compliance with these Terms. The following Sections will survive termination of the Terms in accordance with the terms set forth herein: Software License, Direct Warranty, Intellectual Property Rights and Protection, Confidentiality, Limitation of Liability, Compliance with Laws, and Miscellaneous.

**9.2. U.S. Federal Government Customers.** This Section 9.2 applies only to U.S. Federal Government Customers. The Software, Documentation, Cloud Data Services, and CDS Software Agents are "commercial" computer software and documentation and is licensed in accordance with the rights articulated in applicable U.S. government acquisition regulations (e.g. FAR, DFARs) pertaining to commercial computer software and documentation. U.S. Federal Government customers will not be subject to applicable audit costs specified in Section 9.16. Disputes will be subject to resolution pursuant to the Contract Disputes Act of 1978. Nothing contained in these Terms is meant to derogate the rights of the U.S. Department of Justice as identified in 28 U.S.C. §516. All other terms remain in effect as written.

**9.3. Force Majeure.** Neither Party will be liable to the other for any alleged loss or damages resulting from acts of God, acts of civil or military authority, governmental priorities, fire, floods, earthquakes, epidemics, quarantine, energy crises, strikes, labor trouble, terrorism, war, riots, accidents, shortages, delays in transportation or any other causes beyond the reasonable control of a Party (collectively, "Force Majeure").

**9.4. Data Security and Recovery.** Customer is solely responsible for its use of the Products, including Personal Information managed or stored using Products. Customer is solely responsible for (a) management of its data back-up, data recovery, and disaster recovery measures; and (b) undertaking the supervision, control, and management of Hardware and Software including following industry-standard processes, procedures, and requirements for: (i) the security of data, accuracy of input and output, and back-up plans, including restart and recovery in the event of a Force Majeure event or a Hardware or Software error or malfunction; and (ii) reconstruction of lost or altered files, data, and programs. NetApp will have no responsibility or liability with respect to Customer's internal processes and procedures related to the protection, loss, confidentiality, or security of Customer's data or information in connection with Customer's use of the Products.

**9.5. Functional Data.** NetApp retains all right, title and interest in Functional Data. Without limiting the foregoing, NetApp may collect and use Functional Data to provide and improve the Software, the Cloud Data Services and NetApp's other products and services.

**9.6. Hazardous Environments.** Products are not designed or intended for use in or in the design, construction, operation, or maintenance

of a nuclear facility or similar hazardous environment. NetApp will not be liable for any damages resulting from such use.

**9.7. Product Evaluation.** Unless there is a separate written agreement between the Parties related to Product evaluations, then, subject to these Terms, NetApp may loan Hardware to Customer or license Software specifically identified by NetApp as evaluation, demonstration or trial ("Trial Equipment"), at no cost for a 90-day period from the initial delivery of the Trial Equipment to Customer, or such other period as agreed by NetApp in writing. Trial Equipment provided to Customer under this Section is for evaluation, demonstration, and internal non-commercial use only and Customer will not use the Trial Equipment for production use or in a production environment. Customer is responsible for the Trial Equipment from the date it is received by Customer until NetApp picks up the Trial Equipment at Customer's location, except for reasonable wear and tear. The Trial Equipment will remain NetApp's personal property, even if the Trial Equipment becomes attached or affixed to real property, and NetApp will exclusively maintain title and ownership to all Trial Equipment. In no event will title to the Trial Equipment transfer to Customer unless purchased by Customer. Trial Equipment may only be used up to the maximum amounts of raw storage capacity, number of hosts or other measure of usage as specified in the Documentation, and to evaluate and assess the suitability of the Trial Equipment for Customer's needs. Notwithstanding anything in these Terms to the contrary, Trial Equipment is provided and licensed to Customer on an "AS IS" basis and all warranties, whether express, implied, statutory or otherwise are excluded to the maximum extent permitted by applicable laws, including the implied warranty of merchantability, satisfactory quality, fitness for a particular purpose, or non-infringement. Customer agrees to delete or deinstall the Trial Equipment at the expiration of the evaluation period and make available for pickup by NetApp. Customer is solely responsible for erasing all Customer data from the Trial Equipment before being picked up by NetApp. Customer acknowledges that any data remaining on any Trial Equipment that is returned to NetApp may be disposed of or destroyed by NetApp without any liability to NetApp.

**9.8. NetApp Approved Financing.** These Terms also apply to "Financed Software," which means Software and Documentation licensed to Customer for a limited period of use pursuant to the terms of a financing agreement between Customer and NetApp or its authorized third-party financing partner (an "Approved Financing Agreement" or "AFA"), subject to the following: (a) the particular Financed Software, period of use, installation site, and other transaction-specific conditions will be as agreed in the applicable AFA; and (b) notwithstanding anything to the contrary in these Terms, all licenses for Financed Software terminate at the expiration of the term of the AFA unless otherwise expressly agreed in the AFA, or when sooner terminated by NetApp (whether in accordance with these Terms or the AFA). Customer agrees that the license granted under Section 2 and NetApp's termination rights under Section 9.1 may be affected by an authorized third-party financing partner's rights under the applicable AFA, even if such partner has paid to NetApp all or any portion of the license fees for the Financed Software.

**9.9. Modification, Substitution, Discontinued Product.** NetApp will have sole discretion, at any time, to change, substitute, or discontinue Products. NetApp will use commercially reasonable efforts to provide 60 calendar days' prior notice if a Product will be discontinued.

**9.10. Waiver.** Any waiver or failure to enforce any provision of these Terms on any occasion will not be deemed a waiver of any other provision or of such provision on any other occasion. Either Party's exercise of any right or remedy provided in these Terms will be without prejudice to its right to exercise any other right or remedy.

**9.11. Severability.** In the event any provision of these Terms is held by a court of competent jurisdiction to be unenforceable for any reason, such provision will be changed and interpreted to accomplish the objectives of such provision to the greatest extent possible under applicable law and the remaining provisions hereof will be unaffected and remain in full force and effect.

**9.12. Assignment.** Customer may not assign any rights or delegate any obligations under these Terms without the prior written consent of NetApp. Any purported assignment by Customer without NetApp's prior written consent will be null and void.

**9.13. Subcontractors.** NetApp may use subcontractors to fulfill its obligations under these Terms. NetApp will be responsible for its subcontractors' obligations hereunder.

**9.14. Independent Contractors.** The relationship of the Parties under these Terms is that of independent contractors. Nothing set forth in these Terms will be construed to create the relationship of principal and agent, franchisor/franchisee, joint venture, or employer and employee between the Parties. Neither Party will act or represent itself, directly or by implication, as an agent of the other Party.

**9.15. Publicity.** No advertising, publicity releases, or similar public communications concerning these Terms, the Products, or the Services will be published or caused to be published by either Party without the prior written consent of the other Party. Notwithstanding the foregoing, Customer agrees to be mentioned in the list of buyers of NetApp Products and/or Services and that its logo and trademark may be used for this purpose only.

**9.16. Audit.** Customer grants NetApp and its independent accountants the right to audit Customer or Customer's subcontractors once annually during regular business hours upon reasonable notice to verify compliance with these Terms. If the audit discloses Software, or Cloud Data Services or CDS Software Agent (as defined in the Cloud Data Service Terms) over-usage or any other material noncompliance, Customer will promptly pay any fees, upon notice to Customer, and the reasonable costs of conducting such audit.

**9.17. General.** These Terms will be governed by and interpreted in accordance with the laws of (a) the State of California, United States, excluding its conflicts of law provisions, if Customer is located in the United

States or in a country in which NetApp has no local sales subsidiary, or (b) the country in which Customer is located if NetApp has a local sales subsidiary in that country. The Parties agree to disclaim the application of the United Nations Convention on Contracts for the International Sale of Goods. If required by NetApp's agreement with a third-party licensor, NetApp's licensor will be a direct and intended beneficiary of these Terms and may enforce them directly against Customer. These Terms may not be changed except by an amendment accepted by an authorized representative of each Party. In the event of a dispute between the English and non-English version of these Terms (where translated for local requirements), the English version of these Terms will govern, to the extent permitted by applicable laws. These Terms, including any supplemental terms referenced herein and incorporated herein by reference, (a) represent the entire agreement and understanding between the Parties with respect to the Products and Services acquired hereunder; (b) supersede any previous communications, representations or agreements between the Parties; and (c) prevail over any conflicting or additional terms in any quote, purchase order, acknowledgement, or similar communications between the Parties or between Customer and a NetApp authorized reseller. To the extent there is a conflict between the Services supplemental terms referenced herein in Section 3 and these Terms, the applicable Services supplemental terms will control. The Section headings in these Terms are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or extent of a Section or in any way affect a Section. Any use of the word "including" in these Terms will not be deemed to limit the meaning of the preceding word or phrase.

**9.18. Use Restriction.** Products and Services are for Customer's use and are not for resale or redistribution.