

RACKTOP HARDWARE PURCHASE AND SOFTWARE LICENSE TERMS AND CONDITIONS

This RackTop Hardware Purchase and Software License Terms and Conditions ("Terms and Conditions") is entered into pursuant to the order form and/or invoice which references these Terms and Conditions ("Order"), and together with such Order (the "Agreement"), forms a binding legal contract between you (the legal entity identified on the Order) ("you" or "Customer") and RackTop Systems, Inc. ("RackTop"). If you do not agree to the terms of this Agreement, RackTop is not willing to sell the RackTop Hardware or license any right to use or access the RackTop Software, or any portion thereof, to you. In such event, you may not install, access, or use the RackTop Hardware or RackTop Software. Notwithstanding anything to the contrary in this Agreement, your first use of the RackTop Software, as part of the Authorized Hardware or the execution of the Order (whichever comes first), shall be deemed your express consent to this Agreement.

1. DEFINITIONS

- 1.1 "Authorized Hardware" means the third-party server and/or Disk Shelf that is authorized by RackTop.
- 1.2 "Authorized Server" means the application server(s) for which Customer is authorized to install perpetually licensed RackTop Software.
- 1.3 "Base Storage Operating System" means the computer hardware and software (including, without limitation, the Hardware, the RackTop Software and other software applications, software interfaces, operating system and databases), data storage and all other resources, features, and functionality (including, without limitation, telecommunications equipment but excluding any Licensed Features), and any other Systems used and/or registered by RackTop, to make the RackTop Software available to, and usable by, Customer, as part of the Hardware, on an Authorized Server.
- 1.4 "Claim" means a claim, suit or other similar proceeding.
- 1.5 "Cluster" means one (1) or more Authorized Servers that share the same set of Disk Shelves.
- 1.6 "Confidential Information" means (a) any confidential, proprietary or trade secret information of the disclosing party ("Discloser") that in tangible form is marked as confidential, secret or with a comparable legend or if disclosed orally or visually is identified as confidential at the time of disclosure; and (b) discussions relating to such information. Discloser shall use reasonable efforts to mark its confidential information in tangible form as confidential; however, tangible information that does not bear such a legend and the discussions relating thereto, will be protected hereunder as Confidential Information if the receiving party ("Recipient") knew or should have reasonably known under the circumstances that the information is confidential. Customer Data is deemed to be Confidential Information.
- 1.7 "Customer Data" means any data, information and other materials generated by the Users' use of the RackTop Software and that is stored by RackTop as part of the Base Storage Operating System.
- 1.8 "Derivative Works" mean any revision, modification, annotation or elaboration, whether in source or object code form, to a work which represents, as a whole, an original work of authorship.
- 1.9 "Disk Shelves" means an authorized disk enclosure that covers and holds disk drives.
- 1.10 "Documentation" means the then-current, generally available, written instructions, user guides, and user manuals for the RackTop Software, if applicable, whether in electronic, paper or other equivalent form, provided by RackTop and in connection with any updates, modifications and improvements to the RackTop Software, regardless of form or media.
- 1.11 "Executable Code" means the fully compiled version of a software program that can be executed by a computer and used by an end user without further compilation.
- 1.12 "Hardware" means the Authorized Hardware or RackTop Hardware, as applicable.
- 1.13 "Indemnified Parties" means the officers, directors, employees and agents of the party seeking indemnification.
- 1.14 "Intellectual Property Rights" means, collectively, all worldwide intellectual property rights in and to any works of authorship, moral rights, copyrights, trademarks, service marks, patents, designs, trade secrets and algorithms.
- 1.15 "Licensed Feature" means the machine-readable, object-code version of RackTop's proprietary software that is an added feature or component of the RackTop Software not included in the Base Storage Operating System and requires a separately executed Order.
- 1.16 "Open Source Licenses" mean the terms of use applicable to Open Source Software.
- 1.17 "Open Source Software" means software released under a license that guarantees a certain specific set of freedoms as to use, copying, modifications and redistribution, including any Derivative Works thereof that are released back to the licensor, project or trustee, but not including any Derivative Works by RackTop that are retained as proprietary.
- 1.18 "Perpetual License" means RackTop Software licensed by RackTop to Customer on a perpetual basis.
- 1.19 "RackTop Hardware" means RackTop-branded hardware including its components, subcomponents and spare parts but excluding any firmware and any Third-Party-Branded parts.
- 1.20 "RackTop Software" means the Brickstor proprietary software, operating system, and any software that is preloaded or otherwise installed onto the Hardware or RackTop Hardware.

- 1.21 "Service Effective Date" means (a) the date upon which Customer accepts this Agreement; and (b) with respect to Support, the date the applicable Support Fees were paid for by Customer, with respect to the Support that was ordered.
- 1.22 "Software Key" means the key provided to Customer by RackTop for each named Authorized Server or Cluster that is used to set up the functionality of the RackTop Software as part of a System in accordance with the terms set forth in Section 3.
- 1.23 "Source Code" means the human-readable version of a software program than can be compiled into Executable Code.
- 1.24 "Software Upgrade" means a new version of the RackTop Software incorporating new features and enhancements.
- 1.25 "Software Update" means a revision to the RackTop Software to provide bug fixes, corrections and minor enhancements.
- 1.26 "Subscription License" means any RackTop Software that is licensed based on a functional capability for a specific period of time.
- 1.27 "Support" means maintenance and technical support services purchased by the Customer from RackTop with respect to the RackTop Software, including Software Updates and Software Upgrades, bug fixes, repairs, modifications, improvements, and enhancements. Support does not include any Licensed Features or support or maintenance relating to the Authorized Hardware or to any beta, early access or trial software.
- 1.28 "Support Fees" means those applicable annual fees for the Support of the RackTop Software.
- 1.29 "System" means the computer hardware and software (including, without limitation, the RackTop Software and other software applications, software interfaces, operating system and databases), used and/or registered by RackTop to make the RackTop Software available to, and usable by, Customer, as part of the Hardware, on an Authorized Server.
- 1.30 "Third-Party Software" means any software, licensed as a standalone product or as a part of another software, that is not owned by RackTop or its subsidiaries.
- 1.31 "Users" means Customer's employees, contractors and agents.

2. HARDWARE.

- 2.1 **PURCHASE OF HARDWARE.** Customer may purchase RackTop Hardware to be used as part of the RackTop Software as set forth on an Order, as well as related documentation, accessories, parts, and upgrades. RackTop Hardware shall be provided to Customer by RackTop only upon the execution by Customer of an Order. Each Order shall set forth the RackTop Hardware being purchased by Customer along with the current price for such Hardware. This Agreement, any fully executed amendments to this Agreement, and any Exhibits to this Agreement shall govern such Order. In no event shall any additional or inconsistent terms provided to RackTop supersede or modify the terms set forth in this Agreement or any Order except by mutual, written agreement by Customer.
- 2.2 **SHIPPING; DELIVERY; TITLE.** Unless otherwise stated on an Order, all RackTop Hardware ordered by Customer will be shipped by RackTOP within a reasonable time after the Order is executed by both parties. Unless otherwise expressly stated on an Order, risk of loss or damage, and title to RackTop Hardware, will pass to Customer and acceptance will occur upon delivery to the "ship to" address or, if special shipping arrangements are agreed to, upon delivery to Customer's carrier or designee.
- 2.3 **HARDWARE WARRANTY.** Warranty provisions for the RackTop Hardware is located at: <https://www.racktopsystems.com/about-us/warranty-and-maintenance/>, as amended, from time to time by RackTop.
- 2.4 **DISCLAIMER.** NOTWITHSTANDING ANYTHING IN THIS AGREEMENT, THE WARRANTIES AND ANY ASSOCIATED REMEDIES FOR THE RACKTOP HARDWARE EXPRESSED OR REFERENCED IN THIS AGREEMENT ARE EXCLUSIVE. NO OTHER WARRANTY, WRITTEN OR ORAL, IS EXPRESSED OR IMPLIED BY RACKTOP OR MAY BE INFERRED FROM A COURSE OF DEALING OR USAGE OF TRADE. TO THE EXTENT ALLOWED BY LOCAL LAW, RACKTOP DISCLAIMS ALL IMPLIED WARRANTIES OR CONDITIONS INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

3. SOFTWARE.

- 3.1 **PERPETUAL LICENSE.** This Section 3.1 will only apply to Perpetual Licenses that Customer elects in the Order. Subject to the terms and conditions of this Agreement, RackTop grants to Customer a non-exclusive, non-transferable, license to use and operate the RackTop Software (other than Open Source Software) in accordance with the terms hereof solely for Customer's internal business purposes in accordance with the Documentation, as integrated and indivisible components of the System. The RackTop Software associated with a Perpetual License will be assigned to a single, specific Authorized Server, Cluster, or Hardware (each a "Device"), identified by a unique serial number for each Device and the Perpetual License will terminate once such Device is no longer in operation. THE PERPETUAL LICENSE DOES NOT INCLUDE ANY RIGHT FOR ANY THIRD PARTIES, INCLUDING BUT NOT LIMITED TO ANY AFFILIATES, CONTRACTORS OR AGENTS OF CUSTOMER, TO RECEIVE, ACCESS OR USE THE SOFTWARE, IN WHOLE OR IN PART. FOR THE AVOIDANCE OF DOUBT, PERPETUAL LICENSES ARE NON-TRANSFERABLE FROM ONE DEVICE TO ANOTHER AND CUSTOMER WILL NOT REASSIGN ANY PERPETUAL LICENSE TO A DIFFERENT DEVICE WITHOUT RACKTOP'S PRIOR WRITTEN CONSENT.
- 3.2 **SUBSCRIPTION LICENSE.** This Section 3.2 will only apply to Subscription Licenses that Customer elects in the Order. Subject to the terms and conditions of this Agreement, RackTop grants to Customer a non-exclusive right, during the term set forth in the Order, solely for Customer's internal business purposes and in accordance with the limitations (if any) set forth in the Order, to access and use the RackTop Software in accordance with the Documentation. For bare metal installations, Customer may transfer Subscription Licenses from one Device to another; provided however, that Customer does not exceed their licensed capacities in doing so, deletes or removes the old

copy if not licensed, and will notify RackTop prior to transferring any Subscription License. For virtual machine installations the Customer may allow the virtual machine to move across Devices or cloud infrastructure for high availability and management within the cluster; provided however, that Customer doesn't exceed their licensed capacities in doing so, and does not create a duplicate running instance of the virtual machine under the same license entitlement. AN ACTIVE SUBSCRIPTION IS REQUIRED IN ORDER TO USE SUBSCRIPTION SOFTWARE OR TO OBTAIN ANY SUPPORT. THIS ACCESS GRANT DOES NOT INCLUDE ANY RIGHT FOR ANY THIRD PARTIES, INCLUDING BUT NOT LIMITED TO ANY AFFILIATES, CONTRACTORS OR AGENTS OF CUSTOMER, TO RECEIVE, ACCESS OR USE THE RACKTOP SOFTWARE, IN WHOLE OR IN PART AND CUSTOMER WILL USE COMMERCIALY REASONABLE EFFORTS TO PREVENT UNAUTHORIZED ACCESS TO, OR USE OF, THE RACKTOP SOFTWARE, AND NOTIFY RACKTOP PROMPTLY OF ANY SUCH UNAUTHORIZED USE KNOWN TO CUSTOMER.

- 3.3 **OPEN SOURCE SOFTWARE LICENSES.** The Open Source Software included within the RackTop Software is subject to the following Open Source Licenses as applicable to the particular software. Unless Derivative Works of Open Source Software are contributed back to the Open Source Software licensor, project or trustee, all right, title and interest in and to Derivative Works are hereby retained by RackTop and are subject to the Perpetual License and/or Subscription License. **Any conflict or inconsistency between the terms of any Open Source License and this Agreement, including those terms relating to Disclaimer of Warranty, Limitation of Liability and/or Indemnification, shall be governed by the applicable Open Source License but solely as to such Open Source Software:**

References are to [SPDX \(www.spdx.org\)](http://www.spdx.org) License List

(i)	CDDL-1.0	http://spdx.org/licenses/CDDL-1.0#licenseText
(ii)	Apache-2.0	http://spdx.org/licenses/Apache-2.0#licenseText
(iii)	MIT	http://spdx.org/licenses/MIT#licenseText
(iv)	BSD-2-Clause	http://spdx.org/licenses/BSD-2-Clause#licenseText
(v)	AGPL-3.0	http://spdx.org/licenses/AGPL-3.0

- 3.4 **BETA FEATURES.** From time to time, RackTop may offer "beta" features or tools with which its users may experiment. Such features or tools are offered solely for experimental purposes and without any warranty of any kind, and may be modified or discontinued at RackTop's sole discretion. The provisions of this section apply with full force to such features or tools.

- 3.5 **TRIAL AND DEMO LICENSES.** RackTop may, in its sole discretion, offer limited license to the RackTop Software for trial or demonstration basis only ("Trial License"), in which case, Customer must select the Trial License option in the Order. The term of any Trial License will be as set forth in the Order ("Trial License Term"). At the end of the Trial License Term, the Trial License will expire and Customer shall not further use the RackTop Software unless and until the parties enter into a new Order.

4. DELIVERY AND SUPPORT

- 4.1 **DELIVERY.** Following acceptance of this Agreement, on or before the Service Effective Date, and periodically thereafter, subject to RackTop's receipt of applicable Fees, RackTop will provide Customer with the Software Key(s) necessary to download and use the RackTop Software as part of the Base Storage Operating System(s), as permitted in this Agreement. RackTop will provide new Software Keys for any additional capacity licenses purchased by Customer.

4.2 SUPPORT SERVICES.

- (a) **Support.** In consideration of the Support Fees, RackTop will provide Support for the RackTop Software as described herein. Any Support performed by RackTop which is not specifically included in this section shall be chargeable at RackTop's then-current rates plus travel, telephone and other reasonable expenses provided Customer has paid its annual Support Fees.
- (b) **Accessibility.** Customer agrees and acknowledges that from time to time the System may be inaccessible or inoperable for any reason, including, without limitation: (i) equipment malfunctions; (ii) periodic maintenance procedures or repairs which the RackTop may undertake from time to time; and/or (iii) causes beyond the control of the RackTop or which are not reasonably foreseeable by the RackTop.
- (c) **Support Term.** For Perpetual Licenses the initial term of Support shall be for one (1) year and shall commence upon the Service Effective Date. Thereafter, Support shall continue to be provided on an annual basis unless Customer elects not to renew Support prior to the expiration of the then current term of Support. Termination of Support shall not act as a termination of a Perpetual License. For Subscription Licenses an active subscription is required to obtain Support. Customer understands that no refund, pro-rated or otherwise will be given for termination of prepaid Support. If Customer elects to obtain Support after Customer's election to discontinue Support hereunder, Customer must pay the Support fees for all years missed plus a certification fee to receive the applicable Software Updates and Software Upgrades, and restart Support. RackTop may, in its sole discretion, elect to cease supporting the RackTop Software upon three (3) months' notice to Customer and if RackTop decides to cease such support of the RackTop Software it will refund any prepaid but unused fees on a prorated basis. Support is included with Subscription Licenses and automatically ends on the termination or expiration date of such Subscription License. Termination of a Subscription License terminates the license granted in Section 3 above along with any related Support.
- (d) **Assistance.** Customer shall promptly advise RackTop of any error or defect with the RackTop Software covered under Support and shall provide reasonable assistance and cooperation to allow RackTop to define and resolve such error or defect. This includes providing (i) a detailed problem description; (ii) reasonable efforts to reproduce the problem; and (iii) reasonable access to authorized customer support contacts.

- (e) **Software Errors.** RackTop shall use reasonable efforts to provide corrections to RackTop Software errors (“Software Error Correction”) in the RackTop Software in the form of patches, fixes, workarounds, Software Updates, Software Upgrades or other forms within a commercially reasonable time depending on the severity of the error as determined by RackTop, and provided Customer is entitled to Support. Customer agrees not to attempt to correct errors in the RackTop Software while this Agreement is in effect, except under the direction of RackTop.
- (f) **Software Updates and Upgrades.** When and if available, RackTop shall make available Software Updates and/or Software Upgrades to the RackTop Software which are commercially released during the term of any Support period for no additional license fee(s); however any installation/training or other services provided by RackTop will be subject to additional charges. Licensed Features are not included under this provision unless Customer has paid applicable Fees for such additional Licensed Features. RackTop shall provide support on the current release, and immediately prior Software Upgrades (“Supported Versions”). RackTop shall not be obligated to provide Support for versions that are not Supported Versions or for problems or errors caused by or related to customized RackTop Software, or the addition of, or integration to, incompatible equipment/software; provided, however, that RackTop may, at its option, provide support therefor on a chargeable basis. Customer acknowledges that new Software Updates and Software Upgrades are subject to the terms and conditions of this Agreement. In the event of any termination of Support, Customer shall not be entitled to any further Software Updates or Software Upgrades until Customer reinstates Support and pays any applicable reinstatement fee. Nothing in this Agreement obligates RackTop to develop or create Software Updates or Software Upgrades and/or to support, maintain, upgrade, or enhance the RackTop Software or Documentation or to make any modifications or new releases thereto (except with respect to Support for the Supported Versions as described herein). Notwithstanding the foregoing, if RackTop Software is defective or fails to meet its specifications when downloaded or delivered to Customer, or should any DVD or CD on which such RackTop Software is stored be corrupted or defective upon delivery, RackTop will promptly replace such defective RackTop Software or DVD/CD without charge as RackTop’s sole obligation and Customer’s exclusive remedy for any such defects or deficiencies. RackTop may replace any defective proprietary RackTop Software with the then-current version, in its discretion, if the defective version of proprietary RackTop Software should be a prior version. For purposes of clarity, Support does not include any support or maintenance for Authorized Hardware, or any errors, defects, or issues in connection with the Authorized Hardware, and RackTop will have no responsibility to replace or repair any such Authorized Hardware. Support for RackTop Hardware will be provided pursuant to Section 2.3.

5. FEES AND PAYMENT

- 5.1 **FEES.** Customer’s license to use the RackTop Software is limited to the capacity purchased. Capacity will be allocated based on raw storage capacity per System or Cluster. Customer shall pay to RackTop the applicable license and support fees ordered and/or actually used by Customer (collectively, “Fees”). Customer is responsible for purchasing additional capacity licenses if Customer’s actual use exceeds the raw storage capacity purchased in order to stay in compliance with the terms of this Agreement. Customer will pay the then-current rate for any additional license capacity. Except as specifically set forth in this Agreement, all Fees are non-refundable.
- 5.2 **PAYMENT.** Payments due under this Agreement shall be made in U.S. currency upon receipt of invoice. If Customer fails to timely pay any amount when due, Customer shall pay, in addition, interest at the rate of one and one half percent (1 1/2%) per month, but not to exceed the maximum allowed by law, on such delinquent amount.
- 5.3 **TAXES.** All Fees are exclusive of any sales, value-added, foreign withholding or other government taxes, duties, fees, excises, or tariffs imposed on the production, storage, licensing, sale, transportation, import, export or use of the RackTop Software or Base Storage Operating System (collectively, “Taxes”). Customer is responsible for and, if applicable, will reimburse RackTop within thirty (30) days of request for all such Taxes and any related penalties, except for taxes imposed on RackTop’s net income.

6. OWNERSHIP AND RESTRICTIONS

- 6.1 **TITLE.** Customer acknowledges and agrees that, as between RackTop and Customer, title to and ownership of the Base Storage Operating System (excluding any Authorized Hardware purchased by Customer), and all portions thereof, including all corrections, enhancements, or other modifications to the RackTop Software, and all Intellectual Property Rights therein, are and will at all times be deemed the sole and exclusive property of RackTop or its suppliers. All rights not expressly granted to Customer in this Agreement are reserved by RackTop.
- 6.2 **PROPRIETARY RIGHTS NOTICES.** Customer shall not delete, alter, cover, or distort any copyright, trademark, or other proprietary rights notice placed by RackTop on or in the RackTop Software and shall ensure that all such notices are reproduced on all copies thereof.
- 6.3 **RESTRICTIONS ON USE.** Customer acknowledges that the RackTop Software and its structure, organization and Source Code constitute valuable trade secrets of RackTop or its suppliers. Accordingly, Customer will not, directly or indirectly, do any of the following: (a) modify, adapt, alter, translate, or create derivative works from the RackTop Software or use the RackTop Software for application development purposes; (b) merge the RackTop Software with other software not authorized by RackTop; (c) sublicense, lease, rent, loan, distribute, sell or otherwise transfer or make available the RackTop Software or Base Storage Operating System to any third party except as specifically permitted by this Agreement; (d) reverse engineer, decompile, disassemble, or otherwise attempt to derive the source code for the Base Storage Operating System, or any part thereof, including the RackTop Software or evaluate the Base Storage Operating System, including the RackTop Software, in order to develop a competitive product; (e) otherwise use the Base Storage Operating System, including RackTop Software except as expressly allowed under this Agreement; (f) violate any local, state, federal or foreign law, treaty, regulation or convention applicable to Customer in connection with its Users’ use of the Base Storage Operating System, including the RackTop Software; (g) willfully tamper with the security of the Base Storage Operating System or tamper with other customer accounts of RackTop; (h) attempt to access data on the Base Storage Operating System not belonging to or intended for Customer; (i) attempt to probe, scan or test the Base Storage Operating System or to breach the security or authentication measures without proper authorization; (j) willfully render any part of the Base Storage Operating System unusable; (k) publish or disclose to third parties any evaluation of the RackTop Software without RackTop’s prior written consent; (l) use of the RackTop Software on an unlicensed or unauthorized server or system; (m) install Customer’s own or any Third-Party Software on the System that has not been released, approved or distributed by the RackTop; (n)

use the RackTop Software or the System, in whole or in part, (i) in any life sustaining, nuclear or other application where a failure could result in personal injury, loss of life or catastrophic property damage, or (ii) on a computer or in a network environment of a type, category or specification for which the RackTop Software or the System is not compatible as determined by RackTop in its sole discretion; (o) remove, deface, or obscure any copyright notices, trademarks, legends and/or logos in the RackTop Software or Documentation; (p) publish or otherwise disclose information relating to the performance of the RackTop Software subject to the Perpetual License or Subscription License (as applicable) or the System to any third party unless and to the extent required by law or regulation or as agreed by RackTop in writing; or (q) use the RackTop Software in breach or excess of any limitations (e.g., the types, quantities, user limits, time limits, capacity limits) and other usage attributes related to the associated RackTop Software licenses or other limitations prescribed by RackTop in these Terms or the associated Order. In the event of a breach, or RackTop's reasonable suspicion of a breach, of this Section 6.3 by Customer or its authorized Users, RackTop shall have the right to suspend Customer and its Users' access and use of the RackTop Software and/or terminate this Agreement.

6.4 CUSTOMER'S DATA AND SECURITY. Customer shall have and retain sole right, title and ownership of any and all of Customer Data and information used with or inserted into the System by Customer or its Users. Customer is solely responsible for the security, confidentiality and integrity of all Customer Data and messages and the content that Customer receives, transmits through or stores on the System. Customer is solely responsible for any authorized or unauthorized access to Customer's account by any person. Customer is personally responsible for all applications running on and with traffic originating from the instances Customer initiates within the System. Customer must protect Customer's Software Keys and security credentials as any and all actions taken using Customer's credentials shall be deemed to be actions taken by Customer. Customer is responsible for maintaining licenses and adhering to the license terms of any software that Customer operates.

7. CONFIDENTIALITY AND PRIVACY

7.1 OBLIGATIONS. Each party acknowledges that, in the course of the performance of this Agreement, it may obtain the Confidential Information of the other party. Confidential Information disclosed pursuant to this Agreement will be subject to the terms of this Agreement during the Term and for two (2) years following termination or expiration of this Agreement, except for Customer Data, which will be subject to the terms of this Agreement indefinitely. Recipient shall take reasonable steps to prevent the unauthorized disclosure of and maintain the confidentiality of the Confidential Information of Discloser. Recipient shall not disclose the Confidential Information of Discloser to any employees or third parties except to employees (including independent contractors), subsidiaries and consultants of Recipient who have at least an equivalent confidentiality obligation to Recipient and who have a need to know such Confidential Information on condition that Recipient shall be liable for any breach by such individual or entity. However, the parties acknowledge and agree that, notwithstanding such measures taken to prevent unauthorized disclosure, use of or connection to the Internet provides the opportunity for unauthorized third parties to circumvent such precautions and illegally gain access to Confidential Information. Accordingly, Recipient cannot and does not (and nothing in this Section 7.1 or this Agreement is intended to) guarantee the privacy, security or authenticity of any information so transmitted over or stored in any system connected to the Internet. The Confidential Information disclosed by Discloser may only be used by Recipient as necessary to perform its obligations or exercise its rights under this Agreement.

7.2 EXCEPTIONS. The obligations set forth herein will not apply to any information that: (a) is or becomes generally available to the public or within the industry to which the information relates other than as a result of a breach of this Agreement; (b) was known to Recipient prior to receipt from Discloser, provided such prior knowledge can be substantiated by documentary evidence antedating the disclosure by Discloser; (c) is disclosed to Recipient by a third party (other than employees or agents of either party) which in making such information available to Recipient, is not in violation of any obligation of confidentiality to Discloser; or (d) is independently developed by Recipient, provided such independent development can be substantiated by documentary evidence. A disclosure of Confidential Information (i) in response to a valid order by a court or other governmental body, or (ii) otherwise required by law, will not be considered to be a breach of this Agreement or a waiver of confidentiality for other purposes; provided, however, that Recipient will provide prompt written notice thereof to Discloser to enable Discloser to seek a protective order or otherwise prevent such disclosure.

7.3 PRIVACY. It is the policy of RackTop to respect its customers' privacy. Without limiting the foregoing, Customer hereby consents to RackTop tracking of and collection of information and telemetry data regarding Customer's use of the System which shall constitute RackTop proprietary information. However, RackTop will not monitor, edit or disclose any personal information about Customer or Customer's account, including its contents, without Customer's prior consent unless RackTop has a good faith belief that such action is necessary to: (i) comply with legal process or other legal requirements of any governmental authority; (ii) protect and defend the rights or property of RackTop; (iii) enforce this Agreement; or (iv) protect the interests of users of the System other than Customer or any other person. Customer's IP address and certain location data is transmitted and recorded with each message Customer sends from the System and such data may be retained and used by the RackTop for lawful purposes.

8. LIMITED WARRANTIES AND DISCLAIMERS

8.1 RACKTOP SOFTWARE. RackTop warrants to Customer (and not any third party) that for a period of thirty (30) days following the date of delivery (the "Warranty Period"), the RackTop Software, under normal use and if installed properly on the Hardware, shall perform substantially in accordance with the Documentation. For any breach of this warranty during the Warranty Period and to the extent not otherwise covered by Support purchased by the Customer, Customer's sole and exclusive remedy and RackTop's sole and exclusive liability, will be for RackTop to use reasonable efforts to correct promptly any documents, reproducible errors and defects to make the RackTop Software operate as warranted. RACKTOP DOES NOT MAKE ANY REPRESENTATION OR WARRANTY WITH RESPECT TO ANY AUTHORIZED HARDWARE OR THIRD-PARTY SOFTWARE, ALTHOUGH THE THIRD PARTY SUPPLIERS OR MANUFACTURERS OF SUCH AUTHORIZED HARDWARE OR THIRD-PARTY SOFTWARE MAY PROVIDE THEIR OWN WARRANTIES DIRECTLY TO CUSTOMER. RACKTOP IS NOT RESPONSIBLE, AND SHALL NOT HAVE ANY OBLIGATION OR LIABILITY, FOR AUTHORIZED HARDWARE OR THIRD-PARTY SOFTWARE.

8.2 SUPPORT START AND EXPIRATION. The support period for software purchased without RackTop Hardware shall begin on the day the software entitlement was delivered to the Customer. For RackTop Hardware and any RackTop Software delivered in conjunction with the

hardware the support agreement will start on the 15th of the month for any system delivered to the Customer on the 1st through the 14th of that month and on the first day of the next month for any system delivered after the 14th.

- 8.3 **DISCLAIMER.** EXCEPT AS EXPRESSLY WARRANTED IN THIS SECTION 8, THE BASE STORAGE OPERATING SYSTEM, INCLUDING ALL COMPONENTS THEREOF, ARE PROVIDED "**AS IS.**" WITHOUT ANY WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, NON-INFRINGEMENT OR NON-MISAPPROPRIATION OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY, CUSTOM, TRADE, QUIET ENJOYMENT, ACCURACY OF INFORMATIONAL CONTENT OR RESULTS, DATA LOSS, OR SYSTEM INTEGRATION, OR ANY WARRANTIES OR CONDITIONS ARISING UNDER ANY OTHER LEGAL REQUIREMENT. RACKTOP MAKES NO WARRANTY THAT THE RACKTOP SOFTWARE WILL RUN PROPERLY ON ALL HARDWARE, THAT THE RACKTOP SOFTWARE, OTHER PRODUCTS WILL MEET THE NEEDS OR REQUIREMENTS OF CUSTOMER OR ITS USERS OR WILL OPERATE IN THE COMBINATIONS THAT MAY BE SELECTED FOR USE BY CUSTOMER OR ITS USERS, THAT THE RACKTOP SOFTWARE OR SUBSCRIPTION SERVICES WILL BE UNINTERRUPTED OR ERROR FREE, OR THAT ALL ERRORS WILL BE CORRECTED.

FROM TIME TO TIME, RACKTOP MAY OFFER BETA, EARLY ACCESS OR TRIAL SOFTWARE WITH WHICH USERS MAY EXPERIMENT. SUCH SOFTWARE IS OFFERED SOLELY FOR EXPERIMENTAL PURPOSES AND WITHOUT ANY WARRANTY OF ANY KIND, AND MAY BE MODIFIED OR DISCONTINUED AT RACKTOP'S SOLE DISCRETION. THE PROVISIONS OF THIS SECTION APPLY WITH FULL FORCE TO SUCH BETA, EARLY ACCESS OR TRIAL SOFTWARE.

9. INDEMNIFICATION

- 9.1 **BY RACKTOP.** For RackTop Software, subject to Sections 9.3 and 9.4 below, RackTop shall defend any Claim brought against Customer or its Indemnified Parties by any third party alleging that the RackTop Software (excluding Third-Party Software and Authorized Hardware) infringes, misappropriates or violates that party's patent rights, trademark rights, copyright rights or rights under trade secret laws, each as recognized in the United States, and shall pay all damages and costs awarded against Customer and its Indemnified Parties, by judgment or in settlement, in connection with such a Claim as well as any costs incurred by Customer in response to a request by RackTop to assist with the defense of the Claim. RackTop will have no responsibility or liability for such Claims to the extent such Claim is based upon: (a) any use of any part of the RackTop Software after notification to discontinue use; (b) modifications of the RackTop Software not made or authorized by RackTop; (c) use of the RackTop Software in combination with any products, services, or systems not supplied, authorized, or registered by RackTop; (d) Third-Party Software; (e) Authorized Hardware; or (f) any use in violation of this Agreement or misuse or unauthorized use of the RackTop Software.

- 9.2 **BY CUSTOMER.** Subject to Section 9.3 below, Customer shall defend any Claim brought against RackTop or its Indemnified Parties by any third party arising from or related to Customer's: (a) violations of law or regulations in connection with the use of the Base Storage Operating System, or any part thereof; (b) Customer Data; or (c) business operations. Customer shall pay all damages and costs awarded against RackTop and its Indemnified Parties, by judgment or in settlement, in connection with such a Claim as well as any costs incurred by RackTop in response to a request by Customer to assist with the defense of the Claim.

- 9.3 **CONDITIONS.** Each party's indemnification obligations are contingent upon the indemnifying party receiving: (a) prompt written notice of the Claim; (b) all reasonably necessary assistance, information and authority to defend the claim and perform its obligations under this Section; and (c) sole control of the defense and settlement of such claim and all associated negotiations. The indemnifying party agrees not to settle any claim, action, suit or proceeding for which it is indemnifying the other in a manner that would impose additional obligations on the other party without first consulting the other and obtaining its consent thereto (which shall not be unreasonably withheld or delayed); however, such consent shall not be required where the settlement results in the full and unconditional release of all claims against and obligations of the indemnified party. An indemnified party may, at its option and expense, participate in the defense or settlement of any Claim, provided that the indemnifying party retains control over the defense or settlement thereof.

- 9.4 **RACKTOP'S OBLIGATION FOR INFRINGEMENT INDEMNITY.** If an infringement claim within the scope of Section 9.1 is made or appears likely to be made, Customer agrees that RackTop may, in RackTop's sole discretion and at its expense: (a) enable Customer to continue to use the affected portions of the RackTop Software; or (b) replace or modify the RackTop Software so that it is non-infringing and substantially equivalent in function to the allegedly infringing RackTop Software. If RackTop determines that none of these alternatives is reasonably available, then RackTop may terminate this Agreement in whole or with respect to the affected portions of the RackTop Software.

- 9.5 **ENTIRE OBLIGATION.** THE INDEMNIFICATION OBLIGATIONS SET FORTH IN THIS SECTION 9 ARE EACH PARTY'S ENTIRE OBLIGATION AND LIABILITY FROM OR RELATED TO THIS AGREEMENT REGARDING THIRD PARTY CLAIMS.

10. LIMITATION OF LIABILITY

- 10.1 **WAIVER OF CONSEQUENTIAL DAMAGES.** EXCEPT FOR A BREACH OF THE CONFIDENTIALITY PROVISIONS UNDER SECTION 7, OR MISAPPROPRIATION BY A PARTY OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS, IN NO EVENT WILL EITHER PARTY OR ITS SUPPLIERS BE LIABLE FOR: (a) THIRD PARTY CLAIMS OR LIABILITIES OTHER THAN THOSE IDENTIFIED IN SECTION 9; OR (b) ANY SPECIAL, INDIRECT, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OR DAMAGE TO DATA, INACCURACY OF DATA, LOSS OF ANTICIPATED REVENUE OR PROFITS, WORK STOPPAGE OR IMPAIRMENT OF OTHER ASSETS OR LOSS OF GOOD WILL, WHETHER OR NOT FORESEEABLE AND WHETHER OR NOT A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF THE ESSENTIAL PURPOSE OF THIS AGREEMENT OR ANY LIMITED REMEDY HEREUNDER.

- 10.2 **CAP ON LIABILITY.** EXCEPT FOR A BREACH OF THE CONFIDENTIALITY PROVISIONS UNDER SECTION 7, IN NO EVENT WILL EITHER PARTY OR ITS SUPPLIERS' TOTAL LIABILITY ARISING OUT OF OR IN CONNECTION WITH THE RACKTOP SOFTWARE,

RACKTOP HARDWARE, BASE STORAGE OPERATING SYSTEM, AND THIS AGREEMENT EXCEED THE ACTUAL AMOUNT OF FEES PAID TO RACKTOP OR ITS AUTHORIZED RESELLER FOR THE RACKTOP SOFTWARE IN THE TWELVE MONTH PERIOD PRIOR TO AN EVENT GIVING RISE TO SUCH LIABILITY.

10.3 **DISCLAIMER.** THE FOREGOING LIMITATIONS APPLY TO ALL CAUSES OF ACTION IN THE AGGREGATE, INCLUDING WITHOUT LIMITATION, BREACH OF CONTRACT, BREACH OF WARRANTY, INDEMNIFICATION, NEGLIGENCE, STRICT LIABILITY, MISREPRESENTATION AND OTHER TORTS, AND STATUTORY CLAIMS. EACH OF THE PARTIES ACKNOWLEDGES THAT IT UNDERSTANDS THE LEGAL AND ECONOMIC RAMIFICATIONS OF THE FOREGOING LIMITATIONS, AND THAT THE FOREGOING LIMITATIONS ALLOCATE THE VARIOUS RISKS BETWEEN THE PARTIES AND FORM AN ESSENTIAL PART OF THE AGREEMENT OF THE PARTIES.

11. TERM AND TERMINATION

11.1 TERM.

- (a) **Perpetual License.** For Perpetual Licenses only, the term of this Agreement will commence upon the Service Effective Date and will continue until terminated in accordance with the provisions of this Agreement (“Perpetual Term”).
- (b) **Subscription License.** For Subscription Licenses only, the term of this Agreement will commence upon the Service Effective Date and will continue until all Orders expire (“Subscription Term”, and collectively with the Perpetual Term, the “Term”). Unless otherwise stated in an Order, Subscription Licenses will automatically renew for additional subsequent one-year terms until either party notifies the other party of its intent not to renew in writing at least thirty (30) days before the end of the then-current term.

11.2 **TERMINATION.** Either party may terminate this Agreement upon written notice: (a) if the other party materially breaches this Agreement and fails to cure such breach within thirty (30) days after receiving written notice from the non-breaching party; (b) if the other party files a petition for bankruptcy, insolvency or reorganization under any bankruptcy law or is adjudicated bankrupt; (c) if a petition in bankruptcy is filed against the other party and such petition is not dismissed within sixty (60) days of the filing date; (d) if the other party becomes insolvent or makes an assignment for the benefit of its creditors pursuant to any bankruptcy or insolvency law; or (e) if a receiver is appointed for the other party or its business. In addition, RackTop may suspend Customer’s access to Customer Data or Support or terminate this Agreement (i) immediately, if Customer fails to pay any portion of the Fees when due within ten (10) days after receiving written notice from RackTop that payment is past due, provided, however, Fees will continue to accrue during any such suspension, (ii) upon ninety (90) days’ prior written notice to Customer if RackTop elects not to continue providing the RackTop Software or Base Storage Operating System; or (iii) if Customer breaches, or RackTop reasonably suspects that Customer has breached Section 6.3. In addition, Customer may terminate this Agreement and Customer’s use of the System at any time, in Customer’s discretion, by providing written notice of Customer’s desire to cancel Customer’s account to the then-current RackTop account manager. Upon Customer’s receipt of a confirmation cancellation email, Customer’s use of the System will be terminated and any and all outstanding charges will be immediately charged to any payment mechanism Customer has provided to RackTop. If such mechanism is no longer operative, RackTop may invoice Customer directly and Customer agree to promptly pay such charges.

11.3 **EFFECT OF TERMINATION.** Upon any termination of this Agreement, (i) Customer retains ownership of the Authorized Hardware and the version of the RackTop Software then contained therein (which remains subject to the restrictions herein); (ii) Customer’s right to access to and use of the System shall terminate; (iii) Customer’s right to Support shall terminate; (iv) Customer shall immediately pay any due but unpaid fees to the RackTop; and (v) Customer shall return any Confidential Information of RackTop (and documents containing same) which Customer does not have the right to retain, deleting all electronic versions thereof on any and all media in Customer’s possession. The expiration or termination of this Agreement does not relieve either party of any obligations that have accrued on or before the effective date of the termination or expiration.

11.4 **SURVIVAL.** The following Sections will survive the termination or expiration of this Agreement: 5 through 11, and any other provisions of this Agreement that by reasonable interpretation are intended by the parties to survive the termination or expiration of this Agreement.

12. GENERAL

12.1 **ENTIRE AGREEMENT.** This Agreement constitutes the entire agreement between the parties and supersedes all previous and contemporaneous agreements, understandings and arrangements with respect to the subject matter hereof, whether oral or written. This Agreement may be amended or supplemented only by a writing that refers explicitly to this Agreement and that is signed by both parties; provided however, that, RackTop reserves the right to amend and supplement this Agreement, in its discretion, solely to the extent necessary to align with any updates to the RackTop Software. The titles and headings herein are for reference purposes only and will not in any manner limit the construction of this Agreement, which will be considered as a whole.

12.2 **WAIVER.** No term or provision hereof will be considered waived by either party, and no breach excused by either party, unless such waiver or consent is in writing signed on behalf of the party against whom the waiver is asserted. No consent by either party to, or waiver of, a breach by either party, whether express or implied, will constitute a consent to, waiver of, or excuse of any other, different, or subsequent breach by either party.

12.3 **SEVERABILITY.** If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree that any invalid provision will be deemed to be restated so as to be enforceable to the maximum extent permissible under law consistent with the original intent and economic terms of the invalid provision.

12.4 **ASSIGNMENT.** Neither party will indirectly or directly transfer or assign any rights under this Agreement, in whole or part, without the prior written consent of the other party. Notwithstanding the foregoing, either party may, without the prior written consent of the other party, assign this Agreement to a subsidiary or affiliated entity as part of a divestiture, corporate reorganization or consolidation or to another

party in connection with a merger, acquisition, or sale of substantially all assets or stock to which this Agreement relates, provided the successor agrees in writing to assume all of the assigning party's obligations hereunder. Such transferee's rights to any access or use of the System shall be subject to the RackTop's consent, in its sole discretion, following a full disclosure of the details of such transaction, without which the transferee's rights to use the System shall forthwith terminate. A "Request for RackTop Software License Transfer" may be made through support on RackTop's web site or by email or telephone directly to the RackTop. Any assignments contrary to this Section 12.4 will be void. Subject to the foregoing, this Agreement will bind and inure to the benefit of the parties and their respective successors and permitted assigns.

- 12.5 **COMPLIANCE WITH LAWS.** Each party shall be responsible for its own compliance with laws, regulations and other legal requirements applicable to the conduct of its business and this Agreement and agrees to comply with all such laws, regulations and other legal requirements.
- 12.6 **U.S. GOVERNMENT END USERS.** The RackTop Software subject to the Perpetual License and/or Subscription License and Documentation each were developed by private financing and constitute "Commercial Items," as that term is defined at 48 C.F.R. §2.101. The RackTop Software consists of "Commercial Computer Software" and "Commercial Computer Software Documentation," as such terms are used in 48 C.F.R. §12.212. Consistent with 48 C.F.R. §12.212 and 48 C.F.R. §227.7202-1 through 227.7202-4, all U.S. Government Customers acquire only those rights in the RackTop Software subject to the Perpetual and/or Subscription License and the Documentation that are specifically provided by this Agreement. Consistent with 48 C.F.R. §12.211, all U.S. Government End Users acquire only technical data and the rights in that data customarily as specifically provided in this Agreement.
- 12.7 **INTERNATIONAL TRADE COMPLIANCE.** The RackTop Software, including any Third-Party Software, are subject to the customs and export control laws and regulations of the United States and any country in which the products are manufactured, received or used. Further, under U.S. law, the Base Storage Operating System may not be sold, leased or otherwise transferred to restricted countries, or used by a restricted end-user or an end-user engaged in activities related to weapons of mass destruction including, without limitation, activities related to designing, developing, producing or using nuclear weapons, materials, or facilities, missiles or supporting missile projects, or chemical or biological weapons.
- 12.8 **FORCE MAJEURE.** Except for Customer's payment obligations, neither party will be liable for any failure or delay in performance under this Agreement which might be due in whole or in part, directly or indirectly, to any contingency, delay, failure, or cause of, any nature beyond the reasonable control of such party, including, without limitation, fire, earthquake, storm, flood, power outage, strike, war, act of terrorism, law, export control regulation, instructions of government authorities or judgment of a court (not arising out of breach by such party of this Agreement). If, however, a party's performance is prevented for thirty (30) days or more, then the other party will be entitled to terminate this Agreement on written notice to the party suffering the force majeure at any time prior to resumption of performance by the party suffering the force majeure.
- 12.9 **MARKETING.** Customer agrees that RackTop may use Customer's name and approved logo to identify Customer as a customer of RackTop on RackTop's websites, and as a part of a general list of RackTop customers for use and reference in RackTop's corporate, promotional and marketing literature.
- 12.10 **AUDIT.** Customer will permit RackTop or its representatives to audit Customer's use of the Systems during regular business hours upon reasonable notice to ensure compliance with the capacity restrictions and other license restrictions under the Agreement.
- 12.11 **GOVERNING LAW AND DISPUTE RESOLUTION.** The formation, existence, interpretation, enforcement and validity of this Agreement shall be governed by the law of the State of Maryland (USA), without regard to principles of conflicts of law. Exclusive jurisdiction and venue for any actions or proceedings arising out of or in connection with this Agreement shall lie in state or federal courts located in the State of Maryland. In any such action in which RackTop prevails, RackTop shall be entitled to recovery of its court costs and attorneys' fee through the date of final judgment from the non-prevailing party or parties. The parties hereby irrevocably consent and submit to the jurisdiction of any State or Federal court located in the state of Maryland and waive trial by jury in any such action or proceeding. The U.N. Convention on the International Sale of Goods is hereby excluded and shall not apply to this Agreement.
- 12.12 **ATTORNEYS' FEES.** In the event any attorney is employed by any party to this Agreement with regard to any legal action, arbitration or other proceeding brought by any party for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, then the party or parties prevailing in such proceeding, whether at trial or upon appeal, will be entitled to recover reasonable attorneys' fees and other costs and expenses incurred, in addition to any other relief to which it may be entitled.
- 12.13 **NOTICES.** All notices, consents and approvals under this Agreement must be delivered in writing by e-mail, by courier, by overnight mail service or by certified or registered mail, (postage prepaid and return receipt requested) to the other party at the address for Customer provided upon registration (or if none is specified, that address to which Customer invoices are sent) and for RackTop, to 8170 Maple Lawn Blvd, Suite 180, Fulton, Maryland 20759, and will be effective upon receipt. Either party may change its address by giving written notice of the new address to the other party in writing.