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**Carahsoft Rider to Manufacturer End User License Agreements
(for U.S. Government End Users)**

1. **Scope.** This Carahsoft Rider and the Manufacturer End User License Agreement (EULA) establish the terms and conditions enabling Carahsoft to provide Software and Services to U.S. Government agencies (the "Client" or "Licensee").
2. **Applicability.** The terms and conditions in the attached Manufacturer EULA ~~Are~~ hereby incorporated by reference to the extent that they are consistent with Federal Law (e.g., the Anti-Deficiency Act (31 U.S.C. § 1341(a)(1)(B)), the Contracts Disputes Act of 1978 (41 U.S.C. § 601-613), the Prompt Payment Act, the Anti-Assignment statutes (31 U.S.C. § 3727 and 41 U.S.C. 15), 28 U.S.C. § 516 (Conduct of Litigation Reserved to Department of Justice (DOJ), and 28 U.S.C. § 1498 (Patent and copyright cases)). To the extent the terms and conditions in the Manufacturer's EULA are inconsistent with the Federal Law (*See* FAR 12.212(a)), they shall be deemed deleted and unenforceable under any resultant orders under Carahsoft's contract #GS-35F-0119Y, including, but not limited to the following:
 - (a) **Contracting Parties.** The Government customer (Licensee) is the "Ordering Activity", "defined as an entity authorized to order under GSA contracts as set forth in GSA ORDER 4800.2G ADM, as may be revised from time to time. The Licensee cannot be an individual because any implication of individual licensing triggers the requirements for legal review by Federal Employee unions. Conversely, because of competition rules, the contractor must be defined as a single entity even if the contractor is part of a corporate group. The Government cannot contract with the group, or in the alternative with a set of contracting parties.
 - (b) **Changes to Work and Delays.** Subject to GSAR Clause 552.243-72, Modifications (Federal Supply Schedule) (July 2000) (Deviation I 2010) (AUG 1987), and 52.212-4 (f) Excusable delays. (JUN 2010) regarding which the GSAR and the FAR provisions shall take precedence.
 - (c) **Contract Formation.** Subject to FAR Sections 1.601(a) and 43.102, the Government Order must be signed by a duly warranted contracting officer, in writing. The same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government.
 - (d) **Audit.** During the term of this Agreement: (a) If Ordering Activity's security requirements included in the Order are met, Manufacturer or its designated agent may audit Ordering Activity's facilities and records to verify Ordering Activity's compliance with this Agreement. Any such audit will take place only during Ordering Activity's normal business hours contingent upon prior written notice and adherence to any security measures the Ordering Activity deems appropriate, including any requirements for personnel to be cleared prior to accessing sensitive facilities. Carahsoft on behalf of the Manufacturer will give Ordering

Activity written notice of any non-compliance, including the number of underreported Units of Software or Services ("Notice"); or (b) If Ordering Activity's security requirements are not met and upon Manufacturer's request, Ordering Activity will run a self-assessment with tools provided by and at the direction of Manufacturer ("Self-Assessment") to verify Ordering Activity's compliance with this Agreement.

- (e) **Termination.** Clauses in the Manufacturer EULA referencing termination or cancellation the Manufacturer's EULA are hereby deemed to be deleted. Termination shall be governed by the FAR 52.212-4 and the Contract Disputes Act, 41 U.S.C. §§ 601-613, subject to the following exceptions:

Carahsoft may request cancellation or termination of the License Agreement on behalf of the Manufacturer if such remedy is granted to it after conclusion of the Contracts Disputes Act dispute resolutions process referenced in Section Q below or if such remedy is otherwise ordered by a United States Federal Court..

- (f) **Consent to Government Law / Consent to Jurisdiction.** Subject to the Contracts Disputes Act of 1978 (41. U.S.C §§ 7101-7109) and Federal Tort Claims Act (28 U.S.C. §1346(b)). The validity, interpretation and enforcement of this Rider will be governed by and construed in accordance with the laws of the United States. In the event the Uniform Computer Information Transactions Act (UCITA) or any similar federal laws or regulations are enacted, to the extent allowed by Jaw, it will not apply to this Agreement, and the governing Jaw will remain as if such Jaw or regulation had not been enacted. All clauses in the Manufacturer EULA referencing equitable remedies are deemed not applicable to the Government order and are therefore deemed to be deleted.

- (g) **Force Majeure.** Subject to FAR 52.212 -4 (f) Excusable delays. (JUN 2010). Unilateral Termination by the Contractor does not apply to a Government order and all clauses in the Manufacturer EULA referencing unilateral termination rights of the Manufacturer are hereby deemed to be deleted.

- (h) **Assignment.** All clauses regarding Assignment are subject to FAR Clause 52.232-23, Assignment of Claims (JAN 1986) and FAR 42.12 Novation and Change-of-Name Agreements, and all clauses governing Assignment in the Manufacturer EULA are hereby deemed to be deleted.

- (i) **Waiver of Jury Trial.** All clauses referencing waiver of Jury Trial are subject to FAR Clause 52.233-1, Disputes (JUL. 2002), and all clauses governing waiver of jury trial in the Manufacturer EULA are hereby deemed to be deleted.

- (j) **Customer Indemnities.** All Manufacturer EULA clauses referencing Customer Indemnities are hereby deemed to be deleted.

- (k) **Contractor Indemnities.** All Manufacturer EULA clauses that (1) violate DOJ's right (28 U.S.C. 516) to represent the Government in any case and/or (2) require that the Government give sole control over the litigation and/or settlement, are hereby deemed to be deleted.

- (l) Renewals. All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31 U.S.C. 1341, 41 U.S.C. 11) ban on automatic renewal are hereby deemed to be deleted.
- (m) Future Fees or Penalties. All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31 U.S.C. 1341, 41 U.S.C. 11), which prohibits the Government from paying any fees or penalties beyond the Contract amount, unless specifically authorized by existing statutes, such as the Prompt Payment Act, or Equal Access To Justice Act 31 U.S.C. 3901, 5 U.S.C. 504 are hereby deemed to be deleted.
- (n) Taxes. Taxes are subject to FAR 52.212-4(k), which provides that the contract price includes all federal, state, local taxes and duties.
- (o) Third Party Terms. Subject to the actual language agreed to in the Order by the Contracting Officer. Any third party manufacturer will be brought into the negotiation, or the components acquired separately under Federally-compatible agreements, if any. Contractor indemnities do not constitute effective migration.
- (p) Installation and Use of the Software. Installation and use of the software shall be in accordance with the Rider and Manufacturer EULA, unless an Ordering Activity determines that it requires different terms of use and Manufacturer agrees in writing to such terms in a valid task order placed pursuant to the Government contract.
- (q) Dispute Resolution and Venue. Any disputes relating to the Manufacturer EULA and to this Rider shall be resolved in accordance with the FAR, and the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. The Ordering Activity expressly acknowledges that Carahsoft, on behalf of the Manufacturer, shall have standing to bring such claim under the Contract Disputes Act.
- (r) Limitation of Liability: Subject to the following:

Carahsoft, Manufacturer and Ordering Activity shall not be liable for any indirect, incidental, special, or consequential damages, or any loss of profits, revenue, data, or data use. Further, Carahsoft, Manufacturer and Ordering Activity shall not be liable for punitive damages except to the extent this limitation is prohibited by applicable law. This clause shall not impair the U.S. Government's right to recover for fraud or crimes arising out of or related to this Government Contract under any federal fraud statute, including the False Claims Act, 31 U.S.C. §§ 3729-3733.
- (s) Advertisements and Endorsements. Unless specifically authorized by an Ordering Activity in writing, such use of the name or logo of any U.S. Government entity is prohibited.
- (t) Public Access to Information. Manufacturer agrees that the EULA and this Rider contain no confidential or proprietary information and acknowledges the EULA and this Rider will be available to the public.
- (u) Confidentiality. Any provisions that require the Licensee to keep certain information confidential are subject to the Freedom of Information Act, 5 U.S.C. §552, and any order by a United States Federal Court.

FUSION-10 END-USER LICENSE AGREEMENT""""

IMPORTANT-- PLEASE READ CAREFULLY BEFORE INSTALLING OR USING THIS SOFTWARE PRODUCT: This end-user license agreement ("Agreement") is a legal agreement between you (either an individual or the entity you represent) ("you") and Fusion-io, Inc. ("Fusion-io") that governs your use of any general availability release of the software product in executable object code provided to you with this Agreement, as well as the related user guide, Utilities, and Documentation (collectively, the "Software") and your use of any beta release of a software product in executable object code provided to you with this Agreement, as well as the related, user guide, Utilities, and Documentation (collectively, "Beta Software"). The Software and Beta Software are interchangeably referred to in this Agreement as the "Product."

RIGHTS IN THE PRODUCT ARE OFFERED ONLY ON THE CONDITION THAT YOU AGREE TO ALL TERMS AND CONDITIONS OF THIS AGREEMENT. BY INSTALLING, COPYING, DOWNLOADING, OR OTHERWISE USING THE PRODUCT, YOU AGREE TO BE BOUND BY THIS AGREEMENT. IF YOU DO NOT ACCEPT THIS AGREEMENT, DO NOT INSTALL, DOWNLOAD, OR OTHERWISE USE THE PRODUCT.

1. DEFINITIONS

1.1 "Documentation" means the most current version of any documentation, in all forms, that formally describes the use, function, or technical details of the Product (e.g., reference manuals, user manuals, on-line help files, and training manuals) provided to you for use with the Product in accordance with this Agreement.

1.2 "Error" means a failure of the Software to perform substantially in accordance with the applicable material technical and functional specifications set forth in the Documentation, which failure is reproducible by Fusion-io on an unmodified copy of the most current Release of the Software (excluding faults in the Documentation itself).

1.3 "Maintenance Services" means the maintenance services described in Section 3.3.

1.4 "Release" means a Maintenance Release or a Major Release that is provided to you as part of the Maintenance Services in accordance with Section 3.3.

(a) "Maintenance Release" means a version of the Software that incorporates Error corrections or provides minor functional or performance improvements. Maintenance Releases do not include Major Releases.

(b) "Major Release" means a version of the Software that provides substantial functional or performance improvements. Fusion-io will determine in its sole discretion whether a modification to the Software is a Major Release or a Maintenance Release.

1.5 "Scope Limitations" means the limitations on the scope of the licenses granted to you under this Agreement that are specified in the user guide or the product installation guide for the Product.

1.6 "Unauthorized Use" means any use, possession, knowledge, viewing, inspection, examination, copying, disclosure, or other activity involving any part of the Product that is not expressly authorized under this Agreement or otherwise in writing by Fusion-io.

1.7 "Utilities" means the most current version of any utility file designed to operate with, supplement, optimize, configure, or maintain the Product that is made available to you for use with the Product

2. LICENSE GRANTS

2.1 License to the Software. Subject to the terms and conditions of this Agreement, Fusion-io grants to you a limited, worldwide, non-exclusive, perpetual (subject to termination in accordance with the terms of this Agreement), non-transferable (except as permitted in Section 11.4) license, without right of sublicense to: (a) reproduce, without modification, executable object code copies of the Software; (b) install copies of the Software on computers operated by or for you; (c) internally use installed copies of the Software as described in the Scope Limitations; and (d) reproduce, without modification, and internally use a reasonable number of copies of the Documentation and Utilities solely in connection with use of the Software. Each of the rights granted in this Section 2.1 is subject to the Scope Limitations and contingent upon your compliance with the Scope Limitations. This Agreement applies to each Release unless Fusion-io provides other terms with the Release. In case of a conflict between this Agreement and such other terms, the other terms will prevail.

2.2 Evaluation License. If Fusion-io has provided you with a copy of the Software solely for internal evaluation to determine whether you will purchase a license or subscription to the Software, Fusion-io grants to you a limited, non-exclusive, non-transferable license, without right of sublicense, to internally use the Software, without modification, solely for evaluation purposes during the Evaluation Period ("Evaluation License"). The "Evaluation Period" means the 30 days following the date you initially download the Software unless Fusion-io agrees in writing to extend the period or otherwise to a longer Evaluation Period for a specified period of time. The Software may be used only by those of your employees that must have access to the Software in order to permit you to evaluate the Software. Your Evaluation License does not grant the rights provided for in Sections 2.1, 3.3, 3.4, 7.2(b), or 7.2(c).

2.3 License to Use Beta Software. If Fusion-io has provided you with Beta Software, Fusion-io grants you a non-sub-licensable, nontransferable, nonexclusive, limited license to: (a) use one copy of the Software; and (b) make a single copy of the Software for backup or archival purposes only, as long as the copy contains all of the original proprietary notices ("Beta License"). Your Beta License does not grant the rights provided for in Sections 2.1, 3.3, 3.4, 7.2(b), or 7.2(c).

2.4 Third Party Software. The Product may contain or be distributed with third party software covered by an open source software license ("Open Source Software") or by a license other than that granted by this Agreement ("Third Party Software"). If Open Source Software is included, the terms and conditions of this license do not apply to the Open Source Software. If Third Party Software is included, the terms and conditions of this license may not apply to Third Party Software. Information concerning the inclusion of Open Source Software and Third Party Software, if any, and the notices, license terms, and disclaimers applicable to that software are generally contained in a corresponding license file identified with file names such as "notice," "license," "license.txt," "readme," "readme.txt," or "copying", you should contact Fusion-io support if you cannot locate the Open Source Software or Third Party Software license for the Product. If, in a notice file, Fusion-io identifies code as "Modifiable Code", Fusion-io authorizes you to a) modify the Modifiable Code, and b) reverse engineer the Product modules that directly interface with the Modifiable Code, provided you do so only for the purpose of debugging your modifications to the Modifiable Code. If the Open Source Software licenses include a license that provides for the availability of source code (e.g., the GNU General Public License) and the corresponding source code is not included with the Product, check Fusion-io's product support pages to learn how to obtain such source code.

2.5 Reservation of Rights. The Product is licensed, not sold, by Fusion-io to you under this Agreement, and nothing in this Agreement will be interpreted or construed as a sale or purchase of the Product. You will not have any rights in or to the Product except as expressly granted in this Agreement. Fusion-io reserves to itself all rights to the Product not expressly granted to you in accordance with this Agreement. Fusion-io retains all copyright, patent, and other intellectual property rights in and to the Product. You acknowledge that the Product, all copies of the Product, any derivative works, compilations, and collective works of the Product, and any know-how and trade secrets related to the Product are the sole and exclusive property of Fusion-io and contain Fusion-io's confidential and proprietary materials.

3. KEYS, DEPLOYMENT, MAINTENANCE SERVICES, AND SUPPORT SERVICES

3.1 Delivery of Keys. Fusion-io has delivered, or will deliver to you a key to install and access the Product. You are responsible for the use of keys assigned to you. You may not share the keys with third parties. You may not use any key that is assigned to a third party. If this Agreement grants you an Evaluation License, your key or the Software may include disabling code, which may be used to disable the Software. Fusion-io may use such disabling code to ensure that you do not continue to use the Software longer than the term of your Evaluation License. Upon the expiration of your Evaluation License, and if Fusion-io has not granted you an extension, the Software may cease to function in some or all respects and you may lose access to data made with or stored using the Software. You acknowledge that the disabling of the Software is a key feature of the Evaluation License rights and responsibilities covered by this Agreement.

3.2 Deployment Services. You are solely responsible for the deployment of the Product for operation, including installation, configuration, integration, and testing, unless you have contracted to have Fusion-io perform such deployment services in accordance with the terms of Fusion-io's professional services agreement.

3.3 Maintenance Services. Fusion-io will provide you with Maintenance Services for so long as you are current with your payment of the Maintenance Services subscription fees. Maintenance Services are provided under the following terms:

(a) Fusion-io will use reasonable efforts to correct (e.g., by providing a workaround or correction) verified Errors with a level of effort commensurate with the severity of the Error. Fusion-io is not, however, obligated to correct all Errors.

(b) Within a reasonable time after general commercial publication, Fusion-io will make available to you one copy of all Maintenance Releases and all corrections to the associated Documentation. You may purchase Major Releases for an additional fee.

(c) Fusion-io reserves the right, in its sole discretion, to create a Major Release of the Software. Fusion-io will support a Release of the Software for a period of six months from the first production ship date of the Major Release that supersedes it or from the discontinuation date, as applicable. Special support prices may apply for the support of outdated or discontinued Releases of the Software after the initial six-month period.

(d) Unless otherwise expressly agreed to in writing by Fusion-io, Fusion-io is not obligated to provide Maintenance Services related to: (i) your failure to implement all Releases and Error corrections and workarounds provided by Fusion-io; (ii) changes to the operating system or hardware environment on which the Software operates; (iii) modification of or addition to the Software; (iv) improper installation of the Software; (v) interconnection of the Software with third party software or hardware not furnished by Fusion-io or not specified in the Documentation for use with the Software; or (vi) use of the Software in a manner for which it was not designed or beyond the scope of the license set forth in the Agreement.

(e) Unless otherwise expressly agreed to in a separate agreement by Fusion-io, the Maintenance Services do not include: (i) visits to your site; (ii) any work with or relating to any third party equipment or software; (iii) any installation, configuration, integration, or setup of the Software; (iv) consultation with your end users, distributors, or manufacturers; or (v) any professional services associated with the Software, including without limitation any custom development, training and knowledge transfer, or other services that may be covered in any service agreement with Fusion-io or any third party.

(f) You will provide Fusion-io with reasonable access to all necessary personnel to answer questions regarding Errors and other problems reported by you. You will promptly implement all Releases, Error corrections, and workarounds provided by Fusion-io. You must supervise, control, and manage the use of the Software. In addition, you are responsible for archiving your data to mitigate against losses that may be caused by Errors. In order to provide Error corrections, workarounds, and Releases, Fusion-io may require you to upgrade, at your own cost, your hardware and software systems to Fusion-io's then-current supported versions of system components.

(g) The provision of the Maintenance Services by Fusion-io is contingent upon your performance of your obligations under this Agreement. Fusion-io reserves the right, in addition to other remedies that are available, to suspend its provision of the Maintenance Services for so long as you are not current with your obligations.

3.4 Support Services. Fusion-io will provide you with Support Services for so long as you are current with your payment of the Support Services subscription fees. "Support Services" means Fusion-io's provision of telephone and email support consisting of (a) assistance related to questions on the operational use of the Software; (b) assistance with identifying and verifying causes of suspected Errors; and (c) providing workarounds for verified Errors when reasonably available to Fusion-io.

4. LICENSEE OBLIGATIONS

4.1 General Restrictions. Except as otherwise explicitly provided in this Agreement or as may be expressly permitted by applicable law, you will not, and will not permit or authorize third parties to: (a) reproduce, modify, translate, enhance, decompile, disassemble, reverse engineer, or create derivative works of the Product; (b) rent, lease, or sublicense the Product; (c) use the Product on a service bureau or application service provider basis; (d) provide, divulge, disclose, or make available to, or permit the use of the Product by any third party; nor (e) circumvent or disable any technological features or measures in the Product.

4.2 Proprietary Rights Notices. You will neither alter nor remove any copyright notice or other proprietary rights notices that may appear on any part of the Product. In addition, when reproducing any part of the Product in accordance with this Agreement, you must include all copyright and other proprietary rights notices as are currently contained on each part of the Product.

4.3 Compliance with Laws. You will at all times comply with all applicable laws, statutes, ordinances, and regulations in connection with your use of the Product, and refrain from any unethical conduct or any other conduct that tends to damage the reputation of Fusion-io or the Product. You will inform Fusion-io of any requirements of laws, statutes, ordinances, rules, and regulations of all governmental authorities that directly or indirectly affect your use of the Product.

4.4 Government Restricted Rights. If the Product is licensed for use by the United States or for use in the performance of a United States government prime contract or subcontract, the Product is delivered as: (a) "commercial computer software" as defined in DFARS 252.227-7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation (Feb. 2012); (b) as a "commercial item" as defined in FAR 2.101; or (c) as "restricted computer software" as defined in FAR 52.227-14(a), Rights in Data-General (Dec. 2007); whichever is applicable. The use, duplication, and disclosure of the Product by the Department of Defense shall be subject to the terms and conditions set forth in this Agreement as provided in DFARS 227.7202 (Dec. 2011). All other use, duplication and disclosure of the Product by the United States shall be subject to the terms and conditions set forth in this Agreement and the restrictions contained in subsection DFARS 252.227-7013(b)(3)(i), Rights in Technical Data and Computer Software (Feb. 2012), and FAR 52.227-19(b), Commercial Computer Software-Restricted Rights (Dec. 2007). As used in FAR and DFARS, contractor/licensor is Fusion-io, Inc. 2855 E. Cottonwood Parkway, Suite 100, Salt Lake City, UT 84121.

4.5 Export. The Product may be subject to United States export control laws, including the U.S. Export Administration Act and its associated regulations, and may be subject to export or import regulations in other countries. You must comply strictly with all such regulations that are now or later in effect and acknowledge that you have the responsibility to obtain licenses to export, re-export, or import the Product. You represent that: (a) you are not a citizen, national, or resident of, and you are not under the control of, the government of Cuba, Iran, Sudan, Iraq, Libya, North Korea, Syria, nor any country to which the United States has prohibited export; (b) you will not download or otherwise export or re-export the Product, directly or indirectly, to the above mentioned countries nor to citizens, nationals or residents of those countries; (c) you are not listed on the United States Department of Treasury lists of Specially Designated Nationals, Specially Designated Terrorists, and Specially Designated Narcotic Traffickers, nor are you listed on the United States Department of Commerce Table of Denial Orders; (d) you will not download or otherwise export or re-export the programs, directly or indirectly, to persons on the above mentioned lists; and (e) you will not use the Product for, and will not allow

the Product to be used for, any purposes prohibited by United States law, including, without limitation, for the development, design, manufacture or production of nuclear, chemical or biological weapons of mass destruction.

4.6 No Warranties. You will not make or publish any representations, warranties, or guarantees on behalf of Fusion-io concerning the Product without Fusion-io's specific prior written approval.

4.7 Protection against Unauthorized Use. You acknowledge that the Product furnished to you by Fusion-io involve valuable proprietary rights of Fusion-io. You will take appropriate steps and precautions for the protection of the Product. Without limiting the generality of the foregoing, you will use your best efforts to prevent any Unauthorized Use and immediately notify Fusion-io in writing of any Unauthorized Use that comes to your attention. In the event of any Unauthorized Use by anyone who obtained access to the Product directly or indirectly through you or any of your employees, agents, representatives, or contractors, you will take all steps reasonably necessary to terminate such Unauthorized Use and to retrieve any copy of the applicable Product in the possession or control of the person or entity engaging in such Unauthorized Use. You will provide to Fusion-io such cooperation and assistance related to any such Unauthorized Use as Fusion-io may reasonably request.

4.8 Restrictions on Use of Beta Software. You may not use Beta Software in a live production environment or in conjunction with revenue bearing traffic.

4.9 Feedback. If Fusion-io has provided you with a copy of Beta Software in order to help Fusion-io prepare the Beta Software for commercial release, you will provide feedback to Fusion-io concerning the functionality and performance of the Beta Software, including identifying potential errors and improvements ("Feedback"). If Fusion-io grants you an Evaluation License, you may provide such Feedback to Fusion-io regarding your use of the Software. You hereby assign to Fusion-io all right, title, and interest in and to the Feedback you provide. Fusion-io may use the Feedback, free of charge, without obtaining your consent.

4.10 Confidentiality Required Under Beta License and Evaluation License. Beta Software has not been made available to the public and Fusion-io desires to maintain the confidentiality of the Beta Software until it is commercially released. If Fusion-io has provided you with Beta Software or has provided you with the Software solely for evaluation purposes, you will take reasonable steps to maintain the confidentiality of and not disclose to any third party: (a) the terms of this EULA, (b) all non-public information disclosed by Fusion-io to you under this EULA, and (c) all Feedback, performance data, and other information obtained through your testing and evaluation.

5. FEES AND PAYMENT

5.1 Fees and Payment Terms

(a) You will pay Fusion-io the license fees, Maintenance Services subscription fees, Support Services subscription fees, and any other amounts owing under this Agreement, plus any applicable sales, use, excise, or other taxes, as specified in your quote or order form.

(b) Any amount not paid when due will be subject to finance charges equal to 1.5% of the unpaid balance per month or the highest rate permitted by applicable usury law, whichever is less, determined and compounded daily from the date due until the date paid. You will reimburse any costs or expenses (including, but not limited to, reasonable attorneys' fees) incurred by Fusion-io to collect any amount that is not paid when due. Fusion-io may accept any check or payment in any amount without prejudice to Fusion-io's right to recover the balance of the amount due or to pursue any other right or remedy. Amounts due from you under this Agreement may not be withheld or offset by you against amounts due to you for any reason. Unless otherwise specified in your quote or order form, all amounts payable under this Agreement are denominated in United States dollars, and you will pay all such amounts in United States dollars.

5.2 Taxes. Other than state net income taxes and federal net income taxes imposed on Fusion-io by the United States, you will bear all taxes, duties, and other governmental charges (collectively, "taxes") resulting from this Agreement. You will pay any additional taxes as are necessary to ensure that the net amounts received by Fusion-io after all such taxes are paid are equal to the amounts which Fusion-io would have been entitled to in accordance with this Agreement as if the taxes did not exist.

5.3 Audit. During the term of this Agreement and for three years thereafter, you will keep current, complete, and accurate records regarding the reproduction and use of Product. You will provide such information to Fusion-io and certify that you have paid all fees required under this Agreement within five business days of any written request, so long as no more than four requests are made each year. You will, after reasonable prior notice from Fusion-io, provide Fusion-io reasonable access to your premises, records, and personnel so that Fusion-io may audit and confirm that you comply with this Agreement. If an audit reveals any reproduction, use, or distribution of the Product that is not compliant with this Agreement, you will promptly comply with this Agreement and make an additional payment as contemplated in this Agreement, plus interest at the rate specified in Section 5.1(b). If the amount of the underpayment is 5% or greater, you will promptly reimburse Fusion-io for its reasonable costs of conducting such audit.

6. TERM AND TERMINATION

6.1 Tenn. This Agreement will commence upon your acceptance of this Agreement and continue until terminated in accordance with this Agreement.

6.2 Notice of Material Breach or Default. If either party commits a material breach or default in the performance of any of its obligations under this Agreement, then the other party may give the defaulting party written notice of the material breach or default (including a statement of the facts relating to the material breach or default, the provisions of this Agreement that are in material breach or default, and the action required to cure the material breach or default) and of the non-defaulting party's intention to terminate the Agreement pursuant to Section 6.3 if the material breach or default is not cured within 30 days after the defaulting party's receipt of such notice (or such later date as may be specified in such notice). Without limiting the foregoing, any failure by you to timely pay to Fusion-io any amounts owing under this Agreement will constitute a material breach of this Agreement.

6.3 Notice of Termination. If the defaulting party fails to cure a material breach or default specified in any notice under Section 6.2 within 30 days after receipt of such notice (or such later date as may be specified in such notice), then the non-defaulting party may terminate this Agreement by giving the defaulting party written notice of termination. If you fail to timely pay any Maintenance Services subscription fees or Support Services Subscription fees, Fusion-io may, without limitation to any of its other rights or remedies, suspend performance of Maintenance Services and the Support Services until it receives all amounts due.

6.4 Termination of Evaluation License. If Fusion-io grants you an Evaluation License under this Agreement, this Agreement will terminate upon the earliest of: (a) the conclusion of the Evaluation Period; (b) your breach of any of provision of this Agreement, or (c) your return, destruction, or deletion of all instances and copies of the Software in your possession.

6.5 Termination of Beta License. If this Agreement grants you a Beta License, this Agreement will terminate immediately upon the earliest of: (a) six months after a "generally available" version of the Beta Software is released; (b) one year after your initial download of the Beta Software; (c) your failure to comply with any term of this EULA; or (d) your return, destruction, or deletion of all instances and copies of the Beta Software in your possession.

6.6 Post-Termination Obligations. If this Agreement or any licenses in this Agreement are terminated for any reason, (a) you will pay to Fusion-io any fees, reimbursable expenses, compensation, or other amounts that have accrued prior to the effective date of the termination, (b) any and all liabilities accrued prior to the effective date of the termination will survive, and (c) you will immediately discontinue all use of the Product, uninstall the Product from your systems, destroy or return to Fusion-io all copies of the Product within five days of such termination, and immediately thereafter, if requested by Fusion-io, provide Fusion-io with a written certification signed by an authorized representative certifying that all copies of such Product have been destroyed and all use of such Product has been discontinued. Sections I. 2.5, 3.1, 4, 5, 6, 7, 9, 10, and II survive termination or expiration of this Agreement and the licenses granted herein.

7. WARRANTIES AND DISCLAIMER

7.1 Mutual Warranties. Each party represents and warrants to the other that: (a) this Agreement has been duly executed and delivered and constitutes a valid and binding agreement enforceable against such party in accordance with its terms; (b) no authorization or approval from any third party is required in connection with such party's execution, delivery, or performance of this Agreement; and (c) the execution, delivery, and performance of this Agreement does not violate the laws of any jurisdiction or the terms or conditions of any other agreement to which it is a party or by which it is otherwise bound.

7.2 Performance Warranty

(a) Unless you have been granted an Evaluation License or a Beta License, Fusion-io warrants to you that the Software will perform without Errors during the 90-day period following delivery to you of the license key to the Software ("Warranty Period"). SOFTWARE GOVERNED BY AN EVALUATION LICENSE OR A BETA LICENSE IS PROVIDED "AS IS" AND FUSION-IO DOES NOT WARRANT THAT THE SOFTWARE OR BETA SOFTWARE WILL OPERATE WITHOUT ERROR OR INTERRUPTION.

(b) If any portion of the Software fails to conform to the warranty in Section 7.2(a), your exclusive remedy, and Fusion-io's entire liability in contract, tort, or otherwise, will be to use commercially reasonable efforts to provide a correction or workaround for any Error that is (a) reported to Fusion-io during the Warranty Period and (b) reproducible by Fusion-io on an unmodified copy of the most current Release of the Software. If after repeated efforts, Fusion-io is unable to provide a correction or workaround for a reported Error, then your exclusive remedy, and Fusion-io's entire liability in contract, tort, or otherwise, will be to terminate this Agreement and receive a refund of all license fees paid by you for the Software upon your return of the original and all copies of the Software in your possession, together with your certification that you have ceased all use, reproduction, and distribution of the Software.

(c) The warranty and remedies set forth in Sections 7.2(a) and 7.2(b) will not apply to the extent that a reported Error is caused in whole or in part by: (i) any defect in any portion of any third party software or hardware not furnished by Fusion-io or not specified in the Documentation for use with the Software; (ii) any modification or enhancement made to the Software by anyone other than Fusion-io; (iii) the failure of you to follow the most current instructions promulgated by Fusion-io with respect to the proper use of the Software; (v) the negligence of you or any third party; or (vi) Unauthorized Use of the Software. If Fusion-io determines that any warranty claim reported by you falls within any of the foregoing exceptions, you will pay Fusion-io for its services at Fusion-io's hourly rates then in effect.

7.3 Disclaimer. EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES STATED IN THIS SECTION 7, FUSION-IO MAKES NO ADDITIONAL REPRESENTATION OR WARRANTY OF ANY KIND WHETHER EXPRESS, IMPLIED (EITHER IN FACT OR BY OPERATION OF LAW), OR STATUTORY. AS TO ANY MATTER WHATSOEVER, FUSION-IO EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR YOUR PURPOSE, QUALITY, ACCURACY, TITLE, AND NON-INFRINGEMENT. FUSION-IO DOES NOT WARRANT THAT THE PRODUCT IS ERROR-FREE OR THAT OPERATION OF THE PRODUCT WILL BE SECURE OR UNINTERRUPTED.

7.4 Risks of Using Beta Software. Fusion-io has not commercially released Beta Software, and Beta Software has not yet been tested like other commercially released software that you may use. Therefore, it is likely that Beta Software will contain errors, including errors that may cause the Beta Software or your computer or device to malfunction or cause a loss of data. If you do not wish to accept the risk of errors in the Beta Software, please do not install or use the Beta Software. Furthermore, Fusion-io is not obligated to correct errors, correct the effects of errors (e.g., fix your computer or recover lost data), or provide any technical support related to use of the Beta Software.

8. INTELLECTUAL PROPERTY INFRINGEMENT

8.1 Infringement Defense. Fusion-io will defend you from any actual or threatened third party claim that the Software infringes or misappropriates any U.S. patent issued as of the date you first accept this Agreement or any copyright or trade secret of any third party during the term of this Agreement if: (a) you give Fusion-io prompt written notice of the claim; (b) Fusion-io has full and complete control over the defense and settlement of the claim; (c) you provide assistance in connection with the defense and settlement of the claim as Fusion-io may reasonably request; and (d) you comply with any settlement or court order made in connection with the claim (e.g., relating to the future use of any infringing materials).

8.2 Infringement Indemnification. Fusion-io will indemnify you against: (a) all damages, costs, and attorneys' fees finally awarded against you in any proceeding under Section 8.1, (b) all out-of-pocket costs (including reasonable attorneys' fees) reasonably incurred by you in connection with the defense of such proceeding (other than attorneys' fees and costs incurred without Fusion-io's consent after Fusion-io has accepted defense of such claim); and (c) if any proceeding arising under Section 8.1 is settled, all amounts to any third party agreed to by Fusion-io in settlement of any such claims.

8.3 Mitigation of Infringement Action. If your use of the Software is, or in Fusion-io's reasonable opinion is likely to become, enjoined or materially diminished as a result of a proceeding arising under Section 8.1, then Fusion-io will either: (a) procure you the continuing right to use the Software; (b) replace or modify the Software in a functionally equivalent manner so that it no longer infringes; or if, despite its commercially reasonable efforts, Fusion-io is unable to do either (a) or (b), Fusion-io will (c) terminate the licenses with respect to the Software subject to the infringement claim and refund to you an amount equal to the depreciated license fees paid by you (calculated on a straight line basis over a three-year life).

8.4 Exclusions. Fusion-io will have no obligation under this Section 8 for any infringement to the extent that it arises out of or is based upon: (a) the combination, operation, or use of the Software with third party software or hardware not furnished by Fusion-io or not specified in the Documentation for use with the Software. If such infringement would have been avoided but for such combination, operation, or use; (b) use of the Software outside of the scope of the license granted to you; (d) your failure to use the latest Release of the Software or to comply with instructions provided by Fusion-io, if the alleged infringement would not have occurred but for such failure; (e) any modification of the Software not made by Fusion-io where such infringement would not have occurred absent such modification; or (f) Unauthorized Use of the Software. You will reimburse Fusion-io for any costs or damages that result from these actions.

8.5 Exclusive Remedy. This Section 8 states Fusion-io's sole and exclusive liability, and your sole and exclusive remedy, for the actual or alleged infringement of any third party intellectual property right by the Software.

9. LICENSEE INDEMNIFICATION

9.1 Defense. You will defend Fusion-io from any actual or threatened third party claim arising out of or based upon the your or a third party's use of the Product or your breach of any of the provisions of this Agreement if: (a) Fusion-io gives you prompt written notice of the claim; (b) you have full and complete control over the defense and settlement of the claim; (c) Fusion-io provides assistance in connection with the defense and settlement of the claim as you may reasonably request; and (d) Fusion-io complies with any settlement or court order made in connection with the claim.

9.2 Indemnification. You will indemnify Fusion-io against: (a) all damages, costs, and attorneys' fees finally awarded against Fusion-io in any proceeding under Section 9.1; (b) all out-of-pocket costs (including reasonable attorneys' fees) reasonably incurred by Fusion-io in connection with the defense of such proceeding (other than attorneys' fees and costs incurred without your consent after you have accepted defense of such claim); and (c) if any proceeding arising under Section 9.1 is settled, you will pay any amounts to any third party agreed to by you in settlement of any such claims.

9.3 Exclusions. You will have no obligation under this Section 9 to the extent that Fusion-io is obligated under Section 8.1 to defend you against such third party claim. Fusion-io will reimburse you for any costs or damages that result from any such actions.

10. LIMITATIONS OF LIABILITY

10.1 Disclaimer of Consequential Damages. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, FUSION-IO WILL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO YOU FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, OR EXEMPLARY DAMAGES ARISING OUT OF OR RELATED TO THE TRANSACTION CONTEMPLATED UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO LOST PROFITS OR LOSS OF BUSINESS, EVEN IF FUSION-IO IS APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING.

10.2 Cap on Liability. UNDER NO CIRCUMSTANCES WILL FUSION-IO'S TOTAL LIABILITY OF ALL KINDS ARISING OUT OF OR RELATED TO THIS AGREEMENT (INCLUDING BUT NOT LIMITED TO WARRANTY CLAIMS), REGARDLESS OF THE FORUM AND REGARDLESS OF WHETHER ANY ACTION OR CLAIM IS BASED ON CONTRACT, TORT, OR OTHERWISE, EXCEED THE TOTAL AMOUNT PAID BY YOU TO FUSION-IO UNDER THIS AGREEMENT (DETERMINED AS OF THE DATE OF ANY FINAL JUDGMENT IN AN ACTION).

10.3 Independent Allocations of Risk EACH PROVISION OF THIS AGREEMENT THAT PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES, OR EXCLUSION OF DAMAGES IS TO ALLOCATE THE RISKS OF THIS AGREEMENT BETWEEN THE PARTIES. THIS ALLOCATION IS REFLECTED IN THE PRICING OFFERED BY FUSION-IO TO YOU AND IS AN ESSENTIAL ELEMENT OF THE BASIS OF THE BARGAIN BETWEEN THE PARTIES. EACH OF THESE PROVISIONS IS SEVERABLE AND INDEPENDENT OF ALL OTHER PROVISIONS OF THIS AGREEMENT. THE LIMITATIONS IN THIS SECTION 10 WILL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY IN THIS AGREEMENT.

II. GENERAL

11.1 Notices. Any notice required or permitted to be given in accordance with this Agreement will be effective if it is in writing and sent by certified or registered mail, or insured courier, return receipt requested, to the appropriate party at the address set forth in your quote or order form and with the appropriate postage affixed. Either party may change its address for receipt of notice by notice to the other party in accordance with this Section. Notices are deemed given two business days following the date of mailing or one business day following delivery to a courier.

11.2 Governing Law. This Agreement will be interpreted, construed, and enforced in all respects in accordance with the local laws of the State of Utah, U.S.A without reference to its choice of law rules and not including the provisions of the 1980 U.N. Convention on Contracts for the International Sale of Goods. Each party hereby irrevocably consents to the exclusive jurisdiction and venue of the federal, state, and local courts in Salt Lake County, Utah, in connection with any action arising out of or in connection with this Agreement.

11.3 Consent to Use of Data. Fusion-io may collect technical information relating to your use of the Product and Fusion-io products. To the extent you select the applicable option when installing the Product, you grant Fusion-io and its contractors a perpetual, irrevocable right to use and disclose non-identifiable information relating to your use of the Product, as long as any disclosed information does not include a key or other mechanism that would enable the information to be re-identified.

11.4 Assignability. You may not assign your rights, duties, or obligations under this Agreement without Fusion-io's prior written consent, which consent will not be unreasonably withheld. If consent is given, this Agreement will bind your successors and assigns. Any attempt by you to transfer its rights, duties, or obligations under this Agreement except as expressly provided in this Agreement is void. Fusion-io may freely assign its rights, duties, or obligations under this Agreement without your prior written consent, including by operation of law or in connection with a merger, acquisition, reorganization, or sale of all or substantially all of its assets.

11.5 Commencing Legal Action. An action for breach of this Agreement or any other action otherwise arising out of this Agreement must be commenced within one year from the date the right, claim, demand, or cause of action first occurs or be barred forever.

11.6 Waiver. The waiver by either party of any breach of any provision of this Agreement does not waive any other breach. The failure of any party to insist on strict performance of any covenant or obligation in accordance with this Agreement will not be a waiver of such party's right to demand strict compliance in the future, nor will the same be construed as a novation of this Agreement.

11.7 Severability. If a court of competent jurisdiction holds any provision of this Agreement to be illegal, unenforceable, or invalid, the provision will be enforced to the maximum extent permissible and the remaining portions of this Agreement will remain in full force and effect. If any limitation or restriction on the grant of any license to you under this Agreement is found to be illegal, unenforceable, or invalid, the license will immediately terminate.

11.8 Interpretation. The parties have had an equal opportunity to ~~participate in~~ the drafting of this Agreement and the attached exhibits, if any. No ambiguity will be construed against any party based upon a claim that that party drafted ~~the ambiguous language~~. ~~The headings appearing at the beginning of several sections~~ contained in this Agreement have been inserted for identification and reference purposes only and must not be used to construe or interpret this Agreement. Whenever required by context, a singular number will include the plural, the plural number will include the singular, and the gender of any pronoun will include all genders.

11.9 Entire Agreement. This Agreement contains the complete ~~agreement between the parties~~ with respect to the subject matter hereof, and supersedes all prior or contemporaneous communications, agreements, ~~and, and understandings relating to the Product, whether oral or written.~~ Any ~~varying~~ or additional terms ~~contained in~~ any purchase order or other written notification or document issued by you in relation to the Product licensed under this Agreement will be of no effect.

Please direct all questions concerning this Agreement to: Fusion-io, Inc., 2855 E. Cottonwood Parkway, Suite 100, Salt Lake City, UT 84121; Attention: Legal Department.



Fusion-io, Inc. ("Fusion-io") Limited Warranty

COVERED PRODUCTS: The ioDrive Family of Products

Fusion-io warrants that the Fusion-io products listed above ("Product") will be free from material defects in manufacture when delivered to you and will substantially conform to the Fusion-io published specifications under normal use, beginning on your date of purchase and continuing for a period of five years ("Warranty Period"), subject to the conditions set forth in this Limited Warranty ("warranty"). For purposes of this warranty, "normal use" is described in the product documentation for each Product. This warranty is provided to the original end user that purchases the Product from Fusion-io or an authorized reseller, and is not transferable. Coverage under this warranty requires proof of purchase. The Product must be used in a device that has a compliant interface; use with any other device voids this warranty. Fusion-io is not responsible for any failure or defect caused by any third party product or component, whether authorized or not. This warranty does not apply to any software provided with the Product. This warranty does not cover any Product that Fusion-io determines was (a) damaged as a result of improper installation, misuse, unauthorized repair, modification or accident, (b) was not used in accordance with the Product instructions, or (c) was used in an unsuitable physical or operating environment.

If a Product is found to be defective and you notify Fusion-io of such defect during the first 30 days of the Warranty Period, Fusion-io will, at your discretion, fully refund or replace the Product with a new Product of equal or greater functionality as the returned Product. If a Product is found to be defective and you notify Fusion-io of such defect during the Warranty Period (but after the first 30 days of the Warranty Period), Fusion-io ~~will~~will at its discretion, repair or replace the Product with a new or refurbished Product of equal or greater functionality as the returned Product, or refund a pro-rated portion of your purchase price based on a five-year straight-line depreciation, less any rebates you may have received. The warranty period on any repaired or replaced Product will be the portion of the Warranty Period remaining on your original Product. *To obtain warranty service, or to inquire about an enhanced service and support contract, you may contact Fusion-io at 877-816-5740 or send an email to: support@fusionio.com during the Warranty Period. Before returning a Product, you must obtain a Return Merchandise Authorization number from Fusion-io. All returns of the Product must use secure packaging and be sent freight prepaid, as instructed by Fusion-io.*

Fusion-io does not warrant, and is not responsible for, any lost or damaged data contained in any Product (including in any returned Product), regardless of the cause of the loss or damage. The Product is not warranted to operate in an error-free or uninterrupted manner or without failure. The Product must not be used in life support systems or other applications where failure could threaten injury or life, and any such use voids this warranty. The Product uses a silicon technology which has a finite life expectancy called NAND Flash. While designed to outlast the useful life of the technologies it replaces under normal use, NAND Flash components used in your Fusion-io Product wear-out with use.

THIS WARRANTY SETS FORTH FUSION-IO'S ENTIRE LIABILITY AND YOUR EXCLUSIVE REMEDY FOR ANY BREACH OF THIS WARRANTY. FUSION-IO DISCLAIMS ALL OTHER EXPRESS AND IMPLIED WARRANTIES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT. IF FUSION-IO CANNOT LAWFULLY DISCLAIM OR EXCLUDE IMPLIED WARRANTIES UNDER APPLICABLE LAW, THEN TO THE MAXIMUM EXTENT POSSIBLE, SUCH IMPLIED WARRANTIES ARE LIMITED TO THE DURATION OF THE EXPRESS WARRANTY. IN NO EVENT IS FUSION-IO, ITS SUPPLIERS OR ANY AFFILIATED OR SUBSIDIARY COMPANY LIABLE UNDER ANY CIRCUMSTANCES FOR ANY INDIRECT, CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, ANY FINANCIAL LOSS OR ANY LOST DATA, EVEN IF FUSION-IO HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS, AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY BY JURISDICTION. SOME JURISDICTIONS DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, OR DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU. IN NO EVENT WILL FUSION-IO'S TOTAL LIABILITY EXCEED THE AMOUNT PAID BY YOU FOR THE PRODUCT.