



**VIRTANA CORPORATION**  
**PRODUCT AND SERVICES AGREEMENT**  
**FOR DIRECT PURCHASES**  
**Last Updated 10/27/2022**

**PLEASE READ CAREFULLY**

THIS VIRTANA PRODUCT AND SERVICES AGREEMENT FOR DIRECT PURCHASES (“AGREEMENT”) IS ENTERED INTO BETWEEN VIRTUAL INSTRUMENTS CORPORATION D/B/A VIRTANA (“VIRTANA”) AND THE PARTY IDENTIFIED ON THE QUOTE WHICH REFERENCES THIS AGREEMENT (“CUSTOMER”).

1. **Purpose of Agreement.** This Agreement states the terms and conditions under which Virtana agrees to provide to Customer: (i) software as a service (“SaaS”) services, including Workload Central (“SaaS Services”); (ii) hardware and software products made generally available by Virtana and its licensors (“Products”); (iii) maintenance and support services (“Support Services”); and/or (iv) training, consulting or other services (“Professional Services”), as expressly identified in a Quote or other document that is signed by both parties and references this Agreement.
2. **Quote and Order Acceptance.** The specific SaaS Services, Products, Support Services and/or Professional Services that Virtana will provide to Customer will be described in a quote issued by Virtana (“Quote”), and will be reflected in a corresponding purchase order submitted by Customer and accepted by Virtana (“Order”). Virtana may accept or reject an Order in its sole discretion. Each Order will reflect terms the terms of the Quote without contradiction. Any terms, conditions or provisions contained in any Order or any other communication to Virtana in connection with a Quote that omit, are additional to, or are in any way inconsistent with the terms of this Agreement or the Quote will be of no effect, and are hereby rejected by Virtana. If Customer’s Order is deemed an offer, acceptance of the Order by Virtana is expressly limited to the terms and conditions of this Agreement, to the exclusion of any supplemental or conflicting terms in the Order (other than Product or service quantities, or shipping address). This Agreement will apply except to the extent SaaS Services, Products, Support Services or Professional Services are to be provided to Customer pursuant to a separate agreement between the parties, in which case the terms of such separate agreement will govern over any conflict with the terms of this Agreement. Upon acceptance by Virtana of an Order, Customer’s obligation to purchase the SaaS Services, Products, Support Services or Professional Services set forth in such Order is non-cancelable and any payment therefor is non-refundable, except as otherwise expressly set forth herein.
3. **Delivery of Product.** Virtana delivers software Products to Customers electronically. Except for such Products delivered electronically, Virtana will ship all other Products F.O.B. Virtana’s shipping facility per UCC, or ExWorks Virtana’s place of production or shipment per INCOTERMS 2020, for international shipments. Unless specifically agreed by the parties in writing, all shipments will be sent to the same “ship to” address set forth in the Quote. Title and risk of loss or damage in any Products physically delivered hereunder, including hardware Products and software media, passes from Virtana to Customer upon the tender of shipment to Customer’s carrier at Virtana’s dock. Customer will pay all shipping charges, insurance, forwarding and brokerage fees, import or export duties and taxes that may be required. Virtana may allocate production and deliveries in its sole and reasonable discretion in the event of a shortage of Products. Any shipping dates provided to Customer are approximate only. Virtana will not be liable for any damage, loss, or expense incurred by Customer if Virtana fails to meet a specified shipping date.
4. **Fees and Payment Terms.**
  - 4.1. **Prices; Currency.** Customer will pay Virtana the prices set forth in each accepted Order, which will be reflected in one or more invoices sent to Customer, and will pay or reimburse Virtana for all related taxes or withholdings, except for those taxes based on Virtana’s net income. Payment will be in the currency invoiced by Virtana without any adjustments.
  - 4.2. **Payment Terms.** All fees are due and payable within thirty (30) days of the date of Virtana’s invoice.
  - 4.3. **Support Services Fees.** Fees for Support Services are payable annually, and are due and payable in full in advance of the purchased Support Services period. After the Customer’s first year of Support Services, such Support Services may be renewed at the Customer’s discretion for the same price; provided, however, that if Customer desires to reinstate Support Services after a period of discontinuation, Virtana reserves the right to require Customer to pay fees for the period of discontinued Support Services in its complete discretion as a condition precedent to reinstating such discontinued Support Services. If Customer purchases multiple-year, pre-paid Support Services, either Customer or Virtana may terminate the provision of Support Services at any time, with or without cause, by providing written notice to the other party, in which case Virtana will cease to provide Support Services as of the effective date of such termination, and will refund to Customer any unused, prepaid Support Services fees.
  - 4.4. **Professional Services Fees.** Fees for Professional Services will be invoiced either (i) upon acceptance by Virtana of an Order for prepaid Professional Services, or (ii) upon completion of the Professional Services, if provided on a time and materials basis, or (iii) as otherwise stated in a statement of work signed by the parties. Customer will be responsible for reasonable actual and documented travel expenses incurred by Virtana in connection with performing Professional Services to Customer, unless otherwise agreed to by the parties in writing, or as set forth in a Description of Services Documents (as defined in Section 6 below).
  - 4.5. **Payment Default.** If Customer fails to make any payment when due, Virtana reserves the right to (i) suspend or terminate its performance under, or provision of any Products or services under, any or all Orders under which Virtana has extended credit to Customer, or (ii) pursue any and all other remedies available to Virtana. Customer will pay Virtana interest on any payments

not received when due at the rate of 1.5% per month or the maximum rate allowed by law, whichever is greater.

- 4.6. Financing Arrangements.** Notwithstanding anything to the contrary herein, Customer may obtain and utilize the Products pursuant to a financing arrangement whereby the Customer obtains financing from a third party for the purchase of a Product. Customer's obligation to pay fees hereunder will not be relieved as a result of any such financing arrangement which Customer may enter into with a third party; and any failure on the part of any financing company to issue payment to Virtana on behalf of Customer will constitute a material breach by Customer of the terms hereof entitling Virtana to assert all available remedies hereunder, including the right to terminate Customer's license to use such Product, or suspend such license until Virtana receives payment in full. Customer will ensure that any financing arrangement pertaining to software provided to Customer hereunder will not result in the transfer of possession of or license rights in the software granted to Customer under this Agreement to Customer's financing provider, and any such transfer will be null and void under this Agreement.
- 5. Support Services.** Subject to Customer's compliance with the terms and conditions of this Agreement, including annual advance payment of all applicable Support Services fees, Virtana will provide Customer the then-current standard Support Services purchased by Customer, a description of which is available at the URL [http://www.virtualinstruments.com/corporate\\_info](http://www.virtualinstruments.com/corporate_info) ("Maintenance and Support Services Supplement"), and is hereby incorporated into this Agreement by this reference. Virtana may from time to time in its sole discretion update the Maintenance and Support Services Supplement. Virtana will use reasonable efforts to inform Customer of updates to the Maintenance and Support Services Supplement in accordance with its notification procedures employed generally for all customers. Changes to the Maintenance and Support Services Supplement will be binding against Customer solely on a go-forward basis, provided that Customer agrees in writing to be bound to a Quote or other Virtana-issued document that references such terms on or after the date of modification. Customer's sole and exclusive remedy if it disagrees with a change to the Maintenance and Support Services Supplement is to refrain from renewing Support Services through Virtana.
- 6. Professional Services.** Subject to Customer's compliance with the terms and conditions of this Agreement, Virtana will provide Professional Services either (i) as described in Virtana's standard service documents and supplemental training services terms and conditions ("Description of Service Documents"), a description of which is available at the URL [http://www.virtualinstruments.com/corporate\\_info](http://www.virtualinstruments.com/corporate_info), and is hereby incorporated into this Agreement by this reference; or (ii) pursuant to a custom statement of work signed by each party that details the specific Professional Services and deliverables (if any) to be provided to Customer for the specific project.
- 7. Intellectual Property.**
- 7.1. SaaS Services.** Subject to Customer's compliance with the terms of this Agreement, Virtana will provide Customer with access to the SaaS Services through the internet. Virtana reserves the right to suspend Customer's access to the SaaS Services for (i) scheduled or emergency maintenance, or (ii) in the event Customer is in breach of this Agreement, including failure to pay any amounts due to Virtana, provided that Virtana will use reasonable efforts to notify Customer prior to a

suspension where feasible given the nature of the issue giving rise to the suspension, and provided further that Virtana will immediately restore Customer's access to the SaaS Services as soon as the issue causing the suspension is resolved. In connection with use of the SaaS Services, Customer may provide certain data, including, for example, metadata associated with that data, to Virtana ("Customer Data"), and Customer hereby grants Virtana a non-exclusive license to use such Customer Data to provide the SaaS Services to Customer. Customer understands and agrees that it will not provide any personally-identifiable information or data as part of the Customer Data, and that only business contact information of Users will be shared with Virtana as necessary for login to the SaaS Services and to provide Support Services, Professional Services, and engage in routine business communications between the parties on a confidential basis. If Customer uploads Customer Data in a way that allows such Customer Data to be shared with other Virtana customers using the SaaS Services, Customer further grants (i) Virtana a license to make that Customer Data available to such third party users and provide any services necessary to do so, and (ii) such third party users a license to access such Customer Data, and to use such rights in the Customer Data as permitted by the functionality of the SaaS Services. Customer represents and warrants that it has the right, and has obtained all necessary consents, to provide the Customer Data. If Virtana receives any notice or claim that any Customer Data or activities hereunder with respect to such Customer Data, may infringe or violate a third party's rights or any laws or regulations, Virtana may suspend or terminate Customer's access to the SaaS Services and remove such Customer Data. Customer will be responsible for maintaining the security of any Customer account, passwords and files, and for all uses of Customer's SaaS Services account with or without Customer's knowledge or consent. Virtana will implement and require that its hosting providers implement industry-standard technical, administrative and physical safeguards within the SaaS Services to maintain the integrity, confidentiality, and security of Customer Data in its possession or control as required by applicable law or regulation. Virtana will provide notification of any verified breach of the foregoing safeguards of which it is aware within forty-eight (48) hours of becoming aware of the same, unless earlier notification is required by law, and will take prompt steps to remediate the same at its cost and expense, unless Customer or its users were the cause of the breach. Additional information pertaining to Virtana's data security policies and procedures are available on request and constitute Virtana's Confidential Information hereunder.

- 7.2. Software License.** Subject to compliance with the terms and conditions of this Agreement, upon shipment to Customer, Virtana grants to Customer a nonexclusive, nontransferable, license to use the object code version of the software that is delivered either with hardware Products or as a standalone Product, and any accompanying documentation ("Documentation"), for Customer's internal business use only, during the period of use set forth in the applicable Quote and Order, as agreed to and accepted by Virtana ("Use Period"). The Use Period may be either perpetual (until any termination of this Agreement) or term-based. Customer will use the software Products strictly in accordance with (i) the capacity and units of measure set forth in the Quote and Order; (ii) any supplementary terms of use set forth in a separate written agreement signed by both parties; and (iii) the Documentation.

- 7.3. Firmware License.** Hardware Products may include pre-installed or embedded software programming and/or microcode (collectively “Firmware”). Subject to Customer’s compliance with the terms and conditions of this Agreement, Virtana grants to Customer a nonexclusive, nontransferable license to use such Firmware, and provides such license at no additional charge, provided that Customer may only use Firmware together with the specific hardware or device(s) Product with which the Firmware was licensed and provided to Customer. Customer may not extract or copy Firmware embedded in hardware devices or components for any reason.
- 7.4. Hardware Products.** In addition to Firmware, hardware Products contain technology that may be covered by pending or existing patents and other forms of industrial or intellectual property recognized under applicable law (“Hardware IP”). The sale of a unit of hardware Product does not constitute either the sale or conveyance to Customer or any third party of any Hardware IP or any independent license to exercise the Hardware IP in any manner other than that strictly necessary to use the hardware Products for Customer’s internal business use and in accordance with the terms and conditions of this Agreement.
- 7.5. Evaluation Products.**
- 7.5.1.** From time to time, Customer may wish to evaluate the Products or SaaS Services prior to purchase, or it may wish to test and provide feedback regarding pre-release versions of the SaaS Services or Products at Virtana’s request (in either case, an “Evaluation Product”). Subject to Customer’s compliance with the terms and conditions of this Agreement, Virtana grants to Customer a nonexclusive, revocable, limited term, and non-transferable license to use the Evaluation Products for Customer’s internal, evaluation purposes only, for a period of thirty (30) days from the date of shipment or electronic availability of the Evaluation Product with respect to Products, and fourteen (14) days for SaaS Services (the “Trial Period”), unless a longer period is agreed to in writing by Virtana. If any hardware Evaluation Products are not timely returned to Virtana following the conclusion of the Trial Period, Customer will purchase such Evaluation Products at the then-current list prices, payable within thirty (30) days of the Virtana invoice date. Customer will be responsible for loss of or damage to hardware Evaluation Products while in Customer’s possession, normal wear and tear excepted. Customer must uninstall and delete any copies of standalone software Evaluation Products provided hereunder at the end of the Evaluation Period, unless otherwise instructed in writing by Virtana, or, as with SaaS Services based Evaluation Products, Virtana may disable all access to the same.
- 7.5.2. NO DATA RETENTION.** ANY CUSTOMER DATA ENTERED INTO EVALUATION PRODUCTS MAY BE PERMANENTLY LOST UNLESS CUSTOMER: (i) PURCHASES A LICENSE OR SUBSCRIPTION TO THE EVALUATION PRODUCTS; OR EXPORTS SUCH DATA PRIOR TO TERMINATION OF THE TRIAL PERIOD.
- 7.5.3.** Virtana does not commit, guarantee, promise, or agree to finally release and/or offer for sale any Evaluation Product. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, EVALUATION PRODUCTS ARE PROVIDED ON AN “AS IS” BASIS WITHOUT WARRANTIES, SUPPORT SERVICES, PROFESSIONAL SERVICES OR INDEMNITIES OF ANY KIND.
- 7.6. Freemium Use.**
- 7.6.1.** To the extent offered by Virtana, Customer may wish to use free versions of the SaaS Services or Products (the “Freemium Services”). Subject to Customer’s compliance with the terms and conditions of this Agreement and the requirements posted on Virtana’s website for Freemium Service access (including but not limited to, as noted by Virtana, participation in periodic feedback sessions, minimum training, product related info sessions), Virtana grants to Customer a nonexclusive, revocable, limited term, and non-transferable license to use the Freemium Services for its internal business purposes only and subject to use, quantity, time, or other limitations on Freemium Service use noted on Virtana’s website. Virtana may at any time revoke, terminate, suspend, modify, limit, or condition the further use of Freemium Services on notice to Customer for any reason or no reason. Customer may cancel the Freemium Services with Virtana at any time and for any reason or no reason by following the in-product prompts for deleting Customer’s environment or such other prompts as Virtana may make available. Access to Freemium Services will also terminate automatically if Customer or Virtana terminate this Agreement consistent with the termination provisions herein. In addition, Virtana may suspend or terminate access to the Freemium Services (a) if Virtana generally discontinues, modifies, or limits the Freemium Services following notice to registered contacts, (b) if Customer misuses the Freemium Services, (c) if Customer exceeds the scope, quantities, units, time period, or features or functions included by Virtana at no charge as part of the Freemium Services, (d) if Customer’s Freemium Services account is inactive for thirty (30) or more days. Virtana reserves the right to require payment of fees for any excess usage that is not included in a Freemium Services at its then-current standard rates for the same, or such rates as Virtana may otherwise offer in writing.
- 7.6.2. Restrictions and Disclaimers.** Freemium Services may be subject to certain use, quantity, or other limitations, may contain bugs or errors, and are provided solely and exclusively “AS IS” with no express or implied warranty of any kind. CUSTOMER ASSUMES AND UNCONDITIONALLY RELEASES VIRTANA FROM ALL RISKS ASSOCIATED WITH THE USE OF ANY FREEMIUM SERVICES. Virtana may discontinue offering the Freemium Services at any time in its sole discretion.
- 7.6.3. NO DATA RETENTION.** ANY CUSTOMER DATA ENTERED INTO THE FREEMIUM SERVICES MAY BE PERMANENTLY LOST AT THE CONCLUSION OF THE FREEMIUM SERVICES AVAILABILITY UNLESS CUSTOMER EXPORTS SUCH DATA PRIOR TO TERMINATION OF THE FREEMIUM SERVICES.
- 7.6.4. LIMITED LIABILITY.** VIRTANA’S ENTIRE LIABILITY IN CONNECTION WITH ANY USE OF THE FREEMIUM SERVICES, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, WILL NOT, AS TO ANY INDIVIDUAL CLAIM OR IN THE AGGREGATE, EXCEED \$50. IF CUSTOMER DOES NOT AGREE TO THE ALLOCATION OF RISK IN THIS SECTION, ITS SOLE RECOURSE IS TO IMMEDIATELY DISCONTINUE THE USE OF THE FREEMIUM SERVICES.
- 7.7. Restrictions.** All licenses granted to Customer under this Section 7 are subject to Customer’s ongoing compliance with the terms and conditions of this Agreement. Customer will not, and will not permit any third party, to: reverse engineer, decompile, disassemble, or otherwise attempt to ascertain the source code, object code, or underlying structure, ideas or algorithms of the SaaS Services or Products, or any software,

documentation or data relating thereto (“Software”); modify, translate, make, copy, perform, or create derivative works based on the Products, SaaS Services, or Software; use, resell, commercially exploit, or distribute the SaaS Services, Software, or Products; use the SaaS Services, Software or Products for any service bureau, time-sharing, subscription rental, or other use by third parties for which Customer receives compensation; or use the SaaS Services, Software or Products for any purpose other than for the internal benefit of Customer and in compliance with the terms hereof and all applicable laws. Customer understands and agrees that Virtana and its licensors grant only those rights expressly set forth in this Agreement. Virtana and its licensors reserve any and all rights not expressly granted to the Customer under this Agreement. Customer will be liable for any acts or omissions constituting a breach of this Agreement or violation of Virtana’s intellectual property rights by any third parties authorized by Customer to access and use the SaaS Services and Products on Customer’s behalf. Except as expressly set forth in the next sentence, unless otherwise agreed to by Virtana in writing, Customer may not transfer any licenses hereunder to any third party. Notwithstanding the foregoing, Customer may authorize its outsourced service providers to use the SaaS Services and/or Products on Customer’s behalf provided: (i) Customer informs Virtana in writing of such outsourced use, and (ii) the outsourced service provider agrees in writing to use the SaaS Services and/or Product solely on behalf of Customer and in compliance with all terms of this Agreement.

**7.8. Ownership.** Virtana and its licensors retain all right, title and interest in and to the SaaS Services, Software, all Products, Evaluation Products, Hardware IP, Confidential Information, Documentation, and any improved, updated, modified, or additional versions of the foregoing, and Customer acknowledges and agrees that, without limiting Virtana’s other rights, the foregoing items are, if applicable, licensed to Customer hereunder pursuant to the terms hereof, and are not sold to Customer. Virtana does not acquire any right, title or interest in any Confidential Information (as defined below) owned or supplied by Customer. Virtana retains all right, title and interest in and to any deliverable supplied by Virtana in the course of performing Professional Services, including those that constitute a modification, enhancement or new feature of a Product or Evaluation Product; provided, however, that upon payment of the applicable Professional Services fees, and subject to Customer’s compliance with the terms of this Agreement, Virtana hereby grants to Customer a non-exclusive, worldwide license to use such deliverable during the pertinent Use Period within the scope of the license granted to Customer for the underlying Product to which the deliverable pertains. Virtana will have a royalty-free, worldwide, transferable, sublicenseable, irrevocable, perpetual license to use for any purpose and incorporate into the SaaS Services, Products, Support Services and/or Professional Services any suggestions, enhancement requests, recommendations or other feedback provided by Customers relating to the SaaS Services, Products, Support Services or the Professional Services, provided that Virtana will treat Customer’s identity as the source of such feedback or suggestions as Confidential Information of Customer.

**8. Confidentiality.**

**8.1. Definition.** “Confidential Information” means proprietary and confidential information that the employees, agents, officers, or contractors of one party (“Disclosing Party”) supply to the other

party’s employees, agents, officers, or contractors (“Receiving Party”) hereunder. Confidential Information of either party as Disclosing Party includes but is not limited to the Disclosing Party’s business plans, client lists, financial information, trade secrets, supplier information, employee information, product plans, technical information, or any information that is marked or designated at the time of disclosure as “confidential,” “proprietary,” or similar designation, or that should be reasonably understood to be confidential under the circumstances. Confidential Information of Customer specifically includes, but is not limited to, Customer Data, Customer’s storage area network (“SAN”), Customer’s SAN suppliers, SAN tools or components employed by Customer, SAN performance data or history supplied to Virtana in the performance of Professional Services or Support Services, IP addresses or other identifiers of Customer’s SAN components, and the physical location of the SAN. Confidential Information of Virtana specifically includes, but is not limited to, Virtana’s tools, templates, training materials, Quotes, discounts, Products (including embedded third party components therein), Product benchmarking information, comparative or competitive analyses, infringement testing, or analyses of the Products, Product issues, Evaluation Products, Documentation, SaaS Services, Support Services, and Product roadmap.

**8.2. Exclusions.** Confidential Information does not include information that is (i) rightfully in the Receiving Party’s possession without restriction prior to receipt from the Disclosing Party, (ii) generally publicly available through no fault of the Receiving Party, (iii) rightfully furnished to the Receiving Party by a third party without restriction on disclosure or use; or (iv) independently developed by the Receiving Party without use of or reference to the Disclosing Party’s Confidential Information.

**8.3. Obligation to Maintain Confidence.** The Receiving Party will (i) not disclose the Confidential Information to any third party; (ii) give access to such Confidential Information solely to those employees or contractors with a need to know for purposes of this Agreement; (iii) use Confidential Information of the Disclosing Party only for the purposes of exercising rights or performing obligations in connection with this Agreement, and (iv) use at least reasonable care to protect the Disclosing Party’s Confidential Information from unauthorized use or disclosure to any third parties. If disclosure is required by law, such disclosure will not constitute a breach of this Agreement provided the Receiving Party gives the Disclosing Party reasonable advance notice (if feasible) to enable the Disclosing Party to seek appropriate protection of the Confidential Information. Neither party may disclose the existence or terms of this Agreement without the other party’s written consent, provided that either party may disclose the terms hereof as reasonably necessary to its representatives and potential investors and acquirers, in each case subject to written obligations of confidentiality at least as restrictive as those contained herein. Notwithstanding anything to the contrary, Virtana will have the right to collect and analyze data and other information relating to the provision, use and performance of various aspects of the SaaS Services, Products, Support Services and Professional Services and related systems and technologies, and Company will be free (during and after the Term hereof) to use such information to deliver, improve and enhance the SaaS Services, Products, Support Services and Professional Services and for other development, diagnostic and corrective purposes. For clarity, the foregoing does not give Virtana the right to identify Customer as the source of any such

information and data or to publicly distribute such data in any manner or format such that Customer's or its Users' identity may be identified without Customer's prior written permission.

**9. Warranties; Disclaimers.**

**9.1. Product Warranty.** Virtana warrants to Customer that, commencing on the date of shipment, and for a period of (a) ninety (90) days with respect to software Products, (b) one (1) year from with respect to hardware Products, or (c) for each subscription term with respect to the SaaS Services, the Products will substantially conform to the Documentation for such Products. The foregoing warranty does not apply to Evaluation Products, Freemium Services, Products supplied as part of Support Services, or Products that have been damaged, mishandled, mistreated, used, maintained or stored other than in accordance with the terms of this Agreement or the Documentation and instructions. Customer's sole and exclusive remedy for any breach of the foregoing warranty will be, at Virtana's option, to repair or replace the non-conforming Product with a conforming Product, or refund fees received by Virtana for the non-conforming Product. Virtana will have a reasonable time to make repairs or issue a replacement, and such repaired or replaced Products will be warranted for the remainder of the original warranty period. The warranties in this Section are subject to the following: (i) Customer must report to Virtana the non-conformity during the warranty period; and with respect to hardware Products, (ii) Virtana must issue a "Return Materials Authorization" ("RMA") for the non-conforming hardware Product in accordance with the RMA procedures set forth in the Support Services Supplement, and (iii) Customer must return such hardware Product to Virtana during the applicable warranty period in accordance with Virtana's return instructions.

**9.2. Services Warranty.** Virtana warrants to Customer that Support Services and Professional Services delivered by Virtana to Customer will be performed in a professional and workmanlike manner in accordance with applicable industry standards and laws applicable to Virtana in the performance thereof. Customer's sole and exclusive remedy for any breach of the foregoing warranty will be for Customer to report the non-conformity no later than thirty (30) days following performance of the applicable Professional Service or Support Service, and permit Virtana's to either re-perform the non-conforming Services at no additional charge to Customer within a reasonable time or refund fees received by Virtana for the non-conforming Support Services or Professional Services, as applicable.

**9.3. Disclaimer.** Customer acknowledges and agrees that Virtana assumes no liability in connection with: (i) the operation of the Customer's SAN or other monitored environments; (ii) incomplete, inaccurate, outdated or unavailable data caused by faulty monitored environment components or improperly installed components monitored by use of the Products; and (iii) Product errors or malfunctions, or the unavailability of monitoring data resulting from improper Product installation or configuration by any party other than Virtana. Customer acknowledges and agrees that Customer has not relied and will not rely on the availability of any future version of a Product or any future Product in executing this Agreement or making any purchases under this Agreement. EXCEPT AS EXPRESSLY WARRANTED IN THIS SECTION, VIRTANA MAKES NO OTHER WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, WARRANTIES CONCERNING THE PERFORMANCE OF CUSTOMER'S STORAGE AREA

NETWORK, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS, AND WARRANTIES THAT ANY PRODUCTS OR SERVICES PROVIDED HEREUNDER (OR ANY ELEMENTS THEREOF) WILL ACHIEVE A PARTICULAR RESULT OR WILL BE UNINTERRUPTED OR ERROR-FREE.

**10. Indemnification.** Virtana will defend Customer against any third party claim that a SaaS Service, Product, Support Service, Professional Service or deliverable ("Deliverables") infringes such party's patent or copyright enforceable in a country signatory to the Berne Convention, and pay the resulting costs and damages finally awarded against Customer by a court of competent jurisdiction or the amounts in a written settlement signed by Virtana. The foregoing obligations are subject to Customer's obligation to (i) notify Virtana promptly in writing of any such claim, (ii) grant Virtana sole control over the defense and settlement thereof, (iii) reasonably cooperate in response to a Virtana request for assistance in connection with the defense and settlement thereof, and (iv) comply with the terms of this Agreement. Should any such SaaS Service, Product, Support Service, Professional Service or Deliverable become, or in Virtana's opinion be likely to become, the subject of such a claim, Virtana may, at its option and expense, (a) procure for Customer the right to make continued use thereof, (b) replace or modify such so that it becomes non-infringing, (c) request return of the Product or deliverable and, upon receipt thereof, refund the price paid by Customer, less straight-line depreciation based on a five year useful life, or (d) discontinue the provision of the SaaS Service, Support Service or Professional Service and refund the portion of any applicable pre-paid service fee that corresponds to the period of service discontinuation. Virtana will have no liability under this Section to the extent that the alleged infringement arises out of or relates to: (1) the use or combination of a Product, SaaS Services, or Deliverable with third party products or services not supplied by Virtana, (2) use for a purpose or in a manner for which the Product, SaaS Services, or Deliverable was not designed, supplied, or licensed, (3) any modification to a Product, SaaS Services, or Deliverable made by anyone other than Virtana or its authorized representatives, (4) any modifications to a Product, SaaS Services, or Deliverable made by Virtana pursuant to Customer's specific instructions, (5) any Evaluation Products or Freemium Services, or (6) ongoing use of the infringing version of a Product, SaaS Services, or Deliverable when use of a non-infringing version made available to Customer for purposes of avoiding such infringement would have avoided the infringement. THIS SECTION STATES CUSTOMER'S SOLE AND EXCLUSIVE REMEDY AND VIRTANA'S ENTIRE LIABILITY FOR THIRD PARTY INFRINGEMENT CLAIMS.

**11. LIMITATION OF LIABILITY.** EXCEPT FOR A VIOLATION OF SECTION 7.6 OR VIRTANA'S INTELLECTUAL PROPERTY RIGHTS, A VIOLATION BY EITHER PARTY OF THE CONFIDENTIALITY OBLIGATIONS UNDER SECTION 8, OR DEATH OR PERSONAL INJURY CAUSED BY A PARTY, TO THE MAXIMUM EXTENT PERMISSIBLE UNDER APPLICABLE LAW:

**11.1.** EACH PARTY WILL BE ONLY LIABLE FOR PROVEN DIRECT DAMAGES NOT TO EXCEED, IN THE AGGREGATE, FEES PAID OR OWING TO VIRTANA IN THE 12 MONTH PERIOD ENDING ON THE DATE THAT A CLAIM OR DEMAND IS FIRST ASSERTED; AND

- 11.2. NEITHER PARTY (NOR ITS SUPPLIERS, LICENSORS AGENTS, AFFILIATES OR DISTRIBUTORS) WILL BE LIABLE FOR ANY DELAY OR LOSS OF USE, INTERRUPTION OF BUSINESS, THE COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY ARISING OUT OF OR IN ANY WAY RELATED TO ANYTHING PROVIDED IN CONNECTION WITH THIS AGREEMENT, OR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING WITHOUT LIMITATION LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOSS OF BUSINESS OR LOST SALES, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT PRODUCT LIABILITY OR OTHERWISE, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATIONS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.
12. **Termination.** Either party may terminate this Agreement upon written notice to the other party for any material breach that is not cured within thirty (30) days following written notice thereof to the breaching party. Customer may terminate this Agreement for any reason or no reason by providing written notice to Virtana, provided, however, that such termination will not entitle Customer to any refund of fees paid or owing at the time of termination. Upon termination of this Agreement, all licenses granted to Customer hereunder will terminate. Sections 4 (“Fees and Payment Terms”) but only with respect to outstanding payments due to Virtana, 7.6 (“Restrictions”), 7.7 (“Ownership”), 8 (“Confidentiality”), 9.3 (“Disclaimer”), 11 (“Limitation of Liability”), 12 (“Termination”), 13 (“Legal Compliance”) and 14 (“General”) will survive the termination of this Agreement.
13. **Legal Compliance.** Each party will at all times comply with all applicable federal, state and local laws and regulations. The SaaS Services, Products and certain other services provided under this Agreement may fall within the group of “strategic” electronic or other products or services that are wholly or partly of U.S. origin or technology, the export of which is subject to export license control by the U.S. government. Therefore, Customer agrees to comply with all export control laws, and to obtain any licenses which may be required under the applicable export laws of all U.S. Government Agencies including but not limited to the Bureau of Industry & Security, (BIS), governed by the Export Administration Regulations (EAR) and Directorate of Defense Trade Controls (DDTC) governed by the International Traffic & Arms Regulations (ITAR). Customer will at its own expense obtain and arrange, and maintain in full force and effect all governmental approvals, consents, licenses, authorizations, declarations, filings, and registrations necessary or advisable for any and all uses of the SaaS Services, Products and other services by Customer.
14. **General.** Neither party will be liable, either wholly or in part, for nonperformance or a delay in performance due to force majeure event or contingencies or causes beyond the reasonable control of such party, including, but not limited to, war, acts of God, civil unrest, pestilence, shortage of labor, fuel, raw material or machinery or technical, or yield failure. No waiver will be deemed a waiver of any prior or subsequent default hereunder. The validity, performance, and construction of this Agreement will be governed by the laws of the State of California, without regard to its conflicts of law provisions. The U.N. Convention on contracts for the International Sale of Products will not apply to the Products or this Agreement. If a Product is provided to any unit or agency of the United States Government (“U.S. Government”), the following provisions will apply: all SaaS Services, software Products and accompanying Documentation are deemed commercial, including computer databases, related documentation, technical data, and manuals as defined in FAR 2.101. Pursuant to FAR 12.212 and DFARS 227.7202, any use, modification, reproduction, release, performance, display, or disclosure of the software and accompanying documentation by the U.S. Government will be governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the terms herein. Virtana may subcontract its obligations under this Agreement, provided that Virtana will remain responsible for its and its subcontractors’ obligations to Customer hereunder. Virtana may freely assign or transfer this Agreement. Customer may not assign (voluntarily, by operation of law or otherwise) this contract, or any of its rights or obligations thereunder, without the prior written approval of Virtana. This Agreement, including all Quotes, invoices, and any terms incorporated by reference herein, constitute the sole, exclusive, and fully integrated agreement between the parties relating to the supply of SaaS Services, Products, Support Services or Professional Services, and supersede all prior or contemporaneous communications, representations or agreements either oral or written, with respect to the subject matter hereof. No addition to or modification of any provisions of this Agreement will be binding upon Virtana unless made in writing and signed by a duly authorized representative of Virtana. No course of dealing or usage of trade or course of performance will be relevant to explain or supplement any term expressed in this Agreement. If any provision of this Agreement will be determined to be illegal or unenforceable, all other provisions will remain in full force and effect. All notices provided pursuant to this Agreement will be in writing and will be deemed delivered on the date of personal delivery if addressed to the recipient at the addresses set forth in any order or agreement in which this Agreement is invoked. The prevailing party in any litigation hereunder will be entitled to recover attorney’s fees.