



BEX Professional Services Proposal

County of Fort Bend



Document Control			
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1 Executive Overview

The objective of this project is to provide County of Fort Bend ("Customer") with qualified Syncsort, Inc. ("Syncsort") labor in order to assist with the upgrade of the BEX Data Protection product as well as implement Advanced Recovery for the Windows hosts. The implementation will take place at the County of Fort Bend headquarters.

The objective of the Professional Services Proposal is to define the assumptions, project preparation, as well as remote and onsite activities associated with this project.

2 Project Approach

2.1 Assumptions

The following assumptions have been considered when creating this proposal:

1. All hardware and software required for this project have been previously purchased by the Customer, and is readily available
 - a. NetApp Storage Systems racked, mounted and accessible via TCP/IP
 - b. NetApp Storage Systems licensed as SnapVault Secondary
 - c. NetApp SnapMirror licenses obtained and applied to applicable Storage Systems
2. The customer will be able to provide Syncsort Professional Service and/or Support Engineers remote access to the BEX Enterprise
3. All on-site work performed by Syncsort personnel will be performed during normal business hours on consecutive business days
4. After the on-site project is complete, it is the responsibility of the Customer to maintain, support, troubleshoot and manage any solution that has been designed, implemented or modified during the course of the project
5. If the Customer has purchased a Syncsort maintenance license agreement, and that license is current (including the payment of appropriate fees), Syncsort will provide support to the Customer in accordance with the Syncsort Maintenance Plan and Policy

2.2 Project Preparation

In order to ensure maximum productivity while on-site, the following steps should be undertaken prior to the on-site visit:

1. Customer will designate a primary Point of Contact
2. Customer will provide a completed "Customer Environment Summary" document, "Pre-Implementation Checklist" and supporting network diagrams for all sites
3. Customer will ensure basic operability of all resources (tape libraries, tape drives, servers, networks, applications, NetApp Storage Systems) used in the solution. Customer is responsible for completion of all items within the Syncsort "Pre-Implementation Checklist" (provided with the Customer Environment Summary document)
4. Customer will make available installation media, product documentation, support contracts and contract information for all hardware, operating systems and applications used in the Customer's environment
5. Customer will ensure the availability of technical personnel required for assistance with troubleshooting or reconfiguring resources used in the backup solution

6. Customer will ensure the availability of technical personnel for assistance with the BEX implementation
7. Customer will ensure that the current BEX environment has had the latest patches applied to all Master Servers, Device Servers and clients prior to the on-site engagement.

2.3 Customer Technical Transition Phase

Prior to the onsite implementation, it is mandatory that the customer participate in the Customer Technical Transition Program. The Program's methodology is designed to ensure a effective rollout of the product, by enabling the Sales Engineer to transition the engagement to the Professional Services Engineer, and in turn to the Support Engineer. This time will not be counted against the purchased billable hours, and will minimize/identify any potential pitfalls with the proposed architecture prior to implementation.

<i>Activities</i>	<i>Length of Time</i>
CTTP	2 hours
Total	2 hours

CTTP

The Syncsort Professional Services Engineer, Lead Support Engineer, Sales Engineer, and the customer will hold a conference call to perform the following tasks:

1. Review the BEX implementation project plan with the Customer In order to address any outstanding concerns with the proposed architecture
2. Discuss and modify task list for onsite implementation activities based upon observations and recommendations arising from "Customer Environment Summary" and "Pre-Implementation Checklist" responses

The Syncsort Professional Services Engineer and/or the CTTP Engineer will also conduct a remote follow up call in order to assess the health of the backup environment and address customer concerns following the on-site implementation.

2.4 On-Site Activities

While at a Customer site, Syncsort personnel will assist the Customer with the following activities for the designated number of days:

<i>Activities</i>	<i>Length of Time</i>
Implementation	5 days
Training (Optional)	2 days
<i>Documentation (Optional)</i>	1 days
Total	5 (8) days

Minor adjustments to the Activities and Length of Time may be agreed upon by the Customer's primary Point of Contact and the Professional Services Engineer while the Professional Services Engineer is on-site.

Implementation

The Syncsort Professional Services Engineer(s) will collaborate with the Customer's designated team on the upgrade and configuration of the BEX software. This will consist of the following activities (as time permits):

Installation (2 days)

1. Meet with the Customer team to review the implementation plan, including data protection strategy discussed during the CTTT transition
2. Upgrade, Patch and Configure the BEX Master Server from BEX 3.0.1 to BEX 3.2.1
3. Install/Upgrade, Patch, and Configure up to 30 BEX Advanced Clients in the environment
4. Configure BEX Advanced Client for SQL databases on any clients that require the API functionality

Post-install Configuration (2 days)

5. Configure NetApp Storage System as the target destination for backup
 - a. Creation and Sizing of Advanced Recover SnapVault destination volumes
 - b. A-SIS, SnapMirror configuration (as necessary)
6. Verify the functionality of the tape library, disk directory (file server), and media configuration for File Level clients and NDMP client backups
7. Define job policy and schedule for Advanced Recovery for SnapVault, File-level and NDMP backup (D2D2T)

Backup and Restore Test / DR (1 day)

8. Perform Advanced Recovery for SnapVault Backups to NetApp storage system
 - a. Perform Advanced Recovery backup and restore of representative hosts
 - b. Perform backup and restore of SQL database servers
 - c. Perform Instant Availability Restore tests from the NetApp storage systems
 - d. Perform Bare Metal Recovery Restore tests from the NetApp storage systems
9. Perform backups and restores of Advanced and Basic clients

Adjustments to the installation and configuration activities may be necessary for specific configuration or other site-specific details.

Training

During implementation, the Syncsort Professional Services Engineer will provide simple knowledge transfer of BEX operation requirements. In addition, formal training can be provided at the Customer facility that will consist of a combination of lecture and hands-on exercises to be performed within the Customer environment. Customer will provide appropriate facilities for training including a projector and network connectivity to production environment. The training will include the following topics as time permits:

1. Creation of BEX Advanced Recovery jobs, including scheduling
2. Installation, configuration, and patching of BEX software

3. Configuration of tape library, tape drives, and media pools
4. Job monitoring and review of backup and restore jobs
5. Catalog maintenance
6. Completion of recovery tasks via various restore paths: BEX UI-based file level recovery, Instant Availability, Instant Virtualization, Bare Metal Restore, Exchange Mailbox Restore, etc.

Adjustments to the training activities may be necessary for specific configuration or other site specific details.

Documentation

A Syncsort Professional Services Engineer can assist in the creation of customized documentation that will outline common administrative procedures and place them within a “cookbook” outline, complete with applicable screenshots. This document can contain procedures specific to the customer’s environment and act as an operations manual for those managing the system.

3 Terms and Conditions

3.1 Confidential Information

This PROPOSAL, all work performed under this PROPOSAL and any documentation or reports provided by Syncsort are considered Confidential Information of Syncsort and may not be released and/or duplicated at any time without the prior written permission of Syncsort.

3.2 No Expressed or Implied Deliverables

All Professional Services are delivered strictly on a Time and Material basis, and have no defined or implied deliverables. Professional Services will be performed on consecutive business days unless otherwise approved in writing by Syncsort. Professional Services and related fees are non-cancelable and non-refundable. Professional Services must be used within twelve months from the date of order. Any unused days will be forfeited. Travel Expenses will be billed as incurred in ADDITION to Professional Service Fees. Travel Expenses are defined as airfare, other transportation, lodging and meals.

3.3 Limitation of Liability

EXCEPT IN REGARD TO ITS GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT, SYNCSORT SHALL NOT BE LIABLE IN CONNECTION WITH THE SERVICES DESCRIBED HEREIN (i) FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL OR OTHER INDIRECT DAMAGES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR (ii) FOR ANY AMOUNT IN EXCESS OF THE TOTAL AMOUNT PAID TO SYNCSORT SPECIFICALLY FOR SUCH SERVICES.

Syncsort BEX - NSB Bundle - Fort Bend County

Quote Date: Nov. 4, 2010
Quote Number: -151NOYK/1013-NSB15TB

Part Number	Description	Qty	List Price	Net Price	Price Extended
Hardware					
FAS2040-12X2000-BASE2	Fas2020 w/ 15TB useable SV-Sec, CIFS, ISCSI, Deduplication (Local Snapvault Destination)	1	\$ 48,460.00	\$ 28,650.00	\$ 28,650.00
Software					
7400	BEX Advanced Block Level NSB Bundle (15TB Capacity) w/ NDMP	1	\$ 64,125.00	\$ 38,460.00	\$ 38,460.00
Support					
Syncsort	12 months - 24x7-hour Silver Online/Telephone access, Software Maintenance and Updates,	1	\$ 16,390.00	\$ 14,250.00	\$ 14,250.00
NetApp	13 months - SupportEdge Standard NBD Parts Replacement and Support	1	\$ 6,480.00	\$ 3,845.00	\$ 3,845.00
Professional Service and Training					
1541-IMP	Syncsort Customized Professional Services and Implementation for Total (5) days	1	\$ 12,750.00	\$ 10,750.00	\$ 10,750.00
Net-Imp	NetApp Implementation Services/Training	1	\$ 4,250.00	\$ 2,750.00	\$ 2,750.00
SHIPINS	Shipping Insurance				\$ 98.77

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Storage Assessments LLC

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\$ 152,455.00

\$ 98,803.77

Quote Valid for 30 days from Quote Date
Terms: Net 30

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11. SEVERABILITY. If any provision, or portion thereof, of this SLA is invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted.

12. APPLICABLE LAW. THIS SLA SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE INTERNAL SUBSTANTIVE LAWS OF THE STATE OF NEW JERSEY, U.S.A. WITHOUT GIVING EFFECT TO ITS CONFLICT OF LAWS RULES. All disputes arising out of or in connection with this Agreement shall be resolved in accordance with one of the two following alternatives, (a) or (b).

(a) If this SLA is made between Syncsort and a Customer having offices in the United States, or if the Software is used at any time within the United States, then Customer hereby irrevocably consents to the jurisdiction of, and confers jurisdiction upon, any state court for or within Bergen County in the State of New Jersey, U.S.A. and the United States District Court for the District of New Jersey, U.S.A., in connection with any action, suit, or other proceeding in connection with, arising out of, or relating to this SLA, and agrees not to assert in any such action, suit, or proceeding that it is not personally subject to the jurisdiction of such courts, that the action, suit, or proceeding is brought in an inconvenient forum, or that venue of the action, suit, or proceeding is improper. Customer hereby further irrevocably consents to service of process in any such action, suit or proceeding in any such court.

(b) Otherwise, all such disputes shall be subject to binding arbitration in Bergen County, New Jersey, U.S.A. under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. Syncsort may, without inconsistency with this SLA, seek from a court any interim or provisional relief that may be necessary to protect its rights or property, pending the arbitral tribunal's determination of the merits of the controversy. At the option of the party winning an award as a result of such arbitration, judgment on such award may be entered in any court of competent jurisdiction selected by such party.

The designation of venue under the foregoing clauses (a) and (b) (whichever of the two applies) shall be exclusive for all purposes, except that it shall be non-exclusive at Syncsort's election in the sole case of an action brought by Syncsort against Customer to collect unpaid fees.

You agree to pay all reasonable attorneys' fees incurred by Syncsort in the event it should become necessary as a result of your breach for Syncsort to enforce the provisions of this SLA against you under either of paragraphs (a) or (b).

13. EXPORT RESTRICTIONS. You agree that you will not export or re-export the Software to any country, person, entity or end user subject to U.S. export restrictions. You specifically agree not to export, re-export, or download the Software nor the underlying information or technology: (a) to any country to which the U.S. has embargoed or restricted the export of goods or services, which currently include, but are not necessarily limited to Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria, Federal Republic of Yugoslavia, or to any national of any such country; (b) to any end-user who you know or have reason to know will utilize the Software or portion thereof in the design, development or production of nuclear, chemical, or biological weapons; or (c) to any end-user who has been prohibited from participating in U.S. export transactions by any federal agency of the U.S. government. The Customer is responsible for complying with local laws in its jurisdiction which might impact its right to import, export or use the Software.

14. NOTE ON JAVA SUPPORT. The Software may contain support for programs written in Java. Java technology is not designed, manufactured, or intended for use in on-line control of aircraft, air traffic, aircraft navigation or aircraft communications; or in the design, construction, operation or maintenance of any nuclear facility. If the Software you have licensed contains components written in Java, you warrant that you will not use the Software for such purposes.

Syncsort BEX

Support Services Plans and Policies

Support Services Plan Levels and Fees

1. Bronze Level:

- a) Support Services Fees – 18% annually of the then current List Perpetual License Fee.
- b) Hours - 9:00 AM to 8:00 PM EST, Monday – Friday, excluding holidays (New Year's Day, Presidents Day, Memorial Day, Independence Day, Labor Day, Thanksgiving (Thursday & Friday), Christmas Eve, Christmas Day, New Year's Eve.)

2. Silver Level:

- a) Support Services Fees – 24% annually of the then current List Perpetual License Fee.
- b) Hours – 24/7, including Holidays.

3. Gold Level:

- a) Support Services Fees – 30% annually of the then current List Perpetual License Fee.
- b) Gold Support includes all services of Silver Level, **plus**:
 - Service Account Manager within Backup Express Services tracks service requests status and coordinates with engineers and customer:
 - One stop account status
 - Single, designated customer advocate
 - Action register of open issues for proactive management and communication.
 - Priority and resource oversight
 - One on-site support visit per annual term

4. Platinum Level:

- a) Support Service Fees – 34% annually of the then current List Perpetual License Fee.
- b) Platinum Level includes all services of Gold Level, **plus**:
 - Single, designated support engineer within the Platinum support group
 - Manager-to-manager communication, including annual management review of support performance at your location:
 - Pro-active account planning discussions to align your requirements with services
 - Service request trends
 - Syncsort support metrics
 - Customer satisfaction review
 - Overall review of relationship and services direction
 - One additional on-site support visit, for a total of two per annual term

Syncsort Backup Express **Support Services Plans and Policies (continued)**

5. Support Services Level Upgrade Fee:

Support Services may be upgraded upon payment of the prorated difference in the applicable fee for the respective Levels for the remainder of the current term.

6. License Transfer Fee:

A fee of \$250 will be charged if a license transfer requires the issuance of a new license key.

7. Support Services Reinstatement Fee:

The reinstatement of lapsed Support Services will require the payment of a reinstatement fee. The fee will be a prorated 30% of the then current List Perpetual License Fee of all the licensed product components for each lapsed year for Bronze, Silver and Gold Support Services and 34% of the then current List Perpetual License Fee for Platinum Services. Upon reinstatement, the Support Services Level applicable annual Fee will also be charged.

Support Services Policies

1. Support Services provide customers with:
 - a. Telephone, fax and e-mail support.
 - b. Defect corrections to bring the Product into conformity with Product specifications.
 - c. Functional and performance enhancements that Syncsort may release from time to time.
2. Support Services are provided for a specific server identified to a Named Shipping Contact as designated at the time of the order or as later amended with Syncsort's written approval.
3. License transfers can only be made with Support Services in place, the payment of appropriate fees and prior permission of Syncsort.
4. Additional product and Support Services license fees may be required for an upgraded or replacement system.
5. If a Support Services Level is selected, all Syncsort Backup Express licenses identified to the same Named Shipping Contact must be covered under that Level.
6. Support Services for an existing product release will continue to be provided for at least six months after a new release is made available to customers.

Special Agents for Our Support Contracts

Storage Assessments is acting as an agent on behalf of Syncsort and is an authorized reseller of the above Service Contracts.



Support Offerings

Standard Terms & Conditions – North America

This Agreement governs the provision of Support Offerings by NetApp, Inc. ("NetApp") with respect to Hardware and Software and represents the entire agreement between the parties with respect to Support Offerings (as such capitalized terms are defined below). Pre-printed language on forms such as purchase orders shall not constitute part of this Agreement or operate to modify it in any way, and shall be deemed unenforceable.

1. Definitions

1.1. "Agreement" means these Support Offerings Standard Terms and Conditions.

1.2. "Confidential Information" means any and all technical and non-technical information either party provides to the other party hereunder that is marked or otherwise identified at the time of disclosure as confidential or proprietary, including trade secrets, know-how, firmware, designs, schematics, techniques, Software code, technical documentation, specifications, plans or any other information relating to any research project, work in process, future development, scientific, engineering, manufacturing, marketing or business plan or financial or personnel matter relating to either party, its present or future products, sales, suppliers, customers, employees, investors or business, whether in written, oral, graphic or electronic form.

1.3. "Feature Release" means an enhancement to an existing Software version.

1.4. "Field Replaceable Unit" or "FRU" means any specific system component or system disk within a NetApp system, excluding filer heads, which can be replaced at a Customer location without pre-configuration by NetApp. FRUs will be new or equivalent to new at NetApp's discretion.

1.5. "Hardware" means a NetApp storage server or network cache system purchased from NetApp or a NetApp authorized reseller, including its components and spare parts, but excluding any software and firmware.

1.6. "Maintenance Release" means a Software release created to resolve known problems with existing versions of Software.

1.7. "NetApp Support Website" means the website located at <http://now.netapp.com>.

1.8. "Out-of-Scope Services" means any services requested by Customer which: (a) are not included in the Support Offerings purchased by Customer as set forth in the relevant purchase order, or (b) Support Offerings requested or scheduled to occur subsequent to the expiration or termination of the then current Support Offerings Period. Out-of-Scope services include, without limitation, customized implementations and customizations as well as any services not expressly covered under this Agreement.

1.9. "Patch Release" means a temporary fix developed for individual, known Software issues.

1.10. "Remote Technical Support" means telephone and web-based support.

1.11. "Software" means the software product licensed to the Customer by NetApp under the applicable End User License Agreement ("EULA"), which includes, without limitation, computer software features, protocols, authorized updates and upgrades or other supplements to the software, images, music, text and/or animations incorporated into the software, media, printed computer software features, protocols, authorized updates and upgrades or other supplements to the software, images, music, text and/or animations incorporated into the software, media, printed materials, or online or electronic documentation, provided by NetApp or made available for download.

1.12. "Software Updates" mean Feature Releases, Maintenance Releases, and Patch Releases.

1.13. "Support Offerings" means the support offering(s) purchased by Customer from NetApp as described at <http://now.netapp.com/NOW/products/support/>.

1.14. "Support Offerings Period" means the period of time, in accordance with the NetApp approved Support Offerings requirements stated in the valid purchase order accepted by NetApp, during which NetApp will provide Support Offerings pursuant to this Agreement.

2. Support Offerings

2.1. Scope of Offering. With respect to the initial Support Offerings Period and each renewal Support Offerings Period, NetApp agrees to provide the Support Offerings purchased by Customer for current supported Hardware and Software, pursuant to NetApp's acceptance of a valid purchase order and in accordance with the terms and conditions of this Agreement and the relevant Support Service(s) description(s) in effect as of the effective date of the Support Offerings Period. Support Offerings descriptions can be accessed at <http://now.netapp.com/NOW/products/support/>. NetApp reserves the right to revise, modify or update the Support Offerings Descriptions from time to time without notice to Customer.

2.2. Out-of-Scope Services.

2.2.1. Notwithstanding any other provision herein, NetApp shall have no obligation to provide Out-of-Scope Services or Support Offerings otherwise purchased under a valid purchase order where the request or need for such Support Offerings arises or relates to any of the following conditions or events:

a. Hardware that has been mishandled, altered, damaged or rendered inoperable (e.g., degaussing disk drives, etc.) due to willful or negligent acts or omissions, accident, Force Majeure (as defined herein), or operation of the Hardware other than as specified in NetApp-supplied, applicable specifications.

b. Any work performed at Customer's site except as specified in the Support Offering(s) purchased by Customer.

c. Products or components, including without limitation, software or hardware not provided by NetApp, a NetApp authorized service representative or a NetApp-authorized reseller, or services performed by an entity other than NetApp or an authorized NetApp service representative.



d. Transit or relocation of Hardware, including any damages occurring while in transit or related to such relocation, and services accompanying or related to transit or relocation of the Hardware.

e. Services related to third-party products.

f. Customer's failure to meet its responsibilities under this Agreement.

g. Power surge or failure.

h. Provisioning of accessories, supplies or replacement of disposable parts, which may include, without limitation, power cords, rack mounting kits and cables.

i. Any cleaning, painting, refinishing or cosmetic modification of Hardware, or any electrical or site preparation.

j. Customer's failure to provide a proper environment for the NetApp Hardware within the range of tolerances set forth in the applicable NetApp Site Requirements Guide located at the published NetApp Support Website and any conditions or events arising out of such a failure to provide the required operating conditions for the NetApp Hardware.

2.2.2. Although NetApp is not required to provide Out-of-Scope Services, Out-of-Scope Services may be available for purchase from NetApp, pursuant to a separate written agreement by and between NetApp and Customer.

3. Subcontracting. Customer hereby acknowledges and agrees that NetApp may subcontract the Support Offerings, in NetApp's sole discretion, to a third-party NetApp authorized service representative NetApp will remain responsible for ensuring that the NetApp Support Offerings obligations under this Agreement are fulfilled.

4. End of Availability. End of Availability ("EOA") information will be communicated to all customers with respect to such customer's Hardware or Software then currently within an active Support Offerings Period, pursuant to a notice via the field alert email alias on the NetApp Support Website and in a quarterly EOA announcement.

5. End of Support. End of Support ("EOS") means the last date NetApp will support Hardware or Software that has been identified as discontinued in an EOA notice. EOS information will be communicated to all customers with respect to such customer's Hardware or Software then currently within an active Support Offerings Period, pursuant to a product bulletin published on the NetApp Support Website, currently located at <http://now.netapp.com/NOW/products/ea/>. It is the responsibility of the Customer to ensure that all item of the Hardware, including but not limited to, any components, devices or storage attached thereto or Software thereon, are within the published EOS date for such Hardware, components, devices, storage or Software. Furthermore, Customer shall inform NetApp prior to the renewal of Support Offerings if such renewal of Support Offerings is intended to cover any item of the Hardware, including but not limited to, any components, devices or storage attached thereto or Software thereon, which will exceed the EOS date for such Hardware, components, devices, storage or Software at any point during the

renewal term. Notwithstanding the foregoing or Customer's purchase of a Support Offering entitlement for a particular item of NetApp Hardware ("Covered Device"), NetApp shall have no Support Offering obligations with respect to any Hardware, including any components, devices or storage connected to, or for Software installed on, the Covered Device, beyond the published EOS date for such Hardware, components, devices, storage or Software. With respect to EOA Software, NetApp may, at its discretion, continue to provide Patch releases. NetApp will not, however, develop Feature or Maintenance releases for Software that has been identified as discontinued in an EOA notice. Customer acknowledges that with respect to Hardware running Software for which the EOS date has occurred, and regardless of whether there is an EOS date for such Hardware, Customer may be required to update to a supported version of Software as a prerequisite for NetApp to continue to support such Hardware.

6. Replacement Procedure for Hardware Components and System Disks. For the replacement of failed Hardware subject to Support Offerings, Customer will notify NetApp of the failure, in accordance with the relevant RMA procedures available at: <http://now.netapp.com/NOW/products/rma/>, and upon confirmation by the NetApp Technical Support Center (TSC), NetApp will issue a Return Material Authorization (RMA) number and shipping instructions to Customer.

6.1. NetApp's outbound shipment will include a waybill and reusable packaging for Customer to return the failed Hardware. NetApp will bear all reasonable, as solely determined by NetApp, shipping costs for shipments performed in accordance with NetApp's instructions as well as shipment costs for any replacement Hardware. Customer's obligations under such RMA procedures include but are not limited to:

6.1.1. Coordination of the return of all failed NetApp Hardware within fifteen (15) calendar days upon resolution, as determined by NetApp, of the support case initiated with the TSC. FRUs will not be consolidated in shipment: Customer will return each individual FRU separately.

6.1.2. Proper packaging and labeling, including the correct RMA transaction number, is required for each Hardware item shipped. NetApp Hardware not labeled with a correct RMA number may not be accepted by NetApp, and may result in delay and/or additional charges to Customer, due to the inability to identify such NetApp Hardware and to record the appropriate return credit.

6.1.3. Customer will ensure that the Hardware is free of any legal obligations or restrictions that could prevent its exchange.

6.2. Failure to return the Hardware within fifteen (15) calendar days upon resolution, as solely determined by NetApp, of the support case with the TSC, or Hardware returned in an unacceptable condition (i.e., a condition that may have resulted in the Hardware being identified as unsupportable per the terms specified herein), will result in the issuance of an invoice to Customer at NetApp's then-current list price for the replacement parts provided. Payment of the invoice will be subject to NetApp's standard payment terms (net 30 days) unless the defective Hardware is returned within five (5) calendar days of invoice issuance, in which case NetApp will issue a credit to Customer. In the event that Customer fails to return the Hardware and does not pay the invoice on time, NetApp reserves the right to suspend some or all Support Offerings otherwise owing to Customer.



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7. Non-Returnable System Disk. With respect to each item of Hardware, and notwithstanding Section 6 above, if Customer has also purchased Non-Returnable Disk (NRD) coverage, Customer is not obligated to and shall not return a defective or failed NetApp system disk from such Hardware. Instead, Customer shall remain solely responsible for disposing of such disk(s) in accordance with applicable local environmental and other laws. **NOTICE: DO NOT RETURN DISKS WITH NRD COVERAGE TO NETAPP. Customer understands and agrees that any disk(s) entitled to NRD coverage returned to NetApp will be treated by NetApp as any other non-NRD Hardware and may be delegated to NetApp supply chain for repair and/or destruction in the sole discretion of NetApp.**

8. Software Support. Customers that have purchased a Support Offering which includes the NetApp Software Support Plan are entitled to Software Support during the term of the Support Offering. Software Support consists of both Remote Technical Support and access to all commercially available Software Updates, via the NetApp support website. All Software Updates are governed by the Limited Software Warranty and Disclaimer set forth in the EULA agreed to by Customer upon Customer's download, installation and/or use of the Software Update. NetApp may require Customer to upgrade to a certain Software release in order to resolve current or prospective issues. Any Hardware updates required to utilize new functionality available with a new Software release are the responsibility of Customer and shall be made at Customer's expense.

8.1 Software Support Prerequisites.

Provision of Software Support is conditional upon Customer having: (i) installed and operated the Software in accordance with the specifications provided by NetApp; (ii) adequately described with specificity the nature of the Software issues Customer is experiencing and the circumstances in which they occur; (iii) reproduced the Software issue such that it can be confirmed and evaluated by NetApp, and (iv) made no changes, additions, or modifications to the Software, directly or indirectly and (v) installed the Software in an infrastructure/environment that adheres to the published NetApp Interoperability Matrix, located on the NetApp support website at the following url: <http://now.netapp.com/matrix>.

8.2 Software Support Exclusions.

In addition to exclusions set forth at Section 2.2 of this Agreement, NetApp shall have no obligation to provide Software Support in connection with any of the following conditions: (i) Software problems resulting from Customer or third-party modifications, customizations, or enhancements to the Software; (ii) Customer education or training; (iii) implementation or installation assistance; (iv) consultation for new programs or equipment; (v) correction of problems / assistance with problems caused by Customer error (such as entering of incorrect data, not following recommended procedures, keeping inadequate backup copies, etc.); (vi) correction of errors attributable to software other than the Software; and (vii) issues arising from a change in Customer's system configuration.

9. Customer Responsibilities

9.1. Customer Information. Customer's compliance with the terms of this Agreement is a condition precedent to NetApp's obligation to provide Support Offerings hereunder. Customer understands and agrees that response time commitments can be met only if NetApp has the most current, correct Customer

information including, but not limited to, address for the replacement Hardware and the NetApp authorized service representative to arrive, name and phone number of the key Customer contact at the location, and availability of access to that location for the NetApp authorized service representative. If address and contact information is not current and/or access to the location is denied to the NetApp authorized service representative, the response time commitment will be measured from the point when the correct information is provided by the Customer and/or the NetApp authorized service representative is granted access to the pertinent location. Upon receipt, Customer will register all Hardware and Software on the NetApp Support Website to create Customer's support profile. Customer is responsible for keeping its profile up-to-date.

9.2. NetApp Support Website Access. Provided Customer has purchased Support Offerings for a current Support Offerings Period, Customer will be granted a fully paid-up, royalty-free, non-exclusive, limited, terminable license to access the NetApp Support Website, solely for internal purposes, to facilitate support of the relevant Hardware and Software for the duration of the relevant active Support Offerings Period, and subject to NetApp's terms and conditions ("License"). A unique login and password will be assigned to Customer by NetApp. Customer must hold confidential its login, password and any information obtained from the NetApp Support Website. Customer's License(s) to use the NetApp Support Website is personal to Customer, and Customer shall not divulge, assign, transfer or sublicense the License(s) to any third party, including but not limited to subcontractors or third party service providers, without NetApp's prior, express written approval. Any attempt to do so shall be void and may result in suspension or termination of the License(s), in the sole discretion of NetApp. In the event the Support Offerings require NetApp to run any computer systems or software owned or licensed by Customer, Customer shall obtain any and all consents from third parties required for NetApp to do so, and shall notify NetApp promptly of any failure on Customer's part to obtain any such consents. If Customer breaches its obligations under this Agreement, NetApp may suspend or terminate Customer's License(s), in addition to all other remedies available at law or in equity.

9.3. Customer Contacts. Customer will designate up to three (3) technically qualified employees to serve as Customer's primary points of contact for all Hardware and Software and any related support issues.

9.4. Work Environment. When required, Customer will provide NetApp or the NetApp authorized support representative with site access, access to appropriate Customer personnel, a healthy and safe working environment, including light, heat, electrical outlets and ventilation, adequate work space, and access to telephones with outside lines, as NetApp may reasonably determine are necessary to perform the Support Offerings hereunder.

9.5. Data and Recovery. Customer will be solely responsible for management of its data back-up, data recovery, and disaster recovery measures. NetApp will not be responsible or held liable for Customer's internal processes, procedures or requirements to ensure the protection, loss, confidentiality, or security of Customer data or information. Neither NetApp nor NetApp authorized service representatives will be liable for any claims and/or liabilities relating to or arising out of this Section.

9.6. Equipment Relocation. In the event that Customer wishes to relocate Hardware or Software, Customer will contact the NetApp Technical Support Center via either phone or web interface at least



thirty (30) days prior to such relocation. NetApp will respond as to whether Customer's existing Support Offering will be available for the Hardware or Software at the new location. Customer acknowledges that relocation of the Hardware or Software may change the service level and/or pricing of Support Offerings available for the Hardware or Software. If the NetApp product is moved to a new location where the same level of response time is unavailable, NetApp will respond within a commercially reasonable period of time in performing the Support Offering. If Customer fails to notify and obtain confirmation from NetApp prior to relocation of Hardware or Software as required herein, NetApp will not be obligated to provide Support Offerings for the Hardware or Software. Additionally, if address and contact information is not properly maintained by the Customer on the NetApp Customer support website, NetApp's Support Offering response time commitment will be measured from the point when the correct information is provided by the Customer. If Customer requests a change to the Support Offerings previously purchased, Customer may need to submit a new purchase order to NetApp. Notwithstanding any notification and acknowledgement pursuant to this Section 8.6, NetApp's obligations to provide Support Offerings remain subject to the terms of this Agreement, including but not limited to Section 2.2 herein.

9.7. Reinstatement of Lapsed Support. In the event that Customer intends to reinstate Support Offerings that were either terminated pursuant to Section 14 of this Agreement or were not renewed after the original Support Offerings Period expired, Customer shall be required to pay an amount equal to any accrued Support Offerings for the period between the date of termination or lapse and the date upon which Customer requests reinstatement of Support Offerings as well as the amount due for the period of Support Offerings being purchased.

10. Payment Terms and Pricing

10.1. Payment Terms. NetApp will invoice Customer for the Support Offerings at the time of purchase. Customer will make full payment within thirty (30) days from the date of NetApp's invoice. NetApp reserves the right to charge Customer interest on any delinquent balance in addition to all other remedies herein, at law or in equity. The interest will be computed on a daily basis for each day that the payment is delinquent at the lesser of 1.5 % per month (18% per annum) or the maximum rate permitted by law.

10.2. Pricing. Prices will be based upon the current NetApp U.S. price list for Support Offerings in the United States, and upon the current NetApp international price list for Support Offerings outside the United States. NetApp reserves the right to modify its Support Offerings pricing at any time, however with respect to Support Offerings already purchased for the current Support Offerings Period, such modification shall not take effect until the next Support Offerings Period. Pricing changes to Support Offerings shall be processed as a separate transaction in consideration of any of the following: (a) additional Support Offerings are required, (b) changes to the Customer's Hardware or Software beyond what Customer purchased are required, (c) Customer renews Support Offerings upon the expiration of any Support Offerings Period; or (d) Customer purchases additional hardware or Software and requests Support Offerings for the same.

11. Warranty

11.1. Service Warranty. NetApp warrants to Customer that, for the duration of the pertinent Support Offerings Period, Support Offerings will be performed in a professional and workmanlike manner.

11.2. Exclusions. Any warranties provided herein do not apply to, nor do NetApp prices include, the maintenance of, repair or diagnosis of damage, malfunctions or Hardware or Software failures caused by the conditions or events disclaimed in Section 2.2 of this Agreement. The warranty for any Hardware will likely become void if a component is installed as an add-on and/or replacement part to the original Hardware and such component part or the means and method of installation thereof has not been approved in writing by NetApp.

11.3. THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR NON INFRINGEMENT. NETAPP NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY OTHER LIABILITY IN CONNECTION WITH THE SALE, INSTALLATION, MAINTENANCE OR USE OF ITS PRODUCTS, AND NETAPP MAKES NO WARRANTY WHATSOEVER OF ANY NONSTANDARD PRODUCTS HEREUNDER.

11.4. NETAPP SHALL NOT BE LIABLE UNDER THIS WARRANTY IF ITS TESTING AND EXAMINATION DISCLOSES THAT THE ALLEGED DEFECT IN THE NETAPP PRODUCT DOES NOT EXIST OR WAS CAUSED BY CUSTOMER'S OR ANY THIRD PERSON'S MISUSE, NEGLIGENCE, IMPROPER INSTALLATION OR TESTING, UNAUTHORIZED ATTEMPTS TO REPAIR, OR ANY OTHER CAUSE BEYOND THE RANGE OF THE INTENDED USE, OR BY ACCIDENT, FIRE, LIGHTNING OR OTHER HAZARD.

12. Limitation of Damages

12.1. IN NO EVENT, WHETHER BASED IN CONTRACT OR TORT (INCLUDING NEGLIGENCE), SHALL EITHER PARTY BE LIABLE TO THE OTHER, OR TO ANY THIRD PARTY CLAIMING THROUGH OR UNDER SUCH PARTY, FOR ANY LOST PROFITS, LOSS OF BUSINESS OR OTHER FINANCIAL LOSS, LOST OR CORRUPTED DATA, OR EQUIPMENT DOWNTIME, OR FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY THEREOF ARISING OUT OF OR IN CONNECTION WITH SUPPORT OFFERINGS PROVIDED UNDER THIS AGREEMENT.

12.2. NOTWITHSTANDING ANY OTHER PROVISION OF THESE TERMS AND CONDITIONS, NETAPP'S MAXIMUM LIABILITY FOR DAMAGES HEREUNDER SHALL NOT EXCEED THE FEES FOR SUPPORT OFFERINGS PURCHASED DURING THE SIX (6) MONTH PERIOD PRIOR TO THE TIME THE CLAIM AROSE.

13. Confidentiality. Both parties will keep all Confidential Information, as defined herein, confidential and will not, without the prior written consent of the disclosing party, publish, disclose or otherwise make available, directly or indirectly, any item of Confidential Information to any person or entity other than its employees, agents, or contractors who have a need to know in the performance of their duties and who are under a similar written obligation limiting the use and disclosure of disclosing party's Confidential Information as stated in



this Section. The receiving party further agrees that it will use the Confidential Information solely in connection with the performance or receipt of the Support Offerings. Both parties will protect and maintain all Confidential Information with the same degree of care as it employs to protect its own Confidential Information, but at least with a reasonable degree of care. Customer will not copy, duplicate, reverse engineer, reverse compile or attempt to derive the composition or underlying information of any Confidential Information. For purposes of this Agreement, "Confidential Information" means (1) any information disclosed by either party, that is marked "confidential" or "proprietary" in the manner provided herein or (2) information disclosed orally or visually that is designated "confidential" or "proprietary" at the time of disclosure, and that the disclosing party summarizes in reasonable detail in a writing delivered to the other Party within 30 days. Notwithstanding, Confidential Information does not include any data or information which: (a) was in the receiving party's lawful possession prior to the submission thereof by the disclosing party; (b) is later lawfully obtained by the receiving party from a third party under no obligation of secrecy; (c) is independently developed by the receiving party; or (d) is, or later becomes, available to the public through no act or failure to act by the receiving party. Confidential Information will remain the property of the disclosing party. Notwithstanding the foregoing, any Support Offerings Materials, as defined below, technical information regarding Support Offerings, Hardware or Software as well as any information available or accessible through the NetApp Support Website is hereby deemed the Confidential Information of NetApp, regardless of marking or identification.

14. Termination. This Agreement may be terminated:

14.1. Immediately, upon the mutual written agreement of the parties; or

14.2. By either party, upon a thirty (30) days' prior written notice, for default of any material term or condition by the other party [such notice period is reduced to ten (10) days' in the case of remitting payments when due or immediately where the claim is for alleged breach of confidentiality or intellectual property concern], unless the defaulting party has cured the default within such notice period; or

14.3. Immediately by either party where the other party becomes insolvent, files, or has filed against it a petition under applicable bankruptcy or insolvency laws which is not dismissed within ninety (90) days; proposes any dissolution, composition or financial reorganization with creditors; makes an assignment for the benefit of creditors; or if a receiver, trustee or similar agent is appointed or takes possession with respect to any property or business of the defaulting party.

15. Force Majeure. Neither party will be liable to the other for any delay in performing or inability to perform its obligations under this agreement caused by acts of God such as fire, storm, flood, or earthquake government acts, labor strikes, terrorism, and riots and misconduct outside of the either party's control provided the affected party notifies the other party of such delay as soon as commercially practicable and uses commercially reasonable efforts to minimize potential damages.

16. General Provisions

16.1. Independent Contractors. The relationship of the parties created by this agreement is that of independent contractors and not that of employer/employee, principal/agent, partnership, joint

venture or representative of the other. All Support Offerings, including but not limited to materials, information, discoveries, inventions, technical information, procedures, processes, software, firmware, technology, intellectual property (in the broadest sense) and/or know-how used, generated, created, developed or reduced to practice by or for NetApp in connection with or related to the Support Offerings ("Support Offerings Materials"), and all intellectual property rights therein shall be considered the sole and exclusive property of NetApp. Under no circumstances shall the Support Offerings or any Support Offerings Materials be deemed works made for hire as defined in 17 U.S.C. §101 et. seq., or any law similar thereto, nor shall Support Offerings Materials be deemed to include or embody Customer data or Customer Confidential Information. Except as expressly set forth herein, with respect to the Support Offerings Materials, no license of any kind is granted to Customer.

16.2. Disputes; Governing Law/Venue.

16.2.1. The parties shall use good faith efforts to resolve any disputes related to this Agreement, within twenty (20) business days of notice of such dispute. Such efforts shall include escalation of such dispute to a corporate officer level of each party.

16.2.2. This Agreement will be governed by and interpreted in accordance with the laws of the State of California, excepting its conflict of laws rules. The California Superior Court at Santa Clara and / or the United States District Court for the Northern District of California at San Jose will have exclusive jurisdiction and venue over all controversies in connection herewith. The parties hereto agree to submit to the personal jurisdiction of the courts named above, and waive any claims of inconvenient forum.

16.3. Severability. In the event any provision of this agreement is held by a proper authority to be prohibited by law or unenforceable, such provision will be amended and interpreted to accomplish the objectives of such provision to the greatest extent possible under applicable law and the remaining provisions will continue in full force and effect.

16.4. Assignment. Neither party may assign this Agreement or any right or obligation hereunder, without the prior written consent of the other party. Any purported assignment in violation of this provision will be null and void. Notwithstanding the foregoing, NetApp may assign its obligation to perform the Support Offerings hereunder to a third party without notice to Customer. The parties' rights and obligations under this Agreement will bind and inure to the benefit of their respective successors, heirs, and permitted assigns.

16.5. Notice. Except as otherwise expressly set forth herein, any notice required or permitted to be given NetApp under this Agreement will be given in writing and delivered in person or by express courier, or will be deposited postage prepaid via registered or certified United States mail, at the address below. All notices will be deemed to have been given and received on the earlier of actual delivery or three (3) days from the date of postmark. All notices will be directed to:

NetApp, Inc.
Attn: Legal Department
495 East Java Drive
Sunnyvale, CA 94089
USA



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16.6. Waiver. A waiver by either party of any default, or of any of the terms and conditions of this Agreement, will not be deemed to be a waiver of any other default or of any other term or condition. Either party's exercise of any right or remedy provided in this Agreement will be without prejudice to its right to exercise any other right or remedy.

16.7. Survival. The sections of this Agreement that by their essential purpose will survive any expiration or termination, will survive such expiration or termination.

16.8. Entire Agreement. This Agreement contains the final, complete and exclusive agreement of the parties relative to the subject matter hereof and supersedes all prior and contemporaneous understandings and agreements relating to its subject matter. No waiver or modification of the agreement will be valid unless in writing signed by authorized representatives of each party. Any Support Offerings purchased by Customer will be governed by this Agreement. Pre-printed language on either party's forms, such as purchase orders, shall not constitute part of this Agreement and shall be deemed unenforceable. If there is a conflict between this Agreement and a purchase order, this Agreement will take precedence and any other terms will be null and void.