

# Customer Master Services Agreement

THIS CUSTOMER MASTER SERVICES AGREEMENT, effective as of the invoice date (the “**Agreement**”), is made between the customer (“**Customer**”) and the Dell entity identified on Customer’s invoice (“**Dell**”). “Customer” shall include Customer’s corporate parent, subsidiaries and affiliates that are majority owned by Customer, or its parent, or are under voting control of such entities and/or related companies approved by Dell to receive Services under this Agreement (collectively, “**Affiliates**”) who purchase Services hereunder and “Dell” shall include any affiliate of Dell with whom an order is placed. Dell and Customer agree to the following terms and conditions:

## SERVICES

This Agreement shall apply each time Customer engages Dell to provide services. All services provided will be described in one or more of the following: (i) “**Service Descriptions**” detailed in the services agreements found at <http://www.euro.dell.com/service-descriptions>; (ii) any mutually agreed “**Statement of Work**” (“**SOW**”); (iii) “**Technical Specification Form**” as applicable or (iv) Dell’s standard Terms & Conditions of Sale and Service (“the Ts&Cs”) (the “**Services**”). In the event of a conflict between the terms of this Agreement and a Service Description, SOW, Technical Specification Form or the Ts&Cs, the terms of these documents will be followed according to the following order of preference: (1) the SOW or Technical Specification Form, (2) the Agreement; (3) Service Descriptions and (4) the Ts&Cs. “Services” does not include third party branded services (“**Third Party Services**”) that may be purchased from a third party by Customer or sold by Dell as a distributor or sales agent (e.g. extended warranty on third party branded peripherals offered by the manufacturer).

## TERMS

**Requests for Service; Quotes and Orders.** All orders for Services must specify Dell’s quotation (if any), and reference the Service(s) requested and invoice address. Customer may place orders in writing, by telephone or by facsimile transmission. Telephone orders must be confirmed in writing or by facsimile. All orders are subject to acceptance by Dell. If Customer orders on-line, Dell may issue to Customer user names and passwords (the “**Purchase Codes**”). By accepting and using the Purchase Codes, Customer acknowledges the validity of an electronic order, which shall be deemed to be a writing for all purposes hereunder, and agrees to be responsible for full payment of any Services ordered using Customer’s Purchase Codes. Customer is responsible for keeping the Purchase Codes confidential and controlling their use.

**Purchases by Affiliates.** Unless otherwise agreed in writing, any Affiliate who submits an order to Dell shall have thereby agreed to abide by the terms of this Agreement. Dell, in its sole discretion, may discontinue selling Services to any Affiliate or may require additional payment and/or credit conditions for such Affiliate.

**Affiliate Guaranty.** Subject to the terms regarding “Purchases by Affiliates” above, in consideration of Dell’s agreement to extend credit to Customer’s Affiliates at the same or similar level as the credit extended to Customer, Customer hereby unconditionally guarantees complete and timely payment of any and all amounts due to Dell from any Affiliate.

**Prices.** The prices charged for Services purchased under this Agreement will be Dell’s then current charges for such services in each Dell region or as quoted by Dell. If the Services are being performed on a time and materials basis, any estimates provided by Dell are for planning purposes only. Any required deposits are non-refundable.

**Additional Fees; Taxes.** Prices are exclusive of all country, provincial, state and local sales, use, value added, excise, privilege, franchise and similar taxes. Taxes imposed on Dell (other than taxes related to Dell’s income) in connection with the Services purchased under this Agreement will be paid by Customer and will appear as separate items on Dell’s invoices.

**Invoicing and Payment.** The due date for payment by Customer shall be specified in the applicable invoice and shall be subject to continuing credit approval by Dell. Customer will pay Dell in US dollars or in the currency of the country in which the Dell affiliate that supplied the Services is domiciled, as invoiced by Dell or an affiliate of Dell. Additional charges may apply if Customer requests services that are performed outside contracted hours or are beyond the normal coverage for the particular service. For invoices not paid by the due date, Dell reserves the right to charge Customer a late penalty charge of one and a half percent (1.5%) per month applied against undisputed overdue amounts, or the maximum rate permitted by law, whichever is less. In addition, Dell may, without waiving any other rights or remedies to which it may be entitled, decide not to accept additional orders from Customer and/or seek collection of all amounts due, including reasonable legal fees and costs of collection.

**Term.** This Agreement will begin on the effective date stated above and will continue until terminated in accordance with its terms. Each Service Description, SOW or Technical Specification Form, as applicable, will continue for the term stated therein, unless otherwise terminated pursuant to this Agreement.

### **THIRD PARTY PRODUCTS, THIRD PARTY SERVICES, SOFTWARE INSTALLATION**

**"Third Party Products"** means any hardware or software, other than parts that are Dell branded and originally listed on Dell's standard parts list. Third Party Products and/or Third Party Services may be provided by Customer or procured for Customer by Dell, as described by the applicable Service. In the event the Third Party Products procured by Dell are not used for the Services within a reasonable time following purchase of the parts by Dell, the Third Party Products will be shipped and invoiced to Customer and Customer will pay for these parts within thirty (30) days after the date of invoice. Dell is not responsible for any revision or engineering changes in any Third Party Products or Third Party Services. Some manufacturers' warranties or service contract terms and conditions may become void if Dell or anyone else, other than the manufacturer or its authorized representative, works on the hardware or software. **DELL DOES NOT TAKE RESPONSIBILITY FOR THIRD PARTY WARRANTIES OR FOR ANY EFFECT THAT THE DELL SERVICES MAY HAVE ON THOSE WARRANTIES.** Except as agreed to in writing between Customer and Dell, Third Party Services shall be exclusively subject to terms and conditions between the third party and Customer. For software provided by Customer, Customer authorizes Dell (or otherwise obtains the rights for Dell) to copy, install and modify, if necessary (and as required by the Technical Specification Form), all software to be used in the Services or to be recorded in electronic media for subsequent re-installation of backup. Customer warrants to Dell that it has obtained any licenses, consents, or approvals required to give Dell and its subcontractors or employees the right or license to access, copy, distribute, use and/or modify (including creating derivative works) any Third Party Products to be used in the Services, without infringing the ownership or license rights (including patent and copyright) of the providers or owners of such products.

### **PROPRIETARY RIGHTS**

Dell will retain exclusive ownership in all deliverables created by Dell hereunder and will own all intellectual property rights, title and interest in any ideas, concepts, know how, documentation or techniques developed by Dell under this Agreement. Subject to payment in full for the applicable Services, Dell grants Customer a perpetual, non-exclusive, non-transferable, royalty-free right to use the deliverables solely in the country(ies) in which Customer does business and solely for Customer's internal use.

### **EXPORT; REGULATORY REQUIREMENTS**

**Export.** Customer warrants that any software provided by Customer and used as part of the Services contains no encryption or, to the extent that it contains encryption, such software is approved for export without a license. If Customer cannot make the preceding representation, Customer agrees to provide Dell with all of the information needed for Dell to obtain export licenses from the United States government or any other applicable national government or the European Union and to provide Dell with such additional assistance as may be necessary to obtain such licenses. Notwithstanding the foregoing, Customer is solely responsible for obtaining any specific licenses relating to the export of software if a license is needed. Dell may also require export certifications from Customer for Customer provided software. Dell's acceptance of any order for Services is contingent upon the issuance of any applicable export license required by the United States Government or any other applicable national government or the European Union; Dell is not liable for delays or failure to deliver a product resulting from Customer's failure to obtain such license or to provide such certification.

**Regulatory Requirements.** Dell shall not be under any obligation to perform any Service Description, SOW or Technical Specification Form or to install any Third Party Products as part of the Services or proceed with Services if such Third Party Products, or the resulting software, do not satisfy the local regulatory requirements of the country to which the Products are to be shipped.

### **CUSTOMER RESPONSIBILITIES**

It is the Customer's responsibility to backup data on Customer's system. **DELL WILL NOT BE RESPONSIBLE FOR LOSS OF OR DAMAGE TO DATA OR LOSS OF USE OF ANY COMPUTER OR NETWORK SYSTEMS.** Customer acknowledges that Dell's performance and delivery of the Services are contingent upon: (i) Customer providing access to its personnel, facilities, equipment, hardware, software, network and information and (ii) Customer's timely decision-making, notification of relevant issues or information and granting of approvals and/or permission. Customer will promptly obtain and provide to Dell any required consents necessary for Dell's performance of the Services described in the applicable Service Description, SOW or Technical Specification Form.

Information disclosed by Customer pursuant to a separate Nondisclosure Agreement ("NDA") signed by both parties will be protected under the terms of the NDA. Customer acknowledges that any information or data disclosed or sent to Dell that is not protected under a separate NDA is not confidential or proprietary to Customer.

### **LIMITATION OF SERVICES**

Except as stated below, when Services consist of repair of Dell systems, such Services shall be those repair services that are necessary because of any existing defect or a defect occurs in materials or workmanship in the system or in any system component covered by this Agreement. Preventive maintenance is not included. **Repairs necessitated by software problems, or as a result of alteration, adjustment, or repair by anyone other than Dell (or its representatives) are not included.** Unless otherwise provided in the SOW, Services do not include repair of any system or system component which has been damaged as a result of: (i) accident, misuse, or abuse of the system or component (such as, but not limited to, use of incorrect line voltages, use of incorrect fuses, use of incompatible devices or accessories, improper or insufficient ventilation, or failure to follow operating instructions) by anyone other than Dell (or its representatives), (ii) an act of God such as, but not limited to, lightning, flooding, tornado, earthquakes, and hurricanes, or (iii) the moving of the system from one geographic location to another or from one entity to another.

### **LIMITED WARRANTY & LIMITATION OF LIABILITY**

**Limited Warranty.** DELL WARRANTS THAT SERVICES WILL BE PERFORMED IN A GOOD AND WORKMANLIKE MANNER. EXCEPT AS EXPRESSLY STATED IN THE PRECEDING SENTENCE, DELL MAKES NO EXPRESS OR IMPLIED WARRANTIES WITH RESPECT TO THE SERVICES, INCLUDING BUT NOT LIMITED TO, ANY WARRANTY RELATING TO THIRD PARTY PRODUCTS, ANY WARRANTY WITH RESPECT TO THE PERFORMANCE OF ANY HARDWARE OR SOFTWARE USED IN CONDUCTING SERVICES, ANY WARRANTY CONCERNING THE RESULTS TO BE OBTAINED FROM THE SERVICES OR THE RESULTS OF ANY RECOMMENDATION DELL MAY MAKE, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES CONCERNING THE PERFORMANCE, MERCHANTABILITY, SUITABILITY, NON-INFRINGEMENT OR FITNESS FOR A PARTICULAR PURPOSE OF ANY OF THE DELIVERABLES OR OF ANY SYSTEM THAT MAY RESULT FROM THE IMPLEMENTATION OF ANY RECOMMENDATION DELL MAY PROVIDE.

**Limitation of Liability.** NEITHER DELL OR ITS SUBCONTRACTORS WILL BE LIABLE FOR ANY INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE SERVICES PROVIDED BY DELL OR ITS SUBCONTRACTORS EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT FOR CLAIMS THAT THE SERVICES CAUSED BODILY INJURY (INCLUDING DEATH), DELL'S TOTAL LIABILITY ARISING OUT OF, OR IN CONNECTION WITH, ANY EVENT OR SERIES OF CONNECTED EVENTS OCCURRING IN CONNECTION WITH THE SERVICES THAT ARE THE SUBJECT OF THE CLAIM, SHALL NOT EXCEED THE AMOUNT OF FEES PAID UNDER THIS AGREEMENT FOR THE SPECIFIC SERVICE DURING THE PRIOR YEAR.

**High Risk Activities.** Customer understands and agrees that Dell has not tested or certified its products or Services for use in high risk applications including medical life support, nuclear power, mass and air transportation control or any other potentially life critical uses and makes no assurances that the products or Services are suitable for any high risk uses.

### **INDEMNIFICATION**

Customer accepts responsibility for, and agrees to indemnify and hold Dell harmless from, any and all liability, damages, claims or proceedings arising out of (i) the failure of Customer to obtain the appropriate license, intellectual property rights, or any other permissions required to support any Service Description, SOW, or Technical Specification Form or Dell's performance of the Services, including, but not limited to, the right to make any copies or reproductions of any Customer provided software, or (ii) any inaccurate representations regarding the existence of an export license or the eligibility for export of software or other materials without a license.

### **MISCELLANEOUS ITEMS**

**Assignment; Subcontracting.** Unless otherwise provided in the Service Description, SOW or Technical Specification Form, Customer may not assign this Agreement without the prior written consent of Dell. Dell has the right to subcontract the Services provided under this Agreement.

**Entire Agreement; Severability.** This Agreement (with attachments) is the entire agreement between Dell and Customer with respect to its subject matter and supersedes all prior oral and written understandings, communications or agreements between Dell and Customer. No amendment to or modification of this Agreement, in whole or part, will

be valid or binding unless it is in writing and executed by authorized representatives of both parties. If any provision of this Agreement is void or unenforceable, the remainder of this Agreement will remain in full force and will not be terminated.

**Independent Contractor.** The parties are independent contractors. Neither party will have any rights, power or authority to act or create an obligation, express or implied, on behalf of another party except as specified in this Agreement.

**Force Majeure.** Neither party shall be liable to the other party for any failure to perform any of its obligations (except payment obligations) under this Agreement during any period in which such performance is delayed by circumstances beyond its reasonable control including, but not limited to, fire, flood, war, embargo, strike, riot or the intervention of any governmental authority (a "**Force Majeure**"). In such event, however, the delayed party must promptly provide the other party with written notice of the Force Majeure. The delayed party's time for performance will be excused for the duration of the Force Majeure, but if the Force Majeure events lasts longer than thirty (30) days, the other party may immediately terminate the applicable Service Description, SOW or Technical Specification Form by giving written notice to the delayed party.

**Notices.** To give notice under this Agreement, the notice must be in writing and sent by postage prepaid first-class mail, receipted courier service, facsimile telecommunication or electronic mail to the address which appears below each party's signature below or to such other address as any party shall specify by notice in writing to the other party and will be effective upon receipt.

**Section Headings.** The section headings contained in this Agreement are inserted for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

**Governing Law, Jurisdiction and Language.** THE CONSTRUCTION AND PERFORMANCE OF THIS AGREEMENT SHALL BE GOVERNED BY THE FOLLOWING:

- (a) For disputes arising out of Services performed in the following Regions, the following laws shall apply without regard to choice of law provisions:

<u>Region</u>	<u>Choice of Law</u>
North America, Latin America or South America:	Texas law and jurisdiction;
Europe, the Middle East and Africa:	English law and jurisdiction;
China:	Chinese law and jurisdiction;
Japan:	Japanese law and jurisdiction; and
Asia/Pacific:	Singapore law and jurisdiction.

- (b) This Agreement will be interpreted and construed in accordance with the English language.

**Dispute Resolution.** The parties will attempt to resolve any claim, or dispute or controversy (whether in contract, tort or otherwise) against Dell, its agents, employees, successors, assigns, or affiliates (collectively for purposes of this paragraph, "**Dell**") arising out of or relating to this Agreement, Dell's advertising, or any related purchase (a "**Dispute**") through face to face negotiation with persons fully authorized to resolve the Dispute or through mediation utilizing a mutually agreeable mediator, rather than through litigation. The existence or results of any negotiation or mediation will be treated as confidential. Notwithstanding the foregoing, either party will have the right to obtain from a court of competent jurisdiction a temporary restraining order, preliminary injunction or other equitable relief to preserve the status quo, prevent irreparable harm, avoid the expiration of any applicable limitations period, or preserve a superior position with respect to other creditors, although the merits of the underlying Dispute will be resolved in accordance with this paragraph. In the event the parties are unable to resolve the Dispute within thirty (30) days of notice of the Dispute to the other party, the parties shall be free to pursue all remedies available at law or equity.

**Limitation Period.** Neither party may institute any action in any form arising out of this Agreement more than two (2) years after the cause of action has arisen, or in the case of nonpayment, more than two (2) years from the date of last payment.

**Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all such counterparts shall together constitute one and the same instrument. Please contact your Account Manager indicated in your original invoice.