

SIMPLIVITY CORPORATION OMNICUBE END USER LICENSE AGREEMENT

THE TERMS OF THIS OMNICUBE USER AGREEMENT ARE INCORPORATED IN ALL ORDERS AND ORDER ACCEPTANCES FOR SIMPLIVITY OMNICUBE PRODUCTS AND SOFTWARE AND ARE AN ESSENTIAL ELEMENT OF THE OMNICUBE PRODUCT AND SOFTWARE. BY PLACING AN ORDER FOR SIMPLIVITY OMNICUBE OR SOFTWARE, CUSTOMER ACCEPTS AND AGREES TO THE TERMS OF THIS AGREEMENT.

IN ADDITION, BY EXECUTING THIS AGREEMENT OR IMPLEMENTING, INSTALLING, CONFIGURING, COPYING, ACCESSING, DEPLOYING, CLICKING ON AN "ACCEPT" BUTTON, OR OTHERWISE USING ALL OR ANY PART OF THE SIMPLIVITY PRODUCT DESCRIBED BELOW, CUSTOMER AGREES TO THE TERMS OF THIS AGREEMENT. IF YOU ARE EXECUTING OR OTHERWISE ACCEPTING THESE TERMS ON BEHALF OF CUSTOMER, YOU REPRESENT AND WARRANT THAT YOU HAVE FULL AUTHORITY TO BIND CUSTOMER TO THE TERMS OF THIS AGREEMENT.

IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT,

- DO NOT ORDER OR PURCHASE THE OMNICUBE PRODUCT OR SOFTWARE, AND
- DO NOT IMPLEMENT, INSTALL, CONFIGURE, COPY, ACCESS, DOWNLOAD, DEPLOY, CLICK ON AN "ACCEPT" BUTTON, OR OTHERWISE USE THE OMNICUBE PRODUCT OR SOFTWARE, AND
- CONTACT SIMPLIVITY IMMEDIATELY TO REQUEST A RETURNED MATERIAL AUTHORIZATION ("RMA") AND RETURN THE OMNICUBE PRODUCT AND SOFTWARE AND ALL PACKAGING, DOCUMENTATION AND ANY OTHER MATERIALS DELIVERED IN CONNECTION THEREWITH IN ACCORDANCE WITH THE INSTRUCTIONS INCLUDED IN THE RMA.
- The "Product" consists of a SimpliVity OmniCube™ or two or more SimpliVity OmniCube Systems configured together as an OmniCube Global Federation™. Each OmniCube includes storage, processing, memory, virtualization software, the OmniCube Accelerator™, SimpliVity's OmniStack Software™ and documentation.
- "Software" means any software (including OmniStack Software), library, utility, tool, or other computer or program code, in object (binary) or source-code form, as well as related documentation, provided by SimpliVity, through any medium, to Customer, for use in an OmniCube purchased from SimpliVity or a SimpliVity authorized reseller.
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- **1. SOFTWARE LICENSE GRANT AND RESTRICTIONS.**
- Subject to the terms and conditions of this Agreement and subject to payment of all applicable fees, SimpliVity grants Customer a fully-paid, non-exclusive, non-transferable and non-sublicensable, internal-business-use license to use the Software as specified herein. Software shall be used solely in object code form. Customer agrees that it shall not (i) use the Software for the benefit of any third party or on a rental basis, (ii) copy or reproduce the Software or any software included in or with the Product, (iii) modify or enhance or create any derivative works based on the Software or any component thereof, (iv) disassemble the Software or any part thereof, remove the OmniCube Accelerator™ or use the OmniCube Accelerator™ or any software contained in the Product with any hardware other than the SimpliVity OmniCube with which it was delivered, or (v) reverse engineer, reverse compile or attempt to reduce to human-readable form or otherwise derive the source code of any Software, in each case except to the extent that applicable law prevents the prohibition or limitation of such activities. Customer shall permit use of the Software only by its personnel as necessary to enable the proper use of the Product for Customer's internal business purposes. Customer agrees not to disclose to any third party any test results, benchmarks or other performance or evaluation information relating to the Software.
- **2. OWNERSHIP.**
- a. The Software is, and at all times shall remain, the property of SimpliVity. Customer acknowledges that as between Customer and SimpliVity, SimpliVity is the owner of all right, title and interest, both tangible and intangible, in and to the Software and all documentation and other materials associated therewith, including all patent, copyright, trade secret, trademark, and other intellectual property rights. Except for the express license grant in Section 1, no right, title or interest in the Software is transferred to Customer, and irrespective of any use of the word "purchase," "sale" or like terms hereunder no right, title, interest or any other ownership rights are being conveyed to Customer with regard to the Software under this Agreement or otherwise. All patent, copyright, trade secret, trademark, and other intellectual property rights, and all trademarks, service marks, trade names, logos, branding and other business identifiers associated with the

Product are owned by SimpliVity or its licensors, and no right to use any of the foregoing is granted to Customer.

- b. U.S. Government End Users. The Software and its associated documentation were each developed by private financing and constitute "Commercial Items," as that term is defined at 48 C.F.R. §2.101. The Software consists of "Commercial Computer Software" and "Commercial Computer Software Documentation," as such terms are used in 48 C.F.R.
- §12.212. Consistent with 48 C.F.R. §12.212 and 48 C.F.R. §227.7202-1 through 227.7202-4, all U.S.
- Government End Users acquire only those rights in the Software and the documentation that are specifically provided by this Agreement. Consistent with 48
- C.F.R. §12.211, all U.S. Government End Users acquire only technical data and the rights in that data customarily as specifically provided in this Agreement.

- **3. CONFIDENTIALITY.**

- Customer acknowledges that the Product contains trade secrets of SimpliVity and is proprietary to SimpliVity. Customer agrees not to copy, sell, assign, or disclose the Product or any part thereof to any third party, and to use the same degree of care with the Product as Customer uses to safeguard its own confidential information, but in no event less than reasonable care. Customer shall leave intact and unobscured all proprietary, copyright and similar notices included on the Product or other related materials furnished by or on behalf of SimpliVity.

- **4. LIMITED WARRANTY AND LIABILITY.**

- a. SimpliVity's limited warranty provides for a period of ninety (90) days after delivery the Product will be free from defects in material and workmanship, and will substantially conform to the applicable SimpliVity technical documentation provided with the Product. This limited warranty does not apply to problems that arise from (i) other items or services not provided or authorized by SimpliVity, (ii) installation or configuration other than in accordance with SimpliVity's written instructions or the applicable SimpliVity technical documentation, (iii) use of the Product in an environment, in a manner, or for a purpose for which the Product was not designed, (iv) modifications, alterations or repairs not authorized in writing by SimpliVity, or (v) the negligence or fault of Customer, Customer's personnel or a third party not acting under SimpliVity's instructions or control. Customer's sole remedy and SimpliVity's sole liability with respect to a breach of the foregoing limited warranty shall be for SimpliVity to, at its option, (a) use commercially reasonable efforts to remedy such breach, (b) replace the affected Product(s), or (c) refund the amount paid by Customer for the affected Product(s), upon return thereof to SimpliVity, in which event the license granted herein shall terminate. To receive warranty service, Customer must register (during the warranty period) at <http://www.SimpliVity.com/support>. In jurisdictions that do not allow the limitations on the scope and duration of warranties set forth herein, additional warranties may apply. This limited warranty is limited to the original purchaser of the Product and is not transferable unless otherwise agreed to in writing by SimpliVity.
- b. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, THE FOREGOING WARRANTY IS EXCLUSIVE, AND EXCEPT AS EXPRESSLY SET FORTH HEREIN, THE PRODUCT IS PROVIDED HEREUNDER BY SIMPLIVITY ON AN "AS IS" BASIS, AND SIMPLIVITY AND ITS SUPPLIERS EXPRESSLY DISCLAIM ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY, SATISFACTORY QUALITY, NON- INFRINGEMENT OR FITNESS FOR PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE. NEITHER SIMPLIVITY NOR ITS SUPPLIERS SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, PUNITIVE OR SPECIAL DAMAGES ARISING OUT OF THIS AGREEMENT OR THE USE OR PURCHASE OF ANY PRODUCT, REGARDLESS OF WHETHER SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY LOST REVENUES, GOODWILL OR PROFITS, BUSINESS INTERRUPTION, PROCUREMENT OF SUBSTITUTE HARDWARE, SOFTWARE OR SERVICES, LOST DATA, WORK STOPPAGE, RE- RUN TIME, INACCURATE OUTPUT, COMPUTER FAILURE OR MALFUNCTION. SIMPLIVITY'S TOTAL LIABILITY ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE USE OR PURCHASE OF ANY PRODUCT SHALL BE LIMITED TO PROVEN, DIRECT DAMAGES IN AN AMOUNT
- NOT TO EXCEED THE TOTAL AMOUNT PAID BY CUSTOMER FOR THE PRODUCT GIVING RISE TO SUCH DAMAGES. SIMPLIVITY SHALL NOT BE LIABLE FOR ANY CLAIM BROUGHT MORE THAN TWO (2) YEARS AFTER THE CAUSE OF ACTION FOR SUCH CLAIM FIRST AROSE.

- **5. MAINTENANCE AND SUPPORT.**

- SimpliVity does not provide any Product maintenance or support services under this Agreement. Product maintenance and support services, if any, will be provided under a separate agreement. In addition, this Agreement, in and of itself, does not entitle Customer to any product updates at any time in the future. Customer may purchase Product maintenance and support on an annual or multi-year basis at the pricing and service levels indicated separately by SimpliVity or its authorized reseller. In such event, maintenance

and support shall be provided by or on behalf of SimpliVity in accordance with SimpliVity's then-current maintenance and support policies.

- **6. INTELLECTUAL PROPERTY INDEMNIFICATION.**

- a. SimpliVity shall defend or settle, at its own expense, any third-party action against Customer to the extent based upon a claim that the Product misappropriates that third party's trade secrets or proprietary rights or infringes that third party's U.S. or E.U. issued trademark, copyright or patent and will pay such damages or costs as are finally awarded against Customer attributable to such claim, provided that Customer (i) notifies SimpliVity promptly in writing of any such action, (ii) gives SimpliVity sole control of the defense and/or settlement of such action, (iii) provides SimpliVity all reasonable information and assistance, and (iv) is not in material breach of this Agreement.
- b. Should the Product become, or in the opinion of SimpliVity likely to become, the subject of such an infringement claim, SimpliVity will, at its option: (i) procure for Customer the right to continue using the Product; (ii) replace or modify the Product so that it becomes non-infringing without substantially compromising its functionality; or, (iii) if options (i) and (ii) are not reasonably available to SimpliVity, terminate this Agreement and Customer's license to the affected Product and upon return of the relevant Product, refund Customer an amount equal to the fee paid for such Product, depreciated on a straight line basis over a 5 year period.
- c. SimpliVity shall have no obligation or liability for claims resulting or arising from (i) use of other than a current unaltered version of the Product, (ii) modifications not performed by SimpliVity or
- authorized in writing by SimpliVity, (iii) the use or combination of the Product with non-SimpliVity software, content or other products or materials if such infringement would have been avoided by the use of the Product without the use of such other software, content, products or materials, (iv) Customer's continued use of a version of Software other than the then-current release of the Software, or (v) use of the Product in any manner other than as expressly authorized herein or as contemplated by the applicable SimpliVity technical documentation. Customer shall indemnify and hold harmless SimpliVity and its officers, directors, employees, agents, successors and assigns against any damages, losses, and expenses (including reasonable attorneys' fees) arising from any third-party action to the extent based upon a claim that the Product infringes any copyright or trademark or misappropriates any trade secret due to any of the foregoing factors, and shall give SimpliVity all reasonable information and assistance regarding such claim.
- d. THIS SECTION 6 SETS FORTH SIMPLIVITY'S ENTIRE LIABILITY AND OBLIGATION AND CUSTOMER'S SOLE REMEDY FOR ANY CLAIM OF INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHTS.

- **7. TERMINATION.**

- Either party may terminate this Agreement upon written notice to the other party for any material breach hereof that remains uncured thirty (30) days after notice thereof by the non-breaching party, unless such breach is by its nature incapable of cure, in which case the non-breaching party may terminate this Agreement immediately upon notice to the other party. Upon termination of this Agreement for any reason, the license granted herein shall terminate, and Customer shall immediately discontinue use of the applicable Product(s), promptly remove its confidential data, if any, therefrom and return the Product(s) and related materials to SimpliVity or the party from whom the Product and such materials were obtained. Sections 2, 3, 4, 6, 7, 9, and 10 of this Agreement shall survive its termination.

- **8. OPEN SOURCE COMPONENTS.**

- SimpliVity Software may use or include one or more of the open source software components listed in the SimpliVity Open Source Attribution File, which is available at <http://www.SimpliVity.com/>. Please refer to the Open Source Attribution File for the open source license disclosures and pertinent terms.

- **9. EXPORT**

- The Software and documentation and the underlying information and technology may not be downloaded or otherwise exported or re-exported (i) into (or to a national or resident of) any country to which the U.S. has embargoed goods; or (ii) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Deny Orders. By downloading or using the Software and/or documentation, you are agreeing to the foregoing and you represent and warrant that you are not located in, under the control of, or a national or resident of any such country or on any such list and you agree to comply with all export laws and other applicable laws.

- **10. MISCELLANEOUS.**

- The suppliers of any third party components of the Product have a proprietary interest therein and shall be beneficiaries under this Agreement. Customer may not assign or transfer this Agreement or any rights or obligations under it without the prior written consent of SimpliVity, except that Customer may upon written notice to SimpliVity assign or otherwise transfer its rights and obligations under this Agreement, in whole but not in part, to a successor entity pursuant to a merger, consolidation or other corporate/organizational divestiture or acquisition, provided that the assignee agrees in writing to be bound hereby. Any terms and

conditions inconsistent with or in addition to this Agreement, including without limitation any pre-printed purchase order terms and conditions or other ordering or invoicing document issued by Customer are rejected and null and of no effect, even if SimpliVity accepts, acknowledges or ships Products in response to a Customer purchase order. No term or provision contained herein shall be deemed waived and no breach excused unless such waiver or consent shall be in writing and signed by the party to be bound thereby. Neither party hereto shall be liable to the other party for any failure, delay or interruption in the performance of any of the terms or conditions contained in this Agreement due to causes entirely beyond the control of that party.

- This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, (U.S.A.) without regard to its conflicts of law principles. The U.N. Convention on Contracts for the International Sale of Goods does not apply. The parties hereby unconditionally waive their rights to a jury trial of any claim or cause of action arising directly or indirectly out of, related to, or in any way connected with the performance or breach of this Agreement. The controlling language of this Agreement is English. If you have received a translation into another language, it has been provided for your convenience only. The limitations and disclaimers included herein are intended by the parties to be enforceable to the fullest extent permitted under applicable law, and where any such limitation or disclaimer is not permitted under applicable law without the possibility of a contractual waiver, the parties intend that applicable law be applied to give the fullest possible effect to the original intent of the parties as reflected herein. Notices hereunder shall be effective upon confirmed receipt by SimpliVity at 8 Technology Drive, Attn: Legal, Westborough, MA 01581 U.S.A. or by Customer at Customer's ship-to address identified in the applicable purchase order for the Product or such other address as Customer may provide in writing for purposes of notices hereunder. Customer grants to SimpliVity permission to state in presentations, interviews and other materials that Customer is a customer of SimpliVity. Customer may also be identified as a customer as required by applicable laws or regulatory requirements. If you are a Customer using the Product outside the U.S.A., then the following shall apply: (i) You confirm that this Agreement and all related documentation is and will be in the English language; (ii) you are responsible for complying with any local laws in your jurisdiction which might impact your right to import, export or use the Product, and you represent that you have complied with any regulations or registration procedures required by applicable law to make this Agreement and license granted herein enforceable.