



OPSWARE SOFTWARE LICENSE AND SERVICES AGREEMENT

1. INTRODUCTION

1.1 Agreement. This Agreement (including any Appendix attached to this Agreement or to an Order Form) establishes the terms under which Licensee may use the Technology, and under which Opsware will maintain the Technology and provide professional services if requested.

1.2 Order Forms; Purchase Orders. The Opsware software products and components which Licensee is authorized to use, the license fees, maintenance fees, professional services fees, and any special terms of this Agreement will be specified in one or more "Order Forms" signed by both parties and any Product License Appendix or Services Description attached to this Agreement or to an Order Form or in a purchase order. If the parties have executed an Order Form, such Order Form represents a binding commitment to purchase the Technology and/or services described therein, and the issuance of a purchase order by Licensee is not necessary for Opsware to bill and collect the fees owed by Licensee. The terms of any such Order Form are incorporated herein by reference. If Opsware agrees to provide professional services to Licensee, they will be provided pursuant to the terms of the Professional Services Appendix attached hereto. In no event shall any supplemental or inconsistent terms and conditions contained in any purchase order or similar document issued by Licensee be binding upon Opsware. Opsware's delivery of software or services pursuant to such a purchase order or similar document shall not constitute acceptance of the supplemental or inconsistent terms.

2. DEFINITIONS

2.1 "Authorized Persons" means trained technical employees and contractors of Licensee who are subject to a written agreement with Licensee that includes use and confidentiality restrictions that are at least as protective as those set forth in this Agreement.

2.2 "Confidential Information" means all non-public information disclosed in tangible, visual or verbal form by either party to the other. Confidential Information may include, but is not limited to, services, pricing information, computer programs, source code, names and expertise of employees and consultants, know-how, and other technical, business, financial and product development information. "Confidential Information" does not include any information that the receiving party can demonstrate by its written records (1) was rightfully known to it without obligation of confidentiality prior to its disclosure hereunder by the disclosing party; (2) is or becomes publicly known through no wrongful act of the receiving party; (3) has been rightfully received without obligation of confidentiality from a third party authorized to make such a disclosure; or (4) is independently developed by the receiving party without reference to confidential information disclosed hereunder.

2.3 "Delivery Date" means the date on which the Technology is first shipped by Opsware, FOB shipping point, if it is physically shipped, or the date on which the Technology is first made available to Licensee for electronic download if it is electronically delivered.

2.4 "Documentation" means any administration guides, installation and user guides, and release notes that are normally provided by Opsware to end users of the Technology.

2.5 "Error" means a failure of the Technology to operate as described in the Documentation, provided that such condition is reported by Licensee to Opsware during an annual Maintenance Term and can be verified by both parties. The further definition and classification of Errors is set forth in the Maintenance Appendix.

2.6 "Intellectual Property Rights" means patents, design patents, copyrights, trademarks, Confidential Information, know-how, trade secrets, moral rights, and any other intellectual property rights recognized in any country or jurisdiction in the world.

2.7 "Maintenance" means the support and Error correction services provided hereunder during any Maintenance Term, as described in the Maintenance Appendix.

2.8 “Other Opware Products” means (a) any separately priced product or module offered by Opware that is not included in an Order Form under this Agreement (i.e., Opware products that have not been purchased by Licensee); (b) any new, separately priced Opware product or module released during the term of this Agreement; and (c) any product or module that provides substantial new functionality not included in the Technology previously licensed to Licensee.

2.9 “Technology” means the Opware products, components and modules identified in an Order Form or purchase order. The term “Technology” also includes any Error corrections, patches, work-arounds, Updates and Upgrades provided by Opware to Licensee during any Maintenance Term.

2.10 “Unit” means the hardware or software component (e.g., agent, core, node, device) by which licenses are counted and license fees are determined, as defined in the applicable Product License Appendix.

2.11 “Update” means a revision of the Technology to correct one or more Errors.

2.12 “Upgrade” means a revision of the Technology to improve the existing functionality of the Technology. “Upgrade” does not include Other Opware Products.

3. LICENSE GRANTS AND RESTRICTIONS

3.1 License. There are no implied licenses under this Agreement and Opware reserves all rights and licenses in and to the Technology not expressly granted to Licensee under this Agreement. All Technology licensed pursuant to this Agreement is unpublished copyrighted material, constitutes trade secrets and proprietary data of Opware and is Confidential Information of Opware. Subject to Licensee’s compliance with the terms and conditions of this Agreement, Opware grants to Licensee a perpetual, worldwide, non-exclusive, non-transferable (except in connection with a permitted assignment of this Agreement under Section 13.12 of this Agreement (Assignment)) license as follows:

3.2 License to Use Technology.

3.2.(a) Licensee may install the number and type of Units of technology identified on the Order Form(s) or purchase order(s). Licensee may install additional Units after signing an additional Order Form or issuing a corresponding purchase order and paying the additional per-Unit license fee and Maintenance fee set forth in the Order Form or purchase order.

3.2.(b) Licensee may use the Technology solely to support the internal operations of Licensee.

3.2.(c) Licensee must abide by any limitations or restrictions on Licensee’s use of the

Technology that appear in the Product License Appendix(es) attached to this Agreement or in the applicable Order Form.

3.3 Ancillary Rights in Technology

3.3.(a) The foregoing authorized uses may be exercised on Licensee’s behalf only by Authorized Persons.

3.3.(b) Licensee may copy the Documentation in support of Licensee’s authorized use of the Technology, provided that Licensee does not remove any of Opware’s proprietary notices from the Documentation.

3.3.(c) Licensee may copy the Technology for archival or backup purposes, provided that all titles, trademarks and proprietary rights notices shall be reproduced in such copies.

3.4 Limits on Licenses. Licensee may not (directly or indirectly, in whole or in part):

3.4.(a) Transfer, sublicense, distribute, lease, rent, or commercially share (including timeshare) the Technology or any of Licensee’s rights herein except that Licensee may transfer licenses within the organization that has purchased them;

3.4.(b) Obtain any ownership or leasehold rights in, place a lien or encumbrance upon, or otherwise interfere with Opware’s ownership and right to possession of the Technology for any reason; or

3.4.(c) Modify, translate, reverse engineer, decrypt, decompile, disassemble, create derivative works based on, or otherwise attempt to discover the Technology source code or underlying ideas or algorithms. However, if the Technology is used within a country of the European Union, or in a country whose copyright law gives a similar limited exception to protection for interoperability, nothing in this Agreement will be construed as restricting any rights available under the EC Software Directive 14 May 1991 on the legal protection of computer programs, or under such copyright laws, respectively.

3.5 United States Government Users. If a user or licensee of the Technology is an agency, department, or other entity of the United States Government (“Government”), the use, duplication, reproduction, release, modification, disclosure or transfer of the Technology, or any related documentation of any kind, including technical data or manuals, is restricted in accordance with Federal Acquisition Regulation 12.212 for civilian agencies and Defense Federal Acquisition Regulation 227.7202 for military agencies. The Technology is commercial computer software and the related documentation is commercial computer software documentation. The use of the Technology

and related documentation is further restricted in accordance with the terms of this Agreement, and any modification hereto.

4. LIMITED WARRANTY AND DISCLAIMERS

4.1 Limited Warranty. Opsware warrants for a period of thirty (30) days from the Effective Date that the Technology will materially conform to Opsware's then current Documentation. This warranty only covers problems reported to Opsware during this warranty period. In the event of an uncured material breach of this Section 4.1 by Opsware during the term of this warranty period, Licensee's exclusive remedy is that Opsware will, at its option, repair or replace the Technology, or refund all or a portion of the fees paid by Licensee hereunder.

4.2 Opsware warrants that any professional services provided hereunder shall be performed by experienced and qualified personnel in a professional and workmanlike manner in accordance with industry standards.

4.3 EXCEPT FOR THE LIMITED WARRANTIES PROVIDED ABOVE, OPSWARE MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE RELATING TO THE TECHNOLOGY, OR TO OPSWARE'S MAINTENANCE, PROFESSIONAL OR OTHER SERVICES. OPSWARE SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF DESIGN, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NONINFRINGEMENT. OPSWARE AND ITS SUPPLIERS DO NOT WARRANT OR REPRESENT THAT THE TECHNOLOGY WILL BE FREE FROM BUGS OR THAT ITS USE WILL BE UNINTERRUPTED OR ERROR-FREE, OR MAKE ANY OTHER REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF THE TECHNOLOGY OR DOCUMENTATION OR OPSWARE'S SERVICES IN TERMS OF ACCURACY, RELIABILITY, OR OTHERWISE. THESE DISCLAIMERS SHALL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED HEREIN.

5. OWNERSHIP

5.1 Opsware Ownership of Technology. Opsware and its licensors retain all rights, title, and interest, and all Intellectual Property Rights, in the Technology and Documentation, including any modifications, enhancements maintenance releases, Error corrections,

patches, Updates and Upgrades thereto. Opsware will own all Intellectual Property Rights in any deliverables or work product prepared in connection with any professional services engagement (the "Deliverables"). Opsware agrees to grant to Licensee a royalty-free, non-exclusive, worldwide, perpetual license, under any copyrights in the Deliverables, for Licensee's internal use, or use by a third party on Licensee's behalf, only.

5.2 Licensee Ownership of Licensee Materials. Licensee will retain ownership of all right, title and interest, and all Intellectual Property Rights, to any data, software, Confidential Information or other material created by or for Licensee by a third party prior to or apart from this Agreement (the "Licensee Materials").

6. PAYMENT

6.1 License and Maintenance Fees; Due Date. License and Maintenance Fees for the initial Order Form(s) are due on the Effective Date of this Agreement. Fees for additional software products or additional Units purchased by Licensee will be due upon the date of the subsequent Order Form or purchase order.

6.2 Invoices and Interest. Opsware may invoice Licensee on the Effective Date for the initial License and Maintenance Fees. All invoices are payable net thirty (30) days after the due date. Without limiting any other remedies, payments received later than thirty (30) days after the invoice due date will accrue late charges at a rate of one percent (1%) per month, or the maximum rate allowed under law, whichever is lower, measured from the date such payment was due until the date paid.

6.3 Professional Services Fees. The fees for the professional services shall be set forth in the Order Form(s). If the scope of services changes from what is defined in an Order Form, Services Description or Statement of Work, Licensee will be billed on a time and materials basis at the current Opsware list price. Unless otherwise provided in an Order Form, Services Description, or Statement of Work, reimbursement will be made by Licensee to Opsware for Travel Expenses and all direct and out-of-pocket expenses reasonably incurred by Opsware in connection with the provision of the professional and education services. "Travel Expenses" include all out-of-pocket expenses reasonably and necessarily incurred by Opsware when providing professional services to Licensee. Opsware will comply with Licensee's reasonable travel policy if it is made available to Opsware in writing prior to the Effective Date. For fixed-price charges (including for professional services, training and/or expense reimbursement charges), Opsware will invoice Licensee 100% of the charge upon execution of the Order Form, Service Description, or Statement of

Work. Services rendered on a time and materials basis will be invoiced monthly in arrears on an hourly basis.

6.4 Taxes. Fees are exclusive of all taxes, levies or duties, and Licensee will be responsible for payment of such taxes, levies or duties, excluding only U.S. taxes based solely upon Opsware's income. If Opsware has the legal obligation to pay or collect taxes for which Licensee is responsible pursuant to this Section 6.4, Opsware will invoice the amount of such taxes to Licensee and Licensee agrees to pay such amount, unless Licensee provides Opsware a valid tax exemption certificate authorized by the appropriate taxing authority.

6.5 Currency. Unless otherwise specified in an Order Form or purchase order, all fees are payable in U.S. Dollars.

7. REPORTING AND AUDIT

7.1 Reporting. At Opsware's written request, not more frequently than twice annually, Licensee shall furnish Opsware with a signed certification verifying that the Technology is being used pursuant to the provisions of this Agreement, and identifying the number, type and location of Units of Opsware products that have been installed. If available, Licensee will use the reporting feature contained within the Technology to generate and deliver such reports to Opsware.

7.2 Audit. During the term of this Agreement and for a period of one (1) year thereafter, Licensee will maintain complete and accurate books, records and electronic backups in connection with its use of the Technology, in sufficient detail to permit Opsware to verify Licensee's compliance with the terms and conditions of this Agreement. Opsware and its agents will have the right to inspect Licensee's facilities, equipment and records, including access to the Technology, no more than twice annually to verify compliance with the terms and conditions of this Agreement, including the amounts payable to Opsware hereunder. Any such audit will be conducted during regular business hours at Licensee's offices and will not interfere unreasonably with Licensee's business activities. All information disclosed to Opsware shall be treated as Licensee Confidential Information. If an audit reveals that Licensee has underpaid the total fees or charges to Opsware by more than five percent (5%) for the period covered by the audit, then Licensee will pay Opsware's reasonable costs of conducting the audit, in addition to the underpaid amount and Opsware shall, in addition to any other rights or remedies it may have, be entitled to conduct an additional audit within the same year.

8. TERM AND TERMINATION

8.1 License Term. Subject to Section 8.3, the term of all licenses granted hereunder will be perpetual.

8.2 Maintenance Terms. The Initial Maintenance Term shall be the one (1) year from the Effective Date of this Agreement, unless a different period is specified on the initial Order Form or purchase order. Thereafter, maintenance services will terminate if Licensee fails to renew such maintenance by the expiration of the existing term. Maintenance services will renew at Opsware's then-current fees. If Licensee purchases additional software products or additional Units from Opsware during a maintenance term, then Licensee must purchase Maintenance associated with the additional software products or Units and the term and fees for such additional Maintenance will be prorated so that all annual Maintenance expires on the same date. The Maintenance Term is subject to any earlier termination under Section 8.3. If the maintenance services lapse, Licensee may renew such services by paying the fees for any lapsed period plus payment in advance for the annual fee for the new term.

8.3 Termination. Either party may immediately terminate this Agreement and the licenses granted hereunder if the other party (1) becomes insolvent and becomes unwilling or unable to meet its obligations under this Agreement, (2) files a petition in bankruptcy, (3) is subject to the filing of an involuntary petition for bankruptcy which is not rescinded within a period of forty-five (45) days, (4) fails to cure a material breach of any material term or condition of this Agreement within thirty (30) days of receipt of written notice specifying such breach, or (5) materially breaches its obligations of confidentiality hereunder.

8.4 Effects of Termination. Upon termination of this Agreement for any reason, any amounts owed to Opsware under this Agreement before such termination will be immediately due and payable. If the termination was made by Opsware based upon the provisions of section 8.3, all licensed rights granted in this Agreement will immediately cease, and Licensee will promptly discontinue all use of the Technology and Documentation, erase all copies of the Technology from Licensee's computers, and return to Opsware or destroy all copies of the Technology, Documentation and any other Opsware Confidential Information on tangible media in Licensee's possession or control and certify in writing to Opsware that it has fully complied with these requirements.

8.5 Survival. The following provisions of this Agreement will remain in effect following the expiration or termination of this Agreement for any reason: 4 (Limited Warranty and Disclaimers), 5 (Ownership), 6 (Payment), 7 (Reporting and Audit), 8.4 (Effects of Termination), 8.5 (Survival), 9 (Limitations of Liability), 10 (Indemnification), 11 (Confidentiality) and 13 (General).

9. LIMITATIONS OF LIABILITY

9.1 **Exclusion of Certain Damages.** EXCEPT FOR BREACHES OF CONFIDENTIALITY PROVISIONS (Section 11) AND FOR VIOLATIONS OF THE PROPRIETARY RIGHTS OF A PARTY BY THE OTHER, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL OR RELIANCE DAMAGES, INCLUDING ANY LOST DATA AND LOST PROFITS, ARISING FROM OR RELATING TO THIS AGREEMENT OR THE LICENSED TECHNOLOGY, DOCUMENTATION OR THE OPSWARE SERVICES, EVEN IF SUCH PARTY KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF, OR COULD REASONABLY HAVE PREVENTED, SUCH DAMAGES. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply.

9.2 **Limitation of Damages.** EXCEPT AS SET FORTH IN OPSWARE'S INDEMNITY TO LICENSEE (Section 10) AND FOR BREACHES OF CONFIDENTIALITY PROVISIONS (Section 11) AND FOR VIOLATIONS OF THE PROPRIETARY RIGHTS OF A PARTY BY THE OTHER, EACH PARTY'S TOTAL CUMULATIVE LIABILITY ARISING FROM OR RELATED TO THIS AGREEMENT OR THE LICENSED TECHNOLOGY, DOCUMENTATION OR OPSWARE SERVICES (OTHER THAN FOR PAYMENT OF LICENSE FEES, MAINTENANCES FEES, AND ANY OTHER AMOUNTS OWED BY LICENSEE UNDER THIS AGREEMENT), WHETHER IN CONTRACT OR TORT OR OTHERWISE, WILL NOT EXCEED THE AMOUNT OF FEES PAID OR PAYABLE BY LICENSEE FOR THE LICENSED SOFTWARE OR SERVICES GIVING RISE TO THE CLAIM IN THE TWELVE (12) MONTHS FOLLOWING THE EFFECTIVE DATE. LICENSEE AGREES THAT OPSWARE'S SUPPLIERS WILL HAVE NO LIABILITY OF ANY KIND UNDER OR AS A RESULT OF THIS AGREEMENT. THIS SECTION 9.2 SHALL BE GIVEN FULL EFFECT EVEN IN THE EVENT THAT ANY OF THE WARRANTIES PROVIDED IN SECTION 4 (LIMITED WARRANTIES AND DISCLAIMERS) ARE DEEMED BY AN ARBITRATOR OR COURT OF COMPETENT JURISDICTION TO HAVE FAILED OF THEIR ESSENTIAL PURPOSE. THE PARTIES ACKNOWLEDGE THAT THE TERMS OF THIS SECTION 9.2 REFLECT THE ALLOCATION OF RISK SET FORTH IN THIS AGREEMENT AND THAT THE PARTIES WOULD NOT ENTER INTO THIS AGREEMENT WITHOUT THESE LIMITATIONS OF LIABILITY. This Section 9.2 does not limit either party's liability for bodily injury, gross negligence or willful misconduct.

9.3 IN THE CASE OF (1) OPSWARE'S INDEMNIFICATION OBLIGATIONS (Section 10), (2) BREACH BY EITHER PARTY OF CONFIDENTIALITY OBLIGATIONS HEREUNDER (Section 11), OR (3) VIOLATIONS OF THE PROPRIETARY RIGHTS OF A PARTY BY THE OTHER, EACH PARTY'S LIABILITY SHALL BE LIMITED TO THE GREATER OF (A) \$10,000,000, OR (B) THE SUM OF PERPETUAL LICENSE FEES PAID OR PAYABLE BY LICENSEE FOR THE LICENSED SOFTWARE OR SERVICES GIVING RISE TO THE CLAIM IN THE TWELVE (12) MONTHS FOLLOWING THE EFFECTIVE DATE. THE EXISTENCE OF ONE OR MORE CLAIMS SHALL NOT EXPAND SUCH LIMIT.

9.4 **Limitation of Actions.** IN NO EVENT MAY ANY CAUSE OF ACTION RELATED TO THIS AGREEMENT BE BROUGHT MORE THAN ONE YEAR AFTER THE OCCURRENCE OF THE EVENT GIVING RISE TO THE LIABILITY.

10. INDEMNIFICATION

10.1 **Opware Obligation.** Opware shall at its expense defend Licensee from third party claims brought against Licensee, and shall pay or reimburse Licensee for all damages, costs and expenses payable by Licensee to such third party to the extent they are awarded in a final judgment or agreed to in a settlement, as a result of any third party claims against Licensee alleging that any of the Technology infringe or misappropriates any U.S. patent, copyright, or trade secret; provided that Licensee: (1) promptly notifies Opware in writing of the claim; (2) grants Opware sole control of the defense and settlement of the claim; and (3) provides Opware, at Opware's expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim.

10.2 **Exceptions to Opware Obligation.** Opware's indemnity obligations do not apply to (1) any use of the Technology beyond the scope of license granted herein, (2) any modification or Derivative Works made by or for Licensee, (3) use of a superseded infringing version of the Technology by Licensee after release of a non-infringing version by Opware, or (4) any use or combination of the Technology with any technology, software or hardware not supplied by Opware, if such alleged infringement would be avoided by use of the Technology, alone or with other technology, software or hardware.

10.3 **Claim of Infringement.** If a claim of infringement occurs that is subject to Section 10.1 and not subject to the exceptions in Section 10.2, or if Opware determines that a claim is likely to occur, Opware will attempt, in the following order of precedence, to: (1) procure for Licensee the right or license to continue to use the affected Technology, free of the infringement claim; or (2) replace or modify the

affected Technology, to make them non-infringing provided that the replacement Technology substantially conforms to Opsware's then-current specification for such Technology. If these remedies are not reasonably available to Opsware despite Opsware's commercially reasonable efforts, Opsware may elect to terminate this Agreement, in which case Licensee shall be entitled a pro rata refund of license fees paid based upon a five-year, straight line depreciation.

10.4 Exclusive Remedy. Sections 10.1 through 10.3 state the sole and exclusive obligations and liability of Opsware for any Intellectual Property Rights infringement and are in lieu of any warranties of non-infringement, all of which are disclaimed.

11. CONFIDENTIALITY

Neither party will use any Confidential Information of the other party except as expressly permitted in this Agreement or as expressly authorized in writing by the other party. Each party shall use the same degree of care to protect the disclosing party's Confidential Information as it uses to protect its own Confidential Information of like nature, but in no circumstances less than a commercially reasonable standard of care. Neither party may disclose the other party's Confidential Information to any person or entity other than to Authorized Persons in the case of Licensee and employees and contractors in the case of Opsware who need access to such Confidential Information solely for the purpose of fulfilling that party's obligations or exercising that party's rights hereunder. The foregoing obligations will not restrict either party from disclosing Confidential Information of the other party: (1) pursuant to the order or requirement of a court, administrative agency, or other governmental body, provided that the party required to make such a disclosure gives reasonable notice to the other party prior to such disclosure; and (2) on a confidential basis to its legal and financial advisors. In addition, each party may disclose the terms and conditions of this Agreement: (i) as required under applicable securities regulations; and (ii) on a confidential basis to private investors in or acquirers of such party. Each party may identify the other in its Licensee (or vendor) lists in online and print marketing materials.

12. EXPORT

The Technology and related technical data may be subject to U.S. export control laws, including without limitation the U.S. Export Administration Act and its associated regulations, and may be subject to export or import regulations in other countries. Licensee shall comply with all such regulations and agrees to obtain all necessary licenses to export, re-export, or import the Technology and related technical data.

13. GENERAL

13.1 No Agency. Opsware and Licensee each acknowledge and agree that the relationship established by this Agreement is that of independent contractors, and nothing contained in this Agreement shall be construed to: (1) give either party the power to direct or control the day-to-day activities of the other; (2) deem the parties to be acting as partners, joint venturers, co-owners or otherwise as participants in a joint undertaking; or (3) permit either party or any of either party's officers, directors, employees, agents or representatives to create or assume any obligation on behalf of or for the account of the other party for any purpose whatsoever.

13.2 Compliance with Laws. Each party agrees to comply with all applicable laws, regulations, and ordinances relating to their performance hereunder. Without limiting the foregoing, Licensee warrants and covenants that it will comply with all then current laws and regulations of the United States and other jurisdictions relating or applicable to Licensee's use of the Technology including, without limitation, those concerning Intellectual Property Rights, invasion of privacy, defamation, and the import and export of software.

13.3 Force Majeure. Neither party shall be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder (except for the payment of money) on account of strikes, shortages, riots, insurrection, fires, flood, storm, explosions, acts of God, war, governmental action, labor conditions, earthquakes, material shortages or any other cause which is beyond the reasonable control of such party.

13.4 Notices. Any notice required or permitted hereunder shall be in writing and shall be delivered as follows (with notice deemed given as indicated): (1) by personal delivery when delivered personally; (2) by established overnight courier upon written verification of receipt; (3) by facsimile transmission when receipt is confirmed orally; or (4) by certified or registered mail, return receipt requested, upon verification of receipt. Either party may change its contact person for notices and/or address for notice by means of notice to the other party given in accordance with this Section. Notices shall be sent to the following:

To Opsware:

Mr. Ben Horowitz, President and CEO
Opsware Inc.
599 N. Mathilda Avenue
Sunnyvale, CA 94085

with a copy to Opsware's General
Counsel (same address)

To Licensee: At the address shown below the
signature lines.

13.5 Confirmations. Upon request by Opware, Licensee agrees to reasonably cooperate with Opware's auditors to confirm the terms and conditions of and Opware's obligations under this Agreement and any associated Order Form.

13.6 The parties expressly agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply.

13.7 Injunctive Relief. The parties agree that monetary damages would not be an adequate remedy for the breach of certain provisions of the Agreement, including, without limitation, all provisions concerning infringement, confidentiality and nondisclosure, or limitation on permitted use of the Technology. The parties further agree that, in the event of such breach, injunctive relief would be necessary to prevent irreparable injury. Accordingly, either party shall have the right to seek injunctive relief or similar equitable remedies to enforce such party's rights under the pertinent provisions of the Agreement, without limiting its right to pursue any other legal remedies available to it.

13.8 Entire Agreement and Waiver. This Agreement and any schedules or appendices hereto, as well as all Order Forms executed by both parties and referencing this Agreement, shall constitute the entire agreement and contains all terms and conditions between Opware and Licensee with respect to the subject matter hereof and all prior agreements, representations, and statement with respect to such subject matter are superseded hereby. The terms of this Agreement shall control in the event of any inconsistency with the terms of any Order Form, purchase order, schedule or appendix hereto. This Agreement may be changed only by written agreement signed by both Opware and Licensee. No failure of either party to exercise or enforce any of its rights under this Agreement shall act as a waiver of subsequent breaches; and the waiver of any breach shall not act as a waiver of subsequent breaches.

13.9 Severability. In the event any provision of this Agreement is held by a court or other tribunal of competent jurisdiction to be unenforceable, that provision will be enforced to the maximum extent permissible under applicable law, and the other provisions of this Agreement will remain in full force and effect. The parties further agree that in the event such provision is an essential part of this Agreement, they will begin negotiations for a suitable replacement provision.

13.10 Counterparts. This Agreement may be executed in any number of counterparts, each of which, when so executed and delivered (including by

facsimile), shall be deemed an original, and all of which shall constitute one and the same agreement.

13.11 Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the respective parties hereto, their respective successors and permitted assigns.

13.12 Assignment. Neither party may, without the prior written consent of the other party (which shall not be unreasonably withheld), assign this Agreement, in whole or in part, either voluntarily or by operation of law, and any attempt to do so shall be a material default of this Agreement and shall be void. Notwithstanding the foregoing, a party may assign its rights and benefits and delegate its duties and obligations under this Agreement without the consent of the other party (1) if necessary to satisfy the rules, regulations and/or orders of any federal, state or local governmental agency or body or (2) in connection with a merger, reorganization or sale of all or substantially all relevant assets of the assigning party; in each case provided that such successor assumes the assigning party's obligations under this Agreement.