



**VIRTUAL INSTRUMENTS CORPORATION D/B/A VIRTANA
PRODUCT AND SERVICES AGREEMENT
FOR INDIRECT PURCHASES**

PLEASE READ CAREFULLY

THIS VIRTANA PRODUCT AND SERVICES AGREEMENT FOR INDIRECT PURCHASES ("AGREEMENT") IS ENTERED INTO BETWEEN VIRTUAL INSTRUMENTS CORPORATION D/B/A VIRTANA ("VIRTANA") AND THE PARTY IDENTIFIED ON THE QUOTE WHICH REFERENCES THIS AGREEMENT ("CUSTOMER").

1. **Purpose of Agreement.** This Agreement states the terms and conditions under which Virtana agrees to supply to Customer: (i) hardware and software products made generally-available by Virtana and its licensors ("Products"); (ii) maintenance and support services ("Support Services"); and (iii) training, consulting or other services ("Professional Services"), as each is reflected on a quote issued by Virtana to its authorized reseller or distributor ("Channel Partner") and the corresponding order submitted by Channel Partner to Virtana ("Order").
2. **Conflicting Terms.** Virtana rejects any terms, conditions or provisions contained in any quote, order, agreement, invoice, or any other document or communication issued between Channel Partner and Customer regarding the Products, Professional Services or Support Services that omit, or are additional to or inconsistent with the terms of this Agreement. Customer agrees that any purchase order submitted by Customer to Channel Partner that contains additional, omitted, or inconsistent terms related to the Products, Support Services or Professional Services are enforceable solely against Channel Partner and Customer hereby acknowledges and agrees that Virtana is not legally bound by any such additional or inconsistent terms, and waives any right to seek legal recourse of any kind against Virtana in connection therewith. This Agreement shall apply to all Products, Support Services or Professional Services to be supplied by Virtana to Customer, unless Customer and Virtana enter into a binding separate agreement, in which case the terms of such separate agreement shall govern over any conflict with the terms of this Agreement.
3. **Delivery of Product.** Virtana will deliver the Products in accordance with the shipping terms applicable between Virtana and Channel Partner. Virtana may allocate production and deliveries in its sole and reasonable discretion in the event of a shortage of Products. Customer agrees that Virtana shall not be liable for any damage, loss, or expense incurred by Customer if Virtana fails to meet a specified shipping date.
4. **Support Services.** Subject to receipt by Virtana of payment by Channel Partner of all applicable Support Services fees, Virtana will provide Customer the then-current standard Support Services purchased by Customer, available at the URL www.virtana.com ("Maintenance and Support Services Supplement"), which is hereby incorporated to this Agreement by this reference. Virtana may from time to time update the Maintenance and Support Services Supplement. Virtana shall use reasonable efforts to inform Customer of updates to the Maintenance and Support Services Supplement in accordance with its notification procedures employed generally for all customers. Changes to the Maintenance and Support Services Supplement shall be binding against Customer solely on a go-forward basis as of the applicable renewal date. Customer's sole and exclusive remedy if it disagrees with a change to the Maintenance and Support Services Supplement is to refrain from renewing Support Services.
5. **Professional Services.** Virtana shall provide Professional Services either (i) as described in Virtana's standard service documents and supplemental training services terms and conditions ("Description of Service Documents") available at the URL www.virtana.com, which are hereby incorporated to this Agreement by this reference, as each may be referenced on a Quote; or (ii) pursuant to a custom statement of work signed by Customer and Virtana that details the specific Professional Services and deliverables to be provided to Customer for the specific project.
6. **Intellectual Property.**
 - 6.1. **Software License.** Upon Customer's receipt of software Products, Virtana grants to Customer a nonexclusive, nontransferable, license to use the object code version of the software that is delivered either with the hardware Products or as a standalone Product, and any accompanying documentation ("Documentation"), for Customer's internal business use only, during the period of use noted on the applicable Quote ("Use Period"). The Use Period may be either perpetual or term-based. Customer shall use the software Products strictly in accordance with (i) the capacity and units of measure identified on the Quote and defined in the product use rights supplement available at the URL: www.virtana.com, which is hereby incorporated to this Agreement by this reference ("Product Use Rights Supplement"); (ii) any supplementary terms of use set forth on a or a separate written agreement signed by both Customer and Virtana; and (iii) the Documentation.
 - 6.2. **Firmware License.** Hardware Products may include pre-installed or embedded software programming and/or microcode (collectively "Firmware"). Virtana licenses the use of Firmware at no separate charge, provided Customer may only use Firmware together with any hardware or device(s) Product with which the Firmware was licensed and provided. Customer may not extract or copy Firmware embedded in hardware devices or components for any reason.
 - 6.3. **Hardware Products.** In addition to Firmware, hardware Products contain technology that may subject to pending or existing patents and other forms of industrial or other forms of intellectual property recognized under applicable law ("Hardware IP"). The sale of a unit of hardware Product does not entail or imply either the sale or conveyance to Customer or any third party in any Hardware IP or any independent license to exercise the Hardware IP in any manner other than that strictly necessary to use the hardware Products for Customer's internal business use.
 - 6.4. **Evaluation Products.** From time to time, Customer may wish to evaluate the Products prior to purchase or it may wish to test and provide feedback regarding pre-release versions of the Products at Virtana's request (in either case, an "Evaluation Product"). Upon Customer's receipt of the Evaluation Product, Virtana grants to Customer a nonexclusive, revocable, limited term, and non-transferable license to use the Evaluation



Products for Customer's internal, non-production evaluation purposes only, for a period of thirty (30) days from shipment, unless a longer period is agreed to by Virtana. If any hardware Evaluation Products are not timely returned to Virtana, Customer shall purchase such Evaluation Products at the then-current list prices to be payable within thirty (30) days of the Virtana invoice date. Customer shall be responsible for loss of or damage to hardware Evaluation Products while in Customer's possession, normal wear and tear excepted. Customer must uninstall and delete any copies of standalone software Evaluation Products provided at the end of the Evaluation Period, unless otherwise instructed in writing by Virtana. Virtana does not commit, guarantee, promise, or agree to finally release and/or offer for sale the Evaluation Product. EVALUATION PRODUCTS ARE PROVIDED EXCLUSIVELY ON AN "AS IS" BASIS WITHOUT WARRANTIES, SUPPORT SERVICES, PROFESSIONAL SERVICES OR INDEMNITIES OF ANY KIND.

6.5. Restrictions. All licenses granted under this Section 6 are subject to Customer's ongoing compliance with this Agreement. The licenses granted exclude the right of Customer to modify, make, copy, perform, create derivative works of the Products, or resell, commercially exploit, distribute the Products, or for any service bureau, time-share, subscription rental, or other use by third parties for which Customer receives compensation. Customer understands and agrees that Virtana and its licensors grant only those rights expressly set forth in this Agreement. Virtana and its licensors reserve any and all rights not expressly granted to the Customer under this Agreement. Customer shall not reverse engineer, decompile, disassemble, or otherwise attempt to ascertain the source code or design for the Product. Customer shall be liable for any acts or omissions constituting a breach of this Agreement or violation of Virtana's intellectual property rights by any third parties authorized by Customer to access and use the Products on Customer's behalf. Unless agreed to by Virtana in writing, Customer may not transfer any licenses to software Products to any third party, but Customer may authorize its outsourcing service providers to use the Products on Customer's behalf provided: (i) Customer informs Virtana in writing of such outsourced use, and (ii) the outsourced service provider agrees in writing to use the Product solely on behalf of Customer and in compliance with all terms of this Agreement.

6.6. Ownership. Virtana and its licensors retain all right, title and interest in and to all software Products, Evaluation Products, Hardware IP, Confidential Information, Documentation, and any improved, updated, modified, or additional versions of the foregoing. Virtana does not acquire any right, title or interest in any Confidential Information (as defined below) owned or supplied by Customer. Virtana retains all right, title and interest in and to any deliverable supplied by Virtana in the course of performing Professional Services that constitutes a modification, enhancement or new feature of a Product or Evaluation Product; provided, however, that Virtana grants to Customer a non-exclusive, worldwide license to use such deliverable during the pertinent Use Period within the scope of the license to the underlying Product to which the deliverable pertains for so long as this Agreement is in effect. Virtana shall have a royalty-free, worldwide, transferable, sublicensable, irrevocable, perpetual license to use or incorporate into the Products and/or Services any suggestions, enhancement requests, recommendations or other feedback provided by Customers relating to the Products

or the Services, provided that Virtana shall never identify Customer as the source of such feedback or suggestions.

7. Confidentiality.

7.1. Definition. "Confidential Information" means proprietary and confidential information that the employees, agents, officers, or contractors of one party ("Disclosing Party") supply to the other party's employees, agents, officers, or contractors ("Receiving Party") hereunder. Confidential Information of either party as Disclosing Party includes but is not limited to the Disclosing Party's business plans, client lists, financial information, trade secrets, supplier information, employee information, product plans, or any information that is marked or designated at the time of disclosure as "confidential," "proprietary," or similar designation, or that should be reasonably understood to be confidential under the circumstances. Confidential Information of Customer specifically includes, but is not limited to, Customer's storage area network ("SAN"), Customer's SAN suppliers, SAN tools or components employed by Customer, SAN performance data or history supplied to Virtana in the performance of Professional Services or Support Services, IP addresses or other identifiers of Customer's SAN components, the physical location of the SAN. Confidential Information of Virtana specifically includes, but is not limited to, Virtana's tools, templates, training materials, Quotes, discounts, Products (including embedded third party components therein), Product benchmarking information, comparative or competitive analyses, infringement testing, or analyses of the Products, Product issues, Evaluation Products, Documentation, Support Services, and Product roadmap.

7.2. Exclusions. Confidential Information does not include information that is (i) rightfully in the receiving party's possession without obligation of confidentiality prior to receipt from the disclosing party, (ii) a matter of public knowledge through no fault of the receiving party, (iii) rightfully furnished to the receiving party by a third party without restriction on disclosure or use; or (iv) independently developed by the receiving party without use of or reference to the disclosing party's Confidential Information.

7.3. Obligation to Maintain Confidence. The Receiving Party shall use Confidential Information of the Disclosing Party only for the purposes of exercising rights or performing obligations in connection with this Agreement, and use at least reasonable care to protect the Disclosing Party's Confidential Information from disclosure to any third parties. If disclosure is required by law, such disclosure shall not constitute a breach of this Agreement provided the Receiving Party gives the Disclosing Party reasonable advance notice to enable the Disclosing Party to seek appropriate protection of the Confidential Information.

8. Warranties; Disclaimers.

8.1. Product Warranty. Virtana warrants to Customer that, commencing on the date of shipment, and for a period of (a) ninety (90) days with respect to software Products, and (b) one (1) year from with respect to hardware Products, the Products will substantially conform to the Documentation for such Products. The foregoing warranty does not apply to Evaluation Products, Products supplied as part of Support Services, or Products that have been damaged, mishandled, mistreated, used, maintained or stored other than in conformity with this Agreement or the Documentation and instructions. Customer's sole and exclusive remedy for any breach of the foregoing warranty shall be, at Virtana's option, to repair or replace the non-conforming Product with a conforming Product, or if permitted by Customer's agreement with Channel Partner, to



request the refund of fees paid to Channel Partner (and Customer waives the right to seek any refund from Virtana directly) for the non-conforming Product. Virtana shall have a reasonable time to make repairs or issue a replacement, and such repaired or replaced Products shall be warranted for the remainder of the original warranty period. The warranty remedies in this Section require that: (i) Customer reports the non-conformity during the warranty period; and (ii) Virtana issues a "Return Materials Authorization" ("RMA") for the non-conforming Product in accordance with the RMA procedures set forth in the Support Services Supplement, and (iii) Customer returns such Products during the applicable warranty period to Virtana in accordance with Virtana's return instructions.

8.2. Services Warranty. Virtana warrants to Customer that Support Services and Professional Services delivered by Virtana to Customer shall be performed in a professional and workmanlike manner in accordance with applicable industry standards and laws applicable to Virtual Instrument in the performance thereof. Customer's sole and exclusive remedy for any breach of the foregoing warranty shall be for Customer to report the non-conformity no later than thirty (30) days following performance of the Professional Service or Support Service, and permit Virtana's to either re-perform the non-conforming Services at no additional charge to Customer within a reasonable time.

8.3. Disclaimer. Customer acknowledges and agrees that Virtana assumes no liability in connection with: (i) the operation of the Customer's SAN; (ii) incomplete, inaccurate, outdated or unavailable SAN performance data caused by faulty SAN components or improperly installed SAN components monitored by use of the Products; (iii) Product errors or malfunctions, or the unavailability of SAN monitoring data resulting from improper Product installation or configuration by any party other than Virtana. Customer acknowledges and agrees that Customer has not relied and will not rely on the availability of any future version of a Product or any future Product in executing this Agreement or making any purchases under this Agreement. EXCEPT AS EXPRESSLY WARRANTED IN THIS SECTION, VIRTANA MAKES NO OTHER WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, WARRANTIES CONCERNING THE PERFORMANCE OF CUSTOMER'S STORAGE AREA NETWORK, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS.

9. Indemnification. Virtana shall defend Customer against any third party claim that a Product, Support Service, Professional Service or deliverable infringe such party's patent or copyright enforceable in a country signatory to the Berne Convention, and pay the resulting costs and damages finally awarded against Customer by a court of competent jurisdiction or the amounts in a written settlement signed by Virtana. The foregoing obligations are subject to Customer's obligation to (i) notify Virtana promptly in writing of such claim, (ii) grant Virtana sole control over the defense and settlement thereof, (iii) reasonably cooperate in response to a Virtana request for assistance, and (iv) comply with the terms of this Agreement. Should any such Product, Support Service, Professional Service or deliverable become, or in Virtana's opinion be likely to become, the subject of such a claim, Virtana may, at its option and expense, (a) procure for Customer the right to make continued use thereof, (b) replace or modify such so that it becomes non-infringing, (c) request return of the Product or deliverable, or (d) discontinue

the Support Service or Professional Service. Virtana shall have no liability under this Section to the extent that the alleged infringement arises out of or relates to: (1) the use or combination of a Product or deliverable with third party products or services not supplied by Virtana, (2) use for a purpose or in a manner for which the Product or deliverable was not designed, supplied, or licensed, (3) any modification to a Product or deliverable made by anyone other than Virtana or its authorized representatives, (4) any modifications to a Product or deliverable made by Virtana pursuant to Customer's specific instructions, (5) any Evaluation Products, or (6) ongoing use of the infringing version of a Product or deliverable when use of a non-infringing version made available to Customer for purposes of avoiding such infringement would have avoided the infringement. THIS SECTION STATES CUSTOMER'S SOLE AND EXCLUSIVE REMEDY AND VIRTANA'S ENTIRE LIABILITY FOR THIRD PARTY INFRINGEMENT CLAIMS.

10. LIMITATION OF LIABILITY. EXCEPT FOR A VIOLATION OF VIRTANA'S INTELLECTUAL PROPERTY RIGHTS SUPPLIED UNDER THIS AGREEMENT, A VIOLATION BY EITHER PARTY OF THE CONFIDENTIALITY OBLIGATIONS UNDER SECTION 8, OR DEATH OR PERSONAL INJURY CAUSED BY A PARTY, TO THE MAXIMUM EXTENT PERMISSIBLE UNDER APPLICABLE LAW:

10.1. EACH PARTY SHALL BE ONLY LIABLE FOR PROVEN DIRECT DAMAGES NOT TO EXCEED (I) FEES PAID OR OWING TO VIRTANA IN CONNECTION WITH THE PRODUCTS OR PROFESSIONAL SERVICES GIVING RISE TO SUCH DAMAGE, OR (II) MONTHLY FEES FOR THE REMAINDER OF THE SUPPORT SERVICES PURCHASED, UP TO TWELVE (12) MONTHS, FOR DAMAGES ARISING IN CONNECTION WITH SUPPORT SERVICES; AND

10.2. NEITHER PARTY SHALL BE LIABLE FOR ANY LOSS OF USE, INTERRUPTION OF BUSINESS, OR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING LOST PROFITS) REGARDLESS OF THE FORM OF ACTION WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) AND STRICT PRODUCT LIABILITY OR OTHERWISE, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

11. Termination. Either party may terminate this Agreement upon written notice to the other party for any material breach that is not cured within thirty (30) days following written notice to the breaching party. Customer may terminate this Agreement for any reason or no reason by providing written notice to Virtana, provided, however, that such termination shall not entitle Customer to any refund of fees paid or owing at the time of termination. Upon termination of this Agreement, all licenses to use software Products and any associated Professional Services deliverables shall terminate. The following Sections shall survive in accordance with their terms: 6.5 ("Restrictions"), 6.6 ("Ownership"), 7 ("Confidentiality"), 9.4 ("Disclaimer"), 10 ("Limitation of Liability"), 12 ("Legal Compliance") and 13 ("General") shall survive the termination of this Agreement.

12. Legal Compliance. Each party shall at all times comply with all applicable federal, state and local laws and regulations. The Products covered by this Agreement may fall within the group of "strategic" electronic products that are wholly or partly of U.S. origin or technology, the export of which is subject to export license control by the U.S. government. Therefore, prior to exportation, Customer agrees to obtain any licenses which may be required under the applicable export laws of all U.S. Government Agencies including but not limited to the Bureau of



Industry & Security, (BIS), governed by the Export Administration Regulations (EAR) and Directorate of Defense Trade Controls (DDTC) governed by the International Traffic & Arms Regulations (ITAR). Customer shall at its own expense obtain and arrange, and maintain in full force and effect all governmental approvals, consents, licenses, authorizations, declarations, filings, and registrations necessary or advisable for any and all uses of the Products by Customer.

13. **General.** Neither party shall be liable, either wholly or in part, for nonperformance or a delay in performance due to force majeure event or contingencies or causes beyond the reasonable control of such party, including, but not limited to, war, acts of God, civil unrest, pestilence, shortage of labor, fuel, raw material or machinery or technical, or yield failure. No waiver shall be deemed a waiver of any prior or subsequent default hereunder. The validity, performance, and construction of this Agreement shall be governed by the laws of the State of California, without regard to its conflicts of law provisions. The U.N. Convention on contracts for the International Sale of Products shall not apply to the Products or this Agreement. If a Product is provided to any unit or agency of the United States Government ("U.S. Government"), the following provisions shall apply: all software Products and accompanying Documentation are deemed commercial, including computer databases, related documentation, technical data, and manuals as defined in FAR 2.101. Pursuant to FAR 12.212 and DFARS 227.7202, any use, modification, reproduction, release, performance, display, or disclosure of the software and accompanying documentation by the U.S. Government shall be governed solely by the terms of

this Agreement and shall be prohibited except to the extent expressly permitted by the terms herein. Virtana may subcontract its obligations under this Agreement, provided that Virtana shall remain responsible for its and its subcontractors' obligations to Customer hereunder. Customer may not assign (voluntarily, by operation of law or otherwise) this contract, or any of its rights or obligations thereunder, without the prior written approval of Virtana. This Agreement, including all terms specifically incorporated by reference herein, constitute the sole, exclusive, and fully integrated agreement between the parties relating to the supply of Products, Support Services or Professional Services, and supersede all prior or contemporaneous communications, representations or agreements either oral or written, with respect to the subject matter hereof. No addition to or modification of any provisions of this Agreement shall be binding upon Virtana unless made in writing and signed by a duly authorized representative of Virtana. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any term expressed in this Agreement. If any provision of this Agreement shall be determined to be illegal or unenforceable, all other provisions shall remain in full force and effect. All notices provided pursuant to this Agreement shall be in writing and shall be deemed delivered on the date of personal delivery if addressed to the recipient at the addresses set forth in any order or agreement in which this Agreement is invoked. The prevailing party in any litigation hereunder shall be entitled to recover attorney's fees.