



**MASTER AGREEMENT
FOR PRODUCTS, PROFESSIONAL SERVICES & SUPPORT**

This Master Agreement (the "Agreement"), effective _____ (the "Effective Date"), is entered into by and between Brocade Communications Systems, Inc., a Delaware corporation with a principal office at 1745 Technology Drive, San Jose, California 95110; Brocade Communications Switzerland SarL., a Geneva corporation with principal offices at 29 Route de l'Aeroport, Case postale 105, CH-1215, Geneva 15, Switzerland; and Brocade Communications Services Switzerland SarL., a corporation organized under the laws of Switzerland, with principal offices at 29 Route de l'Aeroport, Caste Postale 105, CH-1215, Geneva 15, Switzerland (independently and collectively "Brocade") and _____, a _____ corporation with a principal office located at _____ ("Customer").

This Agreement incorporates all provisions of the schedules, exhibits, supplements, addendums, amendments and other documents that are referenced herein. All of these documents taken together, including those effective in the future, shall constitute the entire agreement between Brocade and Customer and replace any prior oral and/or written communications, negotiations and agreements relating to the subject matter hereof.

By their signatures below, the parties indicate their agreement to the terms and conditions set forth in this Agreement. Each party represents that the individual signing on its behalf has the power and authority to enter into this Agreement. This Agreement may be executed in two or more counterparts, each of which will be deemed an original for all purposes, and together will constitute one and the same document. Telecopy signatures will be relied upon as original signatures in all respects. All signed copies of this Agreement will be deemed originals.

BROCADE COMMUNICATIONS SYSTEMS, INC.

CUSTOMER:

By: _____
Print Name: _____
Title: _____
Date: _____

By: _____
Print Name: _____
Title: _____
Date: _____

BROCADE COMMUNICATIONS SWITZERLAND, SARL.

BROCADE COMMUNICATIONS SERVICES SWITZERLAND, SARL.

By: _____
Print Name: _____
Title: _____
Date: _____

By: _____
Print Name: _____
Title: _____
Date: _____

MASTER AGREEMENT – GENERAL TERMS AND CONDITIONS

1. Scope of Agreement.

1.1 Brocade Offerings. Customer may from time to time wish to obtain certain products or services from Brocade, which may include one or more of the following (collectively referred to herein as the “Brocade Offerings”):

- a) “Hardware” which includes any Brocade hardware products, and any related documentation and manuals.
- b) “Software” which includes any software licensed by Brocade to Customer in the form of any bundled firmware, or standalone software products, or other software, any backup copies of such software, and any related documentation and manuals provided therewith; and shall include any Upgrades (as defined in Section 4.2) or modified versions of such software provided to Customer by Brocade.
- c) “Professional Services” which includes certain professional service offerings to Customer, including a “Resident Consultant” where Brocade will be placing a dedicated consultant at the Customer location.
- d) “Products” which includes, either an individual component of Hardware and/or Software or any combination thereof offered by Brocade hereunder.
- e) “Support” which includes maintenance and/or support services for the chosen Products.

1.2 Acquiring Brocade Offerings. From time to time, the parties may enter into individual orders for the Brocade Offerings pursuant to a Brocade quotation or proposal. All orders will be deemed to incorporate the terms of this Agreement and must reference Brocade's quotation or proposal or state the part number and description of the Products, Professional Services and Support ordered, the shipping address and the applicable fees. Brocade will accept or reject such order within a reasonable time. Any terms or conditions of any order that are inconsistent with or in addition to the terms and conditions of this Agreement are deemed rejected and shall not be effective, notwithstanding Brocade's acknowledgement or acceptance of such order.

1.3 Order of Precedence. In the event of any conflict among the terms of this Agreement, the documents that comprise the Agreement shall govern in the following order of precedence: (a) this Agreement, and (b) an individual order; provided however, that in order to ensure the maximum flexibility between the parties for an individual Brocade Offering, the parties may modify specific terms in this Agreement for a particular order by specifically referencing this Section of the Agreement, stating the intent to modify this Agreement for the particular order, and having such order signed by authorized representatives of both parties.

1.4 Brocade Entity for Orders. With respect to any Brocade Offerings to be delivered within the United States or its territories, this Agreement is entered into, and all Brocade Offerings shall be performed by or on behalf of Brocade Communications Systems Inc., a Delaware corporation with headquarters at 1745 Technology Drive, San Jose, California, 95110 (“Brocade-US”). When the Products or Support are to be delivered outside the United States or its territories or any Professional Services are bundled with such Products or Support, this Agreement is entered into, and shall be performed by or on behalf of Brocade Communications Switzerland SarL, a Swiss corporation with headquarters at 29, Route de l'Aéroport, Case Postale 105, CH-1215 Geneva 15, Switzerland (“Brocade-Switzerland I”). For Professional Services to be delivered outside the United States or its territories at a Customer location on a standalone basis (without accompanying Products or Support bundled with the Professional Services), this Agreement is entered into, and shall be performed by or on behalf of Brocade Communications Services Switzerland SarL, a Swiss corporation, with headquarters 29, Route de l'Aéroport, Case Postale 105, CH-1215 Geneva 15, Switzerland (“Brocade-Switzerland II”). Notwithstanding the foregoing, Customer acknowledges that Brocade has appointed channel partners which offer Products, Professional Services and Support to end user customers worldwide, and Brocade reserves the right to route orders through a channel if most appropriate.

1.5 Participation of Affiliates. The parties may permit certain Affiliates (as defined below) to purchase Brocade Offerings under this Agreement, subject to Brocade's standard credit review process. “Affiliate” shall mean any corporation, partnership or other business organization of which fifty-one percent (51%) of the voting interests are owned by and controlling, controlled by or under common control with Customer.

2. Consideration.

2.1 Prices and Payment Terms. Customer shall pay Brocade the prices as quoted by Brocade and set forth on an order. Unless otherwise provided in Brocade's quotation or proposal, charges due hereunder are billable as follows: i) charges for Hardware and Software are billable on shipment, ii) charges for Professional Services are billable as set forth in the applicable Brocade quotation or proposal, iii) charges for Support are billable annually in advance; and iv) all other charges are billable as the work is performed or costs are incurred. Customer will pay any reasonable out-of-pocket travel costs and expenses, if applicable, including without limitation airline, automotive, meals, hotel, and related expenses. Customer shall pay Brocade's invoices within thirty (30) days of the date of such invoice. Payment shall be made to the applicable Brocade entity named on the order. Unless otherwise specified in the applicable Brocade quotation or proposal, all payments are to be made in United States Dollars. In addition to any other remedy available to Brocade for late payment, Customer shall pay Brocade interest on any amount not paid when due at the rate of one and one half percent (1.5%) per month, or the maximum rate allowed by law, whichever is less, for each month, or partial month, calculated from the payment due date.

2.2 Taxes. All payments shall be made free and clear without deduction for all present and future taxes imposed by any taxing authority. In the event that Customer is prohibited by law from making any payment unless such deductions are made or withheld therefrom, Customer shall pay such additional amounts as are necessary such that the net amounts received by Brocade, after such deduction or withholding, equal the amounts which would have been received if such deduction or withholding had not occurred. Customer shall promptly furnish Brocade with a copy of an official tax receipt or other appropriate evidence of any tax imposed on payments made under this Agreement, including taxes on any additional amounts paid. In cases other than taxes referred to above, including but not limited to sales and use taxes, stamp taxes, value added taxes, property taxes and any other taxes or duties imposed by any taxing authority on or with respect to this Agreement, the costs of such taxes or duties shall be borne by Customer. In the event that such taxes or duties are legally imposed initially on Brocade or any taxing authority later assesses Brocade, Customer will promptly reimburse Brocade for such taxes or duties plus any interest and penalties suffered by Brocade. This clause shall survive the termination of the Agreement. Notwithstanding the foregoing, Customer shall not be responsible for taxes on or measured by net income, net worth or shareholders' capital of Brocade.

3. Software Specific Terms.

3.1 License Grant. Each Software product may have different licensing grants and restrictions depending on the nature of the Software. The specific licensing terms, model and restrictions related thereto for each Software product shall be set forth in the relevant Brocade quotation, End User License Agreement, and/or Brocade's website. To the extent that no such licensing terms exist, the following license grant shall be applicable: Subject to the terms and conditions of this Agreement and payment of the applicable license fees, Brocade and its suppliers grant to Customer a non-exclusive, non-transferable license to use the applicable Software in object code form solely for internal purposes and solely for the purposes set forth in the Brocade product documentation.

3.2 Additional Software Terms. The following terms shall apply to all Software provided pursuant to this Agreement. Notwithstanding anything to the contrary, any and all Software delivered hereunder is licensed, not sold, and is licensed by the applicable Brocade entity named in Brocade's quotation. Except as otherwise expressly provided in this Agreement, Customer shall have no right, and Customer specifically agrees not to, and not to permit third parties to: (i) modify, adapt, change, enhance or create derivative works based upon the Software, except pursuant to Art. 24 (2) of the Swiss Copyright Act (back up copy); (ii) copy, or otherwise reproduce the Software in whole or in part; (iii) decompile, translate, reverse engineer, disassemble or otherwise reduce the Software to human-readable form, except to the extent and pursuant to Art. 21 of the Swiss Copyright Act (interface information necessary for the interoperability with other software products used by the Customer); (iv) use the Software on any appliances/Hardware in excess of the number of appliances/Hardware for which it is licensed; (v) remove, modify or otherwise tamper with any notice or legend on any labeling on any physical media containing the Software or (vi) use the Software for providing service bureau or other related services to third parties. Customer's rights in the Software will be limited to those expressly granted herein, and Customer shall have no right to sublicense the Software. Before decompiling the Software for the purposes of obtaining the interface information, Customer will request Brocade to provide it with this information. Brocade will charge Customer for its corresponding services at the applicable hourly rates.

3.3 No Hazardous Activities. Customer acknowledges that the Software is not designed, manufactured or intended for use in connection with the design, construction, maintenance, and/or operation of any system where a failure of such system could result in a situation that threatens the safety of human life. Except as otherwise provided herein, Brocade shall not be liable to Customer, in whole or in part, for any claims or damages arising from such uses, and Customer agrees to indemnify, defend (with counsel approved in writing in advance by Brocade) and hold Brocade harmless against any claims for cost, damage, expense (including reasonable attorneys' fees) or liability arising out of or in connection with any such use.

3.4 Open Source Software. Certain components of the Software, including software designed to interoperate with the Software, may incorporate or be based on "open source" software. Such Software is subject to the applicable open source license (e.g., GNU General Public License) and is not subject to this Agreement. To obtain a copy of the source code and applicable licensing terms for the open source software used by Brocade, please see <http://www.brocade.com/support/oscd.jsp>, as may be amended from time to time. Brocade disclaims any and all liability and warranties with respect to such open source software.

3.5 Restricted Rights. The Software and any accompanying documentation provided under this Agreement incorporate commercial computer software and commercial computer software documentation developed exclusively at private expense, and is in all respects proprietary property belonging solely to Brocade or its licensors. If Customer is acquiring the Software on behalf of any part of the United States Government, the following provisions apply. The object code and accompanying documentation are deemed to be "commercial computer software" and "commercial computer software documentation", respectively, pursuant to DFAR Section 227.7202 and FAR 12.212(b), as applicable. Any use, modification, reproduction, release, performance, display or disclosure of the object code and/or the accompanying documentation by the U.S. Government or any of its agencies shall be governed solely by the terms of this Agreement and shall be prohibited except to the extent expressly permitted by the terms of this Agreement. Any technical data provided that is not covered by the above provisions is deemed to be "technical data commercial items" pursuant to DFAR Section 252.227.7015(a). Any use, modification, reproduction, release, performance, display or disclosure of such technical data shall be governed by the terms of DFAR Section 252.227.7015(b).

3.6 Authorized Licenses for Users. Customer's use of the Software and the applicable fees related thereto are based upon a specific licensing model, e.g., concurrent users, named users, per terabyte used, or rights limited to specific networking switches, servers or platforms ("Authorized Licenses"). The applicable licensing model and the number of Authorized Licenses will be set forth in Brocade's quotation or in the Brocade documentation for such Software. For certain Software, Customer may have the right to increase the number of Authorized Licenses for the applicable Software provided that Customer pays Brocade the additional license and Support fees, and such fees shall be paid to Brocade prior to initiating such increases. Customer agrees to work in good faith with Brocade to accurately count the Authorized Licenses. Customer consents to and shall take all actions necessary for the installation and use of certain user authorization software to verify the location and number of Customer's Authorized Licenses. Brocade shall have the right to audit compliance with this Agreement upon reasonable notice to the Customer. In the event that Customer's actual number of users exceeds its Authorized Licenses (with the difference being the "Unauthorized Users"), Customer shall pay Brocade all license and Support fees due for the Unauthorized Users at Brocade then-current list rates therefor plus interest on such late payments as provided in this Agreement. Payment of such late fees shall not limit any other rights Brocade may have against Customer for such Unauthorized Users.

4. Support Obligations.

4.1 General Support Obligations.

a) Technical Support. Provided that Customer has paid the applicable Support fees and subject to the terms and conditions set forth below, Brocade will provide remedial telephone, email, online and/or onsite assistance for the Products listed on a Brocade Support quotation ("Covered Hardware" and "Covered Software", respectively or "Covered Product(s)" collectively) based on the applicable support plan selected by Customer. Whenever Customer submits a Support issue to Brocade related to the Covered Products ("Problem"), Brocade will classify the Problem according to the Customer "Severity" level that defines the Problem, based on the Customer Severity level descriptions located in the Support Plan Policies document at Brocade's website, which document may be updated from time to time in Brocade's discretion. Additional charges may apply if Customer contacts Brocade when it is later determined that the cause was not related to the Covered Products. Brocade will only provide Support for the baseline licensed Software, and will not support any customizations or unique implementations of the Software under its general Support obligations, and any such assistance will be provided on a time and material basis.

- b) Support Term and Renewal. The initial term applicable to each Support quotation will begin (i) in the case of newly acquired Products, on the date of shipment; or (ii) in the case of previously shipped Products, on the effective date specified on Brocade's quotation, and such services shall continue through the term stated on the quotation. Thereafter, such Support will only be renewed based on Brocade's renewal quotation to Customer and receipt of Customer's corresponding purchase order. Upon sixty (60) days prior written notice before the end of any Support term, Brocade may increase the yearly fees for Support.
- c) Covered Products. Provided that Customer has paid the applicable fees, Brocade will provide Support for the Covered Products, as described in a Brocade quotation. Any changes to the Covered Products should be reported to Brocade prior to making any such changes, and such changes could result in modifications to Brocade's obligations and the applicable Support fees.
- d) Recertification of Products. For any Products where Customer requests Support on Products previously supported by another party or for which Support services have lapsed, Brocade may require that the Product be recertified for a fee.
- e) Third Party Product Interoperability. Due to interoperability requirements, Customer agrees that the use of any third party products which have not been recommended or certified by Brocade may cause errors in the operation of the Products or may cause additional resolution time for Brocade under its Support obligations hereunder. Customer acknowledges that use of any such third party products shall release Brocade from the performance of Brocade's Support obligations related thereto, and Customer agrees to pay Brocade for any time spent by Brocade diagnosing such problems which shall be billed at Brocade's hourly billing rate. Brocade may be prepared in Brocade's discretion to provide additional Professional Services to resolve any such problems in such circumstances, but shall not be obliged to do so.
- f) Cancellation. Customer may cancel Support services at any time on thirty (30) days prior written notice to Brocade. In such event, Brocade shall refund any Support fees prepaid for the period after such termination, less any prepayment or multi-year discount to which Customer is no longer entitled.

4.2 Software Specific Support Terms

- a) Upgrades. Subject to payment of the applicable fees, Brocade will use reasonable efforts to provide a Patch for any material deviation between the current release of the Covered Software and its Specifications which is reported by Customer to Brocade and is reproducible by Brocade. Additionally, Brocade may provide Customer with Maintenance Releases, Feature Releases and Platform Releases of the Covered Software, on an "if and when available" basis, that Brocade generally makes available to other Brocade customers at no charge beyond the fees for Support. As used herein: (i) "Platform Release" means a platform, operating system or software architecture change and/or the addition of a major new application or function; (ii) "Feature Release" means a major new feature or an enhancement in operating performance that does not alter the basic functionality; (iii) "Maintenance Release" means a regularly scheduled update which may include defect fixes and limited platform-specific improvements; and (iv) "Patch" means a temporary solution to a Customer-reported critical defect (all collectively referred to as "Upgrades").
- b) Licensing Terms. All Upgrades are subject to the original license terms and conditions for the baseline Software, which may be an individual license agreement or an End User License Agreement. Support related to such baseline Software and all Upgrades will be subject to any additional terms and conditions contained in this Agreement.
- c) Software Support Policy. Brocade will provide Software Support for the then current Feature Release and the greater of (i) the two immediately preceding Feature Releases, or (ii) all Feature Releases made available within the preceding 12 months. As a general rule, Upgrades must be installed sequentially through all Feature Releases and Platform Releases (e.g., to upgrade from release 5.1 to 6.0, all Feature Releases and Platform Releases after 5.1 will be added as part of the upgrade process).
- d) Conditions and Limitations of Software Support. Support services does not cover and Brocade disclaims any responsibility for Problems arising out of Customer's failure to implement all Upgrades issued hereunder, changes to the computing environment, alterations or modifications of the Software performed by parties other than Brocade, accident, negligence, or misuse of the Software. Additional information related to the various Software products, including without limitation additional support service descriptions, escalation procedures, product development guidelines, and other general procedures may be included on the Brocade site, as may be amended from time to time, and shall apply to the Software.
- e) Rights and Obligations between the Parties. As part of the Support services, Brocade may be providing Upgrades to the Software purchased from authorized resellers. In such circumstances, Customer's contractual relationship for Software acquired outside of this Agreement remains with the applicable authorized reseller, including without limitation Customer's licensing rights and restrictions, warranties, indemnification and all other related terms. Brocade shall have no liability directly to Customer related to such baseline Software; Brocade's obligations to Customer shall be limited to any Upgrades provided as part of the Support under this Agreement.

4.3 Hardware Specific Support Terms

- a) General Description. For all Problems identified by Brocade related to Covered Hardware and provided that Customer has paid the applicable Support fees, Brocade will provide Hardware Support in accordance with the terms herein and in accordance with the support plans at Brocade's website, which may be updated from time to time in Brocade's discretion.
- b) Malfunctioning Covered Hardware. If any Covered Hardware malfunctions, Brocade will repair or replace such Covered Hardware, or any parts of the Covered Hardware as provided in the applicable support plan. Any item Brocade replaces will become Brocade's property, and the replacement item will become Customer's property. The replacement items may not be new, but will be in good working order and at least functionally equivalent to the item replaced. Before Brocade exchanges any Hardware, Customer must remove all features, parts, options, alterations, encumbrances, and attachments not provided by Brocade. Customer also agrees to ensure that the item is free of any legal obligations, encumbrances, or restrictions that could prevent its exchange. Based on the support plan selected by Customer, Customer may be responsible for one-way shipping costs related to any such returns.
- c) Exclusions. Support does not cover servicing of Covered Hardware damaged by misuse, accident, Act of God, improper installation, misapplication, modification, unsuitable physical or operating environment, abnormal physical or electrical stress, improper maintenance (unless by Brocade), removal or alteration of switch or part identification labels, or failure caused by a product for which Brocade is not responsible. Brocade may charge Customer separately for any services provided by Brocade related to such damaged hardware.

5. **Professional Services Specific Terms.**

5.1 Scope of Agreement. Provided that Customer has paid for the Professional Services, Brocade will use commercially reasonable efforts to perform the Professional Services as described in the applicable Brocade quotation.

5.2 Working Hours. Except for any Professional Services with explicitly stated extended work hours, all Professional Services shall be performed during normal business hours (Monday to Friday, 8:30 am to 5:30 pm, local time). Customer shall inform Brocade in advance if any off-shift services will be required and Brocade shall inform Customer of any additional charges that may be associated with performing Professional Services outside of normal business hours. Customer agrees to pay Brocade any applicable additional charges for such off-shift Professional Services performed.

5.3 Facilities. Customer agrees to provide the facilities reasonably necessary for Brocade to perform the Professional Services, including a safe and suitable workspace for the Brocade employees or contractors performing the Professional Services, as well any required hardware and software. For security and safety reasons, a Customer representative shall be available on-site whenever Brocade employees or contractors are performing the Professional Services at such facilities.

5.4 Prerequisites. Prior to the commencement of the Professional Services, Customer agrees to take all the prerequisite steps identified by Brocade prior to Brocade performing the Professional Services, including without limitation, (a) ensuring that all manufacturers' labels (such as serial numbers) are in place, accessible, and legible, (b) obtaining authorization to have Brocade service a Product that Customer does not own, (c) purchasing and installing the required software and obtain a license for Brocade to use such software, and (d) testing all hardware and software necessary to perform the Professional Services, and all such hardware and software documentation shall be made available to Brocade, and (e) any other prerequisites identified by Brocade. Customer acknowledges that any failure to perform the prerequisites may result in voiding the warranty for the particular service, delays and/or cause additional charges to apply. IT IS CUSTOMER'S RESPONSIBILITY TO ENSURE THAT CUSTOMER HAS COMPLETE BACKUPS OF ALL DATA PRIOR TO COMMENCEMENT OF ANY SERVICES. BROCADE ASSUMES NO RESPONSIBILITY FOR LOST DATA.

5.5 Scheduling Professional Services. Promptly following receipt of Customer's order, Brocade shall contact Customer's representative to schedule the Professional Services. All Professional Services must be started within one hundred eighty (180) days of the date of the order. If Customer is unable or unwilling to have Brocade perform the Professional Services during this period, or if Brocade is unable to perform the Professional Services owing to Customer's failure to make the appropriate facilities available or to perform the necessary prerequisites, Brocade shall have no further obligation to Customer with respect to the Professional Services and the fees for such Professional Services shall not be refunded.

5.6 Rights in the Software Deliverables. The following terms shall apply for any Software deliverables provided by Brocade as part of the Professional Services. Subject to the terms and conditions of this Agreement and payment of the applicable license fees, Brocade and its supplier grant to Customer a non-exclusive, non-transferable license to use the applicable Software deliverables in object code form solely for internal purposes and solely for the purposes set forth in the relevant Brocade product documentation. Customer shall have no right to sublicense such Software deliverables or any rights related thereto.

5.7 Acceptance Procedures. Upon completion of the Professional Services which are subject to acceptance under the terms of the Brocade quotation, Customer shall have ten (10) days (or such other time period specified in the quotation) following the date of delivery to evaluate such Professional Services. On or before the tenth (10th) day following such delivery, Customer shall provide Brocade with either (1) a written acceptance of the Professional Services; or (2) written notice of rejection describing in detail the deficiency that is the basis for the rejection. A deficiency is a material non-conformity of the Professional Services to the acceptance criteria stated in the applicable Brocade quotation, or in the absence of such criteria, a material non-conformity to the description of the Professional Services set forth in the quotation. In the event that Customer rejects the Professional Services in accordance with the afore-described procedure, Brocade will use diligent efforts to correct the deficiency promptly. The Professional Services and any associated deliverables that are re-performed or redelivered shall be subject to Customer's acceptance in accordance with this provision. In the event Customer fails to accept or reject the Professional Services within 10 days after Brocade's completion of the applicable Professional Services, or accept or reject re-performed Professional Services within 10 days after Brocade's completion of the applicable Professional Services, the Professional Services shall be deemed accepted by Customer, and Customer shall have no further right to reject the Professional Services.

5.8 Right to Instruct. Brocade consultants deployed to perform any services for Customer under this Agreement are under the exclusive supervision and instruction of Brocade. Brocade reserves the exclusive right to instruct its consultants, in particular with respect to work hours and the scope and manner of services to be performed under this Agreement. Customer has no rights to instruct Brocade's consultants whatsoever.

5.9 Resident Consultant Specific Terms. Brocade has a specific Professional Service offering where Brocade provides a Brocade Resident Consultant (BRC) to perform ongoing Professional Services at the customer facilities. With respect to any Customer order for a BRC, the following terms shall apply. Any Professional Services provided by a BRC shall not be subject to the acceptance and warranty provisions set forth above; and such Professional Services shall be billed monthly on an "as occurred" basis, unless another billing time frame is set forth in the applicable Brocade quotation. For BRC's purchased on an annual basis, the availability of a BRC is subject to the local employment laws and Brocade shall have the right to substitute certain BRC(s) in order to comply with such laws.

5.10 Non-Solicitation of Employees. While this Agreement is in effect and for a period of one (1) year following the termination of this Agreement, Customer will not Solicit for employment or retention as an independent contractor, any Resource of Brocade without the prior written consent of Brocade. "Solicit" as used in this section does not include general solicitations, such as advertisements in newspapers, trade publications or on the Internet. "Resource" for purposes of this section means: (a) employees or contractors of Brocade who provide the Professional Services and (b) former employees or contractors of Brocade who directly worked on such project and whose relationship with Brocade ended less than six (6) months prior to the date of such solicitation. A breach of this section may be considered a material breach of this Agreement by Brocade.

5.11 Indemnity. Each party ("Indemnitor") hereby agrees to indemnify and hold harmless the other party, its subsidiaries and affiliates, and their respective officers, directors, employees and agents (the "Indemnitee") from and against any and all damages, losses, liabilities, judgments, penalties, fines, settlement amounts, fees, costs and expenses (including, but not limited to, the reasonable fees and expenses of attorneys and other professionals) that the Indemnitee may suffer or incur, to the extent arising out of or attributable to, or allegedly arising out of or attributable to any of the following (each, a "Claim") claims by third parties of bodily injury (including death) or damage to tangible property to the extent such claims arise from tortious willful misconduct or gross negligence on the part of such Indemnitor or any Indemnitor personnel.

5.12 Security and Conduct. Customer shall maintain industry standard security policies, practices and procedures, and shall comply with all applicable laws and regulations and with all applicable health, safety and security rules, programs and procedures. Brocade shall comply with all such Customer security policies, practices and procedures to the extent applicable and to the extent Brocade is made aware of such policies, practices and procedures.

5.13 Background Checks and Drug Free Workplace. Brocade has certain procedures in place to perform background checks and to ensure a drug free workplace for its employees and contractors performing Professional Services. Upon request, Brocade will provide information related to such procedures. Customer acknowledges that certain jurisdictions do not allow or limit such checks, and Brocade will not perform such checks in these jurisdictions or for employees from these jurisdictions.

6. Hardware Specific Terms.

6.1 Order Process.

a) Purchase Orders. "Purchase Order" means each of Customer's written purchase order forms for Product, or other written purchase order forms submitted by Customer to Brocade in accordance with this Section.

i) Customer shall issue to Brocade binding Purchase Order in accordance with this Section. All Purchase Orders shall refer to this Agreement, bear a separate, unique number and contain, at a minimum, the following information relative to purchases made under this Agreement: (i) the part number and description of Product purchased; (ii) the quantity of each Product to be purchased; (iii) routing instructions; (iv) the desired shipment date; and (v) the destination.

ii) If for any reason Brocade cannot process Customer's Purchase Order, Brocade shall, in writing, so notify Customer within five (5) days of receiving said Purchase Order. Brocade's notification shall set forth the reason for Brocade's inability to comply with the Purchase Order.

iii) Brocade reserves the right to reject Purchase Orders that do not conform to the terms set forth in this Agreement or to cancel any Purchase Order previously accepted if Brocade determines that Customer is in default of or is otherwise not complying with this Agreement. Brocade will have five (5) days after receipt of the Purchase Order to reject the Purchase Order.

b) Rescheduling. During any calendar quarter during the term of this Agreement, Customer may request shipment rescheduling, one (1) time only, from the original requested shipment date by providing written notice to Brocade at least fourteen (14) days prior to the requested shipment date and provided such later shipment date is no more than thirty (30) days after the original desired shipment date but within Brocade's fiscal quarter.

c) Cancellation. Customer may cancel Purchase Orders, without incurring a charge, provided such cancellation request is received by Brocade at least thirty (30) days prior to the original desired shipment date. Customer may cancel up to twenty-five percent (25%) of any Purchase Orders for Products, upon written notice delivered to Brocade at least fifteen (15) days prior to Customer's original desired shipment date without incurring any cancellation charge or other liability. If Customer cancels a Purchase Order within the fifteen (15) day period prior to the shipment date, or if Customer cancels more than twenty-five percent (25%) of any Purchase Order for Products, Customer may be subject to a cancellation charge in the amount set forth herein. If Customer cancels a Purchase Order such that a cancellation charge is applicable, as set forth herein, the cancellation charge will equal the full Price for all cancelled Products under that applicable Purchase Order less the cost of raw materials that have not yet been ordered for, or allocated to the Purchase Order. To minimize cost, Brocade shall divert completed parts, material or work-in-progress whenever, in Brocade's reasonable opinion, it is practicable to do so.

d) Product Discontinuance. Subject to its obligations under any outstanding Purchase Orders, Brocade reserves the right to cease the manufacture and the offering of any Product to Customer if such Product is neither made available to any other customers of Brocade, nor otherwise disposed of by Brocade either as a separate product or incorporated into any other product of Brocade. Brocade shall provide Customer at least ninety (90) days notice of any Product discontinuance and shall permit Customer to submit a last time buy. Purchase Orders for any last time buy shall be placed within ninety (90) days of the date of the notice of discontinuance with delivery of the Products to take place no later than three (3) months after the date of the notice of discontinuance.

6.2 Shipping.

a) Shipment Dates. For Purchase Orders in accordance with the terms set forth above, Brocade shall use reasonable commercial efforts to ship all orders for Products on the shipment dates specified in the Purchase Order. Unless otherwise instructed in writing by Customer, Brocade shall select the carrier.

b) Delivery and Packaging. Delivery will be made Ex Works point of sale (per Incoterms 2000). Customer shall provide Brocade with all information necessary for Brocade to ship Product. In the absence of specific written instructions from Customer, Brocade will select the carrier, but such carrier will not be the agent of Brocade. Brocade will pack all Product shipped in accordance with standard commercial practices.

c) Expenses. Customer shall pay all freight, insurance and other shipping expenses, as well as any special packing expenses. Customer shall also bear all applicable taxes, duties and similar charges that may be assessed against the Products after delivery to the carrier at Brocade's facility.

d) Inspection of Products. Within thirty (30) days of delivery of Products, Customer may return to Brocade, at Brocade's expense, any defective Products. Customer shall return the defective Product in its original packaging, and shall include with the returned Products, the Purchase Order number, the approximate date on which the Products were delivered to Customer and any other information, including part numbers, as Brocade may reasonably require. Brocade shall, following such notice, deliver to Customer within the manufacturing lead times for such Product, replacement Products for each defective Product which Brocade has, through its own inspection, determined to be defective, or provide Customer with a written report on those which it has determined are not damaged or defective.

6.3 RMA Procedure. Customer shall not return any Product, which Customer determines to be defective, without a return material authorization number ("RMA") issued by Brocade. For every Product returned by Customer subject to this Agreement: (a) Customer must provide Brocade with the serial number of the Product; (b) Brocade shall verify whether or not Product is within the applicable Warranty Period or Customer is otherwise entitled to repair or replacement of Product without charge; (c) (i) if Customer is entitled to return Product for repair/replacement without charge, then Brocade shall issue to Customer an RMA; and (ii) if Product is not under warranty, then Customer must issue a purchase order for service to Brocade, upon receipt of which Brocade will issue an RMA to Customer; (d) Customer shall ship the Product together with the RMA information to the address provided by Brocade; and (e) Brocade shall repair or replace

Product. Customer shall pay freight costs for return shipment by Brocade to Customer of any Product claimed by Customer to be defective but determined by Brocade to not be defective. The repair lead time is thirty (30) days from receipt of the returned Product at Brocade's repair facility.

7. Warranties and Disclaimers.

7.1 **Brocade General Warranty.** Brocade warrants to Customer that (i) Brocade has the right, power and authority to enter into this Agreement and to fully perform all its obligations hereunder; and (ii) the making of this Agreement does not violate any agreement existing between Brocade and any third party.

7.2 **Customer General Warranty.** Customer warrants to Brocade that (i) Customer has the right, power and authority to enter into this Agreement and to fully perform all its obligations hereunder; and (ii) the making of this Agreement does not violate any agreement existing between Customer and any third party.

7.3 **Professional Services Warranty.** Brocade warrants for a period of thirty (30) days: (a) following the completion of the Professional Services, in the case where no acceptance procedure is applicable and (b) following acceptance of the Professional Services, otherwise, that all Professional Services will be performed in a professional and workman-like manner by appropriately trained personnel, using generally accepted industry standards and practices. As Brocade's sole liability and Customer's exclusive remedy for a breach of this warranty, if the Professional Services are not provided as warranted, Brocade will, at its sole discretion, either: (1) correct any material non-conformances in the Professional Services deliverables; (2) re-perform the Professional Services; or (3) credit Customer for the amount paid for the nonconforming Professional Services. This warranty does not apply to the extent any non-conformity relates to (a) any specifications, code, diagnostic or other tools, or any other materials provided by Customer; (b) the integration, operation, modification, or use of the Professional Services or any deliverables in any manner not authorized by Brocade, (c) any Professional Services or Support provided by a Brocade Resident Consultant, and (d) any changes to the storage area network ("SAN") environment after the services were rendered.

7.4 **Software Warranty.** Brocade warrants to Customer for a period of ninety (90) days from the date of shipment to Customer that the Software will perform substantially in accordance with the published Specification therefore. As Brocade's sole liability and Customer's exclusive remedy for a breach of this warranty, Brocade shall use its commercially reasonable efforts, in Brocade's sole discretion, to repair and/or replace such non-conforming Software or to refund the applicable portion of the fees paid by Customer to Brocade. "Specification" means the written specifications that accompany each Product when sold or licensed, as the case may be, pursuant to this Agreement. Brocade specifically disclaims any and all warranties and liability related to any security Software. Customer acknowledges that SAN security software does not guarantee the security of Customer's SAN or overall network, and that Customer is responsible for all other aspects of SAN security, including without limitation, correct installation and setup of the security features of the software and all related requirements, correctly configured security policies, selection of hardware and software (including network security tools), correct installation, configuration, and maintenance of the hardware and software, the interoperability of the various components of Customer's SAN and Customer's network, and a physically and electronically secure operating environment.

7.5 **Hardware Warranty.** Brocade warrants to Customer for a period of thirteen (13) months from the date of shipment to Customer that each unit of Hardware shall be free of defects in any material respect in materials and workmanship and shall substantially conform to the Specifications for such Hardware. This warranty does not apply to those units of Hardware which: (i) have been serviced or altered, except as expressly authorized by Brocade; (ii) have not been installed, operated, repaired, or maintained in accordance with any installation, handling, maintenance or operation instructions supplied by Brocade; (iii) have been subjected to unusual physical or electrical stress, misuse, negligence or accident; or (iv) have been damaged as a result of accident, misuse or transporting. Brocade's sole obligation and Customer's exclusive remedy for failure of the Hardware(s) to conform to the warranty set forth in this Section shall be, at Brocade's expense, to repair/replace such defective Hardware within the normal manufacturing lead times applicable to such Hardware and to return such repaired Hardware to Customer or to refund the applicable portion of the fees paid by Customer to Brocade. "Specification" means the written specifications that accompany each Product when sold or licensed, as the case may be, pursuant to this Agreement.

7.6 **No Other Warranties.** EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, THE PRODUCTS, SUPPORT AND PROFESSIONAL SERVICES ARE DELIVERED "AS IS" AND NEITHER BROCADE NOR ITS SUPPLIERS MAKES ANY WARRANTIES, EXPRESS, IMPLIED OR OTHERWISE, WITH RESPECT TO THE PRODUCTS, ANY RELATED DOCUMENTATION OR SERVICES.

8. **Resale Products.** "Resale Products" are those goods that are sold with Brocade's Products, are not manufactured by Brocade, and are not supported by Brocade. Brocade's sole responsibility for Resale Products is limited to reasonable commercial efforts to arrange for procurement and shipping of Resale Products. To the extent that such Resale Products come to Customer with an express warranty offered by the manufacturer, these warranties, including those expressly set forth in manufacturer's literature, are in lieu of all other warranties. Warranty and/or maintenance support, if available, may be obtained by contacting the manufacturer. Should Brocade assist Customer in procuring maintenance support from the manufacturer, Brocade shall in no way be responsible for any aspect of the fulfillment of the manufacturer's obligations thereunder. Such obligations rest solely with the manufacturer. Notwithstanding anything to the contrary in this Agreement, Brocade shall have no obligations or liabilities to Customer for Resale Products other than as stated in this Section 8. Should manufacturer become, for any reason, unable to fulfill its obligations under the applicable warranties and/or maintenance support services provided to Customer, Brocade shall have no liability, obligation or responsibility as to the fulfillment of any manufacturer's warranty or maintenance obligations, in any form, applicable to any Resale Products.

9. **Insurance.** Each party shall maintain, at their own expense, workers compensation insurance, as required by law, and employers' liability insurance upon its employees. Customer agrees to purchase reasonable and comprehensive liability insurance for all operations necessary and incidental to this Agreement. Brocade agrees to maintain, during the term of this Agreement, at its own expense, all necessary insurance for its employees and contractors, including, but not limited to the following: (i) Workers' compensation as required by law, (ii) Employers' liability insurance in the amount of \$1,000,000 per occurrence, (iii) if applicable to the performance under this Agreement, automobile liability insurance with a combined single limit of \$1,000,000 per occurrence, (iv) General liability insurance including products liability with a limit of \$1,000,000 per occurrence. Upon prior written agreement of the parties, Customer shall be named as an additional insured but only with respect to bodily injury or property damage to a third party as caused by employees or subcontractors of Brocade in the performance of all operations necessary and incidental to this Agreement; (v) Umbrella or excess liability insurance with a limit no less than \$5,000,000 per occurrence excess of ii), iii), and iv) above, and (vi) Professional liability or errors and omissions insurance in amounts no less than \$5,000,000 per occurrence. Brocade's insurance will be with insurers rated A- VI or higher by A.M. Best's

insurance rating guide. Upon mutual written agreement between the parties, each party may request from the other party a Certification of Insurance. Each party's insurance shall be primary for its employees and contractors and its actions or omissions related to this Agreement.

10. Indemnification. Subject to the terms contained herein, Brocade will defend and indemnify Customer against any third party claim that the Products infringe a United States or a European Union patent, copyright or misappropriate a valid trade secret; provided Customer shall (i) promptly notify Brocade in writing of the claim, (ii) provide Brocade sole control over the defense and/or settlement of such claim, at Brocade's expense and with Brocade's choice of counsel, and (iii) at Brocade's request and expense, provide full information and reasonable assistance to Brocade with respect to such claim. Brocade will not be obligated to defend or be liable in any manner for infringement arising out of: (a) required compliance with Customer provided technology or Customer provided specifications; (b) modification of a Product (except modifications provided by Brocade) or use of such Product not contemplated by Brocade; (c) Customer's combination of a Product with hardware, software or other materials not provided by Brocade; (d) Customer's failure to use reasonable materials or instructions provided by Brocade which would have rendered a Product non-infringing. Customer may join in defense of a claim with counsel of its choice at its expense. Brocade shall not be liable to Customer under this Agreement for any Software if Customer does not have then-current Support for such Software. If, at any time, any Product becomes, or in the opinion of Brocade may become, the subject of claim of infringement as set forth in this Section, Brocade may, at its option and expense: (i) procure for Customer the right to continue using such Product; (ii) replace or modify such Product; or, in the event that neither (i) or (ii) is reasonably available, (iii) terminate this Agreement with respect to such Product and issue Customer a prorated refund equal to the original price paid by Customer for the infringing Product, discounted on a 3-year depreciation basis. **BROCADE WILL NOT BE LIABLE FOR ANY COSTS OR EXPENSES INCURRED WITHOUT ITS PRIOR WRITTEN AUTHORIZATION. THE FOREGOING PROVISIONS OF THIS SECTION STATE THE ENTIRE LIABILITY AND OBLIGATIONS OF BROCADE AND ITS SUPPLIERS, AND THE EXCLUSIVE REMEDY OF CUSTOMER WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHT BY THE PRODUCTS OR ANY PART THEREOF OR BY THEIR OPERATION.**

11. Proprietary Rights. Brocade owns and retains for itself all right, title and interest in and to all designs, engineering details, and other data and materials pertaining to the Products, Support or Professional Services supplied by Brocade and to all discoveries, inventions, patents and other proprietary rights arising out of the work done by Brocade in connection with the Products, Support and Professional Services or with any and all products developed by Brocade as a result thereof, including the sole right to manufacture any and all such Products. Customer warrants that it will not divulge, disclose, or in any way distribute or make use of such Brocade Products or Professional Services or related information, and that it will not manufacture or engage to have manufactured such Products.

12. Confidential Information. The party receiving ("Recipient") agrees to maintain in confidence information disclosed by the other party ("Discloser") which it knows or has reason to know is regarded as confidential ("Confidential Information"). The Confidential Information will include, but will not be limited to, the terms and conditions of this Agreement (but not the existence of the Agreement), trade secrets, the structure, sequence and organization of any Brocade software or hardware, marketing plans, blueprints, techniques, processes, procedures and formulae. Recipient shall at all times keep in confidence all such Confidential Information, and shall not use such Confidential Information without Discloser's written consent except in performance of its duties hereunder. Recipient will not disclose the Confidential Information to any person except its employees to whom it is necessary to disclose the Confidential Information for such purposes. Recipient agrees that the Confidential Information will be disclosed or made available only to those of its employees who have agreed to receive it under terms at least as restrictive as those specified in this Agreement. Recipient understands and agrees that the obligation to protect Confidential Information shall be satisfied if Recipient utilizes the same control (but no less than reasonable) over the Confidential Information as Recipient employs to avoid disclosure of Recipient's own confidential and valuable information. Recipient will immediately give notice to Discloser of any unauthorized use or disclosure of the Confidential Information. Recipient agrees to assist Discloser in remedying such unauthorized use or disclosure of the Confidential Information. This obligation will not apply to the extent that Recipient can demonstrate: (a) the disclosed information at the time of disclosure is part of the public domain; (b) the disclosed information can be established by written evidence to have been in the possession of Recipient at the time of disclosure by Discloser; (c) the disclosed information is received by Recipient from a third party without similar restrictions on disclosure and without breach of this or any Agreement; or (d) the disclosed information is required to be disclosed by a government agency to further the objectives of this Agreement, such as to obtain permission to distribute the Product, or by a proper court of competent jurisdiction; provided, however, that Recipient will use its best commercially reasonable efforts to minimize the disclosure of such information and will consult with and assist Discloser in obtaining a protective order prior to such disclosure. Nothing in this Agreement shall preclude Brocade from working with third parties, including subcontractors, neither on services or products nor on developing services or products similar to the Professional Services herein. Brocade may use any general learning, skills, or know-how or any information retained in the unaided memory of a person who had access to the Customer's Confidential Information for any purpose. Brocade and Customer are free to develop products independently without the use of the other's Confidential Information. Brocade is not obligated to restrict the future work assignments of people who have had access to Customer's Confidential Information or to restrict Brocade product development or plans in any way due to such access. Brocade may use any technical information it derives from providing the Professional Services or Support relating to problem resolution, troubleshooting, product functionality enhancements and fixes. In the event of an unauthorized use, distribution or disclosure of any Brocade Confidential Information, Customer agrees that Brocade will not have an adequate remedy at law. Therefore, injunctive or other equitable relief may be appropriate to restrain such use, distribution or disclosure, whether threatened or actual.

13. Export Controls. Customer represents and warrants that it shall not sell or otherwise transfer any products, deliverables, or any technology contained in the Products or deliverables, to, or for the use of, any ultimate purchaser with which Brocade could not do business under the laws or regulations of the United States, including, without limitation, the regulations of the U.S. Departments of Commerce, Energy, State and Treasury. Customer represents and warrants that it will not sell, divert, transfer or disclose products or deliverables, or any technology contained in the Products or deliverables, to a country or countries embargoed by the United States or any prohibited entities unless authorized by the United States government, and Customer acknowledges that willful violation of such regulations shall be considered just cause for the immediate and unqualified cancellation of this Agreement by Brocade without any liability of Brocade. Customer shall promptly provide Brocade with any information that may come to Customer's attention concerning violations of such regulations by Customer or its customers.

14. LIMITATION OF LIABILITY. EXCEPT FOR A BREACH OF THE TERMS OF ANY SOFTWARE LICENSE, INTELLECTUAL PROPERTY OR CONFIDENTIALITY PROVISIONS, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES OF ANY KIND, INCLUDING LOSS OF PROFITS OR REVENUE, LOST BUSINESS, AND LOST DATA OR GOODWILL ARISING OUT OF OR RELATED TO THIS AGREEMENT, INCLUDING ANY GOODS OR

SERVICES SOLD PURSUANT HERETO, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY STATED HEREIN. EXCEPT FOR BROCADE'S INDEMNIFICATION OBLIGATIONS RELATED TO INFRINGEMENT, BROCADE'S ENTIRE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNTS PAID HEREUNDER IN THE TWELVE (12) MONTH PERIOD PRIOR TO THE DATE THE CAUSE OF ACTION AROSE.

15. Term and Termination.

15.1 Term and Termination. The term of this Agreement will commence on the Effective Date and continue for a period of one (1) year and shall automatically renew for successive one year periods unless a party provides written notice of termination 90 days before the end of the applicable term. Either party may terminate this Agreement for cause immediately by written notice upon the occurrence of any of the following events: (a) the other party ceases to do business, or otherwise terminates its business operations; or (b) the other party materially breaches any provision of this Agreement and fails to cure such breach within thirty (30) days of receipt of written notice describing the breach; or (c) the other becomes insolvent or seeks protection under any bankruptcy, receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against the other (and such proceeding is not dismissed within ninety (90) days); or (d) Customer breaches any provision of this Agreement relating to the protection of the intellectual property rights or Confidential Information of Brocade.

15.2 Effect of Termination and Survival. Notwithstanding any other obligation hereunder, upon any termination of this Agreement, Customer shall return to Brocade each and every copy, and Customer shall not retain any copies, of any Brocade Confidential Information. The following provisions shall survive termination or expiration of this Agreement: 2 ("Consideration"), 3.2 ("Additional Software Terms"), 5.10 ("Non-Solicitation of Employees"), 5.11 ("Indemnity"), 7.6 ("No Other Warranties"), 9 ("Insurance"), 11 ("Proprietary Rights"), 12 ("Confidential Information"), 13 ("Export Controls"), 14 ("Limitation of Liability"), 15.2 ("Effect of Termination and Survival"), and 16 ("Miscellaneous").

16. Miscellaneous.

16.1 Governing Law; Venue.

a) Within the United States. All disputes arising out of this Agreement and/or any Customer order issued hereunder to Brocade-US or disputes involving more than one Brocade entity out of which one is Brocade-US shall be subject to the exclusive jurisdiction of the state and Federal courts located in Santa Clara County, California, and the parties agree and submit to the personal and non-exclusive jurisdiction and venue of these courts, and agree that service on Customer at its address set forth above shall constitute valid service for any proceeding in the courts of that jurisdiction. Such Agreement and Customer order(s) shall be governed by the laws of California without reference to conflict of laws principles. The U.N. Convention on the International Sale of Goods shall not apply to this Agreement and Customer order(s).

b) Outside the United States. All disputes arising out of or in connection with this Agreement and/or any Customer order issued hereunder to any Brocade entity other than Brocade-US shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. The place of arbitration shall be Geneva. The arbitral tribunal shall conduct the proceedings and all awards shall be rendered in the English language. This choice of jurisdiction does not prevent either party from seeking injunctive relief with respect to a violation of intellectual property rights or confidentiality obligations in any appropriate jurisdiction. Such Agreement and Customer order(s) shall be governed by the laws of Switzerland without reference to conflict of laws principles. The U.N. Convention on the International Sale of Goods shall not apply to this Agreement.

c) Additional Laws and Venues. Notwithstanding the forgoing, to the extent that the parties have entered into an order incorporating the laws of another jurisdiction into this Agreement in certain circumstances, the parties may designate the laws of such jurisdiction to apply to such individual order. In such instances, the parties may designate a different venue for disputes arising out of or in connection with such individual order.

16.2 Further Assurances. Each party shall execute or cause to be executed such further documents and shall do or cause to be done such further acts and things as may be necessary or desirable to give full effect to the provisions of this Agreement.

16.3 Severability. If any term or other provision of this Agreement is determined by a non-appealable decision of a court, administrative agency or arbitrator to be invalid, illegal or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to either party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, that term or provision shall be severed from this Agreement and there shall be deemed to be substituted a similar term or provision to accomplish the intent of the parties as closely as possible to the original term or provision, as determined by any court or arbitrator having jurisdiction, to the extent permitted by applicable law; provided, however, that if any restriction or limitation set forth in any license granted hereunder is deemed invalid or unenforceable, the entire license shall terminate.

16.4 Force Majeure. Except for payment obligations, neither party shall be liable for the performance of its obligations under this Agreement if it becomes commercially impracticable to perform due to any contingency beyond the reasonable control of that party, including as a result of a Force Majeure. In no event shall Brocade be required to purchase goods from others to enable it to provide the Products under this Agreement. Each party, as applicable, shall give the other party notice of its inability to perform and particulars in reasonable detail of the cause of the inability. Each party must use reasonable commercial efforts to remedy the situation and remove, so far as is commercially reasonable and as soon as practicable, the cause of its inability to perform or comply. Each party shall give the other party prompt notice of the cessation of the event of Force Majeure. "Force Majeure" means a cause of any kind not reasonably within the control of a party, including, without limitation, acts of God and the public enemy, sabotage, boycotts, disruptions of transportation facilities, inability to obtain supplies or materials, acts of government or its agencies, strikes, labor disputes, power disruptions, lockouts or any other industrial disturbance, or judicial action.

16.5 Independent Contractors. The relationship between the parties established by this Agreement is that of independent contractors, and nothing in this Agreement shall be construed to create a relationship of agency or partnership between the parties or to allow either party to create or assume any obligation on behalf of the other party.

16.6 Subcontractors. Brocade may engage subcontractors to perform certain of its obligations under this Agreement, provided that Brocade will remain liable for all such obligations hereunder.

- 16.7 Compliance with Statutes and Regulations. Each party will comply with all applicable statutes, rules, regulations and orders.
- 16.8 Retention of Records. Each party shall retain the applicable records pertaining to its performance obligations for 3 years after the termination or completion of such obligation. Upon mutual agreement of the parties, each party shall make such records available to the other party for inspection upon terms to be agreed to by the parties.
- 16.9 Notices. All notices under this Agreement shall be in writing and shall be delivered by personal delivery, internationally recognized overnight carrier, or facsimile transmission, and shall be deemed given upon personal delivery, three (3) business day after delivery to the international carrier with proof of receipt, or by fax upon acknowledgment of receipt of electronic transmission. Notices shall be sent to the signatories of this Agreement at the address set forth in this Agreement or such other address as either party may specify in writing, and in the case of Brocade, with a copy to Brocade Communications Systems, Inc., Attention: Office of the General Counsel, 1745 Technology Drive, San Jose, CA 95110, Fax Number (408) 333-5630.
- 16.10 Assignment. Customer shall not, directly or indirectly, in whole or in part, whether by operation of law or otherwise, assign or transfer this Agreement, without Brocade's prior written consent, and any attempted assignment, transfer or delegation without such prior written consent shall be voidable at the sole option of Brocade. Brocade or its successors may assign this Agreement, in whole or in part, and any of its rights and obligations hereunder, in its discretion. Without limiting the foregoing, this Agreement will be binding upon and inure to the benefit of the parties and their permitted successors and assigns.
- 16.11 Remedies Cumulative. All rights and remedies existing under this Agreement are cumulative to, and not exclusive of, any rights or remedies otherwise available.
- 16.12 Waiver; Amendment. Failure or delay on the part of either party hereto in the exercise of any right hereunder shall not impair such right or be construed to be a waiver of, or acquiescence in, any breach of any representation, warranty or agreement herein, nor shall any single or partial exercise of any such right preclude other or further exercise thereof or of any other right. Change or amendment will be made to this Agreement except by an instrument in writing signed on behalf of each of the parties to such agreement.
- 16.13 No Implied Licenses. Nothing contained in this Agreement shall be construed as conferring any rights by implication, or otherwise, under any intellectual property right, other than the rights expressly granted in this Agreement.
- 16.14 No Other Forms. The terms and conditions of Purchase Orders, acknowledgments, invoices or any other business forms submitted by either party which conflict with or purport to amend the terms and conditions of this Agreement are hereby specifically objected to by the other party and shall be of no force or effect. Further, no additional or different terms proposed by Brocade or Customer shall become part of the Purchase Order or any transaction contemplated hereunder without the written agreement of both Customer and Brocade.
- 16.15 Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and shall supersede all prior written and oral and all contemporaneous oral agreements and understandings with respect to the subject matter hereof.
- 16.16 Translations. This Agreement is in the English language only, which language shall be controlling in all respects, and all versions hereof in any other language shall be for accommodation only and shall not be binding upon the parties. All communications and notices to be made or given pursuant to this Agreement, and any dispute proceeding related to or arising hereunder, shall be in the English language. In the event of any discrepancy or inconsistency between different language versions of the Agreement (and all associated documents or correspondence concerning this Agreement), the English language version shall prevail.
- 16.17 Counterparts. This Agreement may be executed in two or more counterparts, all of which, taken together, shall be considered to be one and the same instrument.

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