

Dell APEX Distributor Agreement – Portugal for APEX Outcome Based Services

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This Dell APEX Distributor Agreement for APEX Outcome Based Services (the “**Agreement**”) applies to the Dell Technologies “**APEX**” branded service (“**APEX Service**”) and any other related the Dell Technologies service identified on a Quote (“**Related Service(s)**”) ordered by you, on behalf of your company, (“Distributor”) from the Dell Technologies entity which invoices Distributor for the APEX Service (“**Dell**”). By agreeing to Dell’s Quote (through physical signature, electronic signature or clicking to accept): (a) **Distributor agrees to be legally bound by the Agreement; and (b) you represent to Dell that you are authorized to agree to the Agreement on behalf of Distributor.** The “**Effective Date**” of the Agreement is the earlier of the date Distributor agreed to the Quote referencing this Agreement or the date Customer first used the APEX Service and/or the Related Service.

1. Definitions.

“**Affiliate**” means (a) with respect to Distributor, any other entity that directly or indirectly controls, is owned by, controlled by or under common ownership or control with Distributor; and (b) with respect to Dell means Dell Inc. and its wholly-owned or wholly-controlled subsidiaries. “Control” means more than 50% of the voting power or ownership interests.

“**APEX System**” means the Dell-branded IT hardware (“**Equipment**”) and/or software (including microcode, firmware, operating systems, or applications) (“**Software**”) which are used to operate the APEX Service. References to the APEX Service include the APEX System.

“**Colocation Site**” means, where applicable, a third party Site.

“**Customer**” means a customer that purchases the APEX Service and any Related Service from Reseller for its own internal business purposes and not for resale. Customer includes a Cloud Service Provider partner purchasing from Distributor for its own internal business purpose and not for resale as described in Clause 2.1.D.

“**Customer Content**” means data (including but not limited to all text, sound, video, and image files), software (including machine images), and other information Customer or End Users store, use or make available to Dell on the APEX Service. Customer Content does not include System Data relating to Customer’s or End Users’ use of the APEX Service and which is described in the Service Offering Description.

“**Dell APEX Terms for Channel End Customers**” or “**Flow Down Terms**” means the terms and conditions that apply to a Customer’s access and use of the APEX Service and Related Service, including the applicable Service Offering Description. The Dell APEX Terms for Channel End Customers can be found at https://www.dell.com/learn/us/en/uscorp1/legal_terms-conditions_dellwebpage/apex-terms-for-channel-end-customers and may be updated from time to time.

“**End Users**” means Customer’s customers or other third parties to whom Customer may provide a service using the APEX Service.

“**Order**” means Distributor’s order for the APEX Service and any Related Services that is confirmed by Dell. Confirmation of Orders is described in Clause 4.1.A (Order Confirmation).

“**Quote**” means Dell’s written quotation or online quotation for an APEX Service and any Related Services. A “Quote” also includes an “APEX Subscription Quote” or an amendment to an APEX Subscription Quote

“**Reseller**” means a Solution Provider partner in the Dell Technologies Partner Program who purchases the APEX Service from Distributor and resells the APEX Service to Customer.

“**Service Level Agreement**” or “**Service Level Objective**” means the then-current version of Dell’s performance commitments for the APEX Service. If applicable, these will be provided in the Service Offering Description.

“**Service Offering Description**” means the then-current version of the Dell document that describes the APEX Service Distributor ordered.

“**Site**” means the location where the APEX System is installed. The Site will be either Customer’s premises or a Colocation Site. Distributor will provide Dell with the required Site information.

“**Subscription Term**” means the period of each APEX Service in Distributor’s Order, and any extensions. The initial Subscription Term begins as specified in the Order and/or the Service Offering Description.

“**Territory**” means the European Economic Area and Switzerland. Distributor’s focus territory is Portugal.

“**Third-Party Claim**” means any third-party allegation, claim, action, demand, or lawsuit arising from or relating to: (a) Customer Content or Third-Party Products; (b) Distributor’s use of any APEX Service or any Related Service in violation of the Agreement; (c) Customer’s or End User’s use of APEX Service and any Related Service in violation of the Dell APEX Terms for Channel Customers; (d) combination of the APEX Service with non-Dell products, non-Dell content including any Customer Content, and/or any Third-Party Products; or (e) Distributor’s infringement or misappropriation of Dell’s, Dell Affiliates’ or third parties’ intellectual property rights.

“**Third-Party Products**” means hardware, software, products, or services that are not Dell-branded. Third-Party Products are not embedded components of the APEX Service.

2. **The APEX Service.**

2.1 **Scope; Right to Distribute.**

A. The Agreement applies to the APEX Service and any Related Services Distributor ordered when Distributor agrees to the Quote. Orders for other APEX Services and other Related Services, including amendments to APEX Subscription Quotes, will be governed by the Agreement agreed by Distributor with the new Quote or amendment to the APEX Subscription Quote from Dell. The Agreement does not apply to any other Dell products and services Distributor purchases and distributes pursuant to a separate distribution agreement with Dell (each an “**Existing Distribution Agreement**”). The Agreement shall not be deemed to modify, supersede, or amend any Existing Distribution Agreement, and any Existing Distribution Agreement shall not apply to Distributor’s purchase and distribution of the APEX Service. Unless otherwise agreed in writing by Dell, this Agreement does not apply to the purchase of APEX Service and any Related Services for Distributor’s or Distributor Affiliate’s internal end-use.

B. Subject to compliance with local laws and the terms and conditions of this Agreement, Distributor is authorized to resell the APEX Service and Related Service to a Reseller that is located in the Territory and identified in the Order for resale to a Customer located in the Territory, agrees to the Flow Down Terms and is identified in the Order (the “**Distribution Right**”). In Distributor’s agreement with the Reseller (the “**Reseller Agreement**”) Distributor shall cause such resale by the Reseller to be described in a contract separately executed between the Reseller and Customer (the “**Customer Agreement**”). Distributor shall not market or distribute the APEX Service or Related Service (i) to any Reseller or Customer outside the Territory, (ii) to any consumers, without Dell’s prior written approval. Distributor shall not market, resell, distribute, or use the APEX Service or Related Service other than as expressly permitted in this Agreement.

C. Distributor shall ensure that your contract with your reseller ensures the Customer Agreement, at a minimum and without contradiction, contains the Flow Down Terms and provisions that: (i) specify the APEX Service and any Related Service being ordered pursuant to this Agreement for resale by Reseller to Customer; (ii) are sufficient to enable Dell to access the Site to provide any warranty maintenance or support services, monitor and meter the APEX Service as described in this Agreement and the Service Offering Description, and to take possession of the APEX System in the event of any termination of, or default under, the Customer Agreement, the Reseller Agreement, or this Agreement or in the event of any Customer Bankruptcy or Customer Non-Payment Event; (iii) name Dell as a third party beneficiary to the Customer Agreement; (iv) state the Customer’s obligation to pay Reseller for the APEX Service is unconditional by explicitly stating such obligations are “absolute, unconditional and non-cancellable and shall not be subject to any abatement, reduction, set off, defense, delay or counterclaim for any reason whatsoever”; (v) allow disclosure of the Customer Agreement to Dell, its Affiliates and funding partners; and (vi) are sufficient to satisfy Distributor’s obligations contained herein including but not limited to those obligations to include certain provisions in the Customer Agreement and/or Reseller Agreement, and those obligations to ensure Reseller’s and Customer’s agreement, compliance and/or cooperation, throughout this Agreement. Distributor shall indemnify Dell from any damages or liability which arise from Distributor’s failure to meet the requirements of this Clause 2.1.C.

D. Subject to compliance with local laws and the terms and conditions of this Agreement, Distributor is authorized to resell the APEX Service and Related Service to a Cloud Service Provider partner in the Dell Technologies Partner Program who is located in the Territory and identified in the Order and is purchasing for its own internal business purposes (including provision of IT as a service) and not for resale. Distributor shall cause such resale to be described in a contract separately executed between Distributor and the Cloud Service Provider partner, and such agreement shall comply with the Customer Agreement requirements herein and Distributor is deemed the “Reseller” in references to “Customer Agreement” in this Agreement.

2.2 Site Options and Requirements.

A. **Dell Colocation Site.** If Distributor Ordered a Dell offered Colocation Site option (where available), then (a) Dell will be responsible for arranging hosting of the APEX System in an appropriate data center environment; and (b) the following clauses of the Agreement will not apply: Clause 4.5 (Shipment), Clause 4.6 (Title to APEX System), Clause 4.7 (Risk of Loss), Clause 4.8 (Insurance), Clause 4.9 (Bankruptcy Rights), Clauses 6.4.A(b) (Generally) and 6.4.B (Additional Recovery Rights), Clause 7.2 (Site Access), and Clause 7.5 (Replaced Parts).

B. **Non-Dell Colocation Site.** If Distributor locates the APEX System at a non-Dell provided Colocation Site, then Distributor shall ensure that Reseller ensures that Customer will be responsible for ensuring that Dell has the level of access to the non-Dell provided Colocation Site required in Clause 7.2 (Site Access). Distributor agrees to hold Dell harmless from and against any and all disputes, claims or controversies (whether in contract, tort (including negligence) or otherwise) resulting from Distributor or Customer locating the APEX System at a non-Dell provided Colocation Site.

C. **Landlord Waiver.** If requested by Dell, Distributor will arrange (or Distributor will ensure that Reseller or Customer arranges) for Colocation Site landlord to sign a landlord waiver agreement confirming Dell’s ownership of the APEX System and Dell’s right to access the APEX System in connection with the APEX Service and this Agreement.

2.3 **Service Offering Description.** The scope and details of the APEX Service, including the Colocation Site option if ordered from Dell, are provided in the Service Offering Description. Unless otherwise defined in the Service Offering Description, the references in the Service Offering Description to “Customer” or “you” shall be understood as a reference to the Customer that is entitled to receive the APEX Service, except that for pricing, billing, refund, ordering (including without limitation, expansion, extensions, and add-ons), cancellation, and similar financial terms, the references to “Customer” or “you” shall mean Distributor.

2.4 Use and Ownership of the APEX Service and Related Services.

A. Distributor may access and use the APEX Service only: (i) during the Subscription Term; (ii) as necessary to exercise the Distribution Right; and (iii) in accordance with the Agreement.

B. Customer may access and use the APEX Service only: (i) during the Subscription Term; and (ii) as provided in the Flow Down Terms and the Service Offering Description. If the APEX Service includes Software that is licensed by Dell, then the Customer Agreement will require Customer to use the Software only: (a) in connection with Customer’s use of the APEX Service and as provided in the Flow Down Terms; (b) for the Subscription Term; and (c) in accordance with Dell’s [End User License Agreement](#) (“EULA”). The Customer Agreement will also require that Customer must not: (1) resell or rent the use of the APEX Service; or (2) use the APEX Service in support of an offering, or for a purpose, which is intended to compete with Dell’s APEX Service business.

C. If Dell believes a problem with the APEX Service is caused by, or results from, Customer Content, or Distributor’s, Reseller’s, or Customer’s use of the APEX Service, then Distributor agrees to cooperate with Dell in order to identify and resolve the problem.

D. Distributor agrees that Dell owns all rights, titles, and interests in and to the APEX Service and any Related Services and all improvements, enhancements, modifications, and derivative works, and all intellectual property rights in all of these. Distributor’s rights to use the APEX Service are limited to those specifically stated in writing in the Agreement. Distributor agrees that Distributor does not have any other implied rights in, or to, the APEX Service or any Related Services. Dell reserves all rights not granted to Distributor in the Agreement.

3. Modifications.

3.1 **Generally.** Dell may modify the APEX Service from time to time. Modifications may include optional new features for the APEX Service, which Customer may use subject to the then-current Service Offering Description or changes to components of the APEX System. Dell will inform Distributor and/or Customer of modifications either by email, through the APEX Console, through a Dell sales representative, or directly through the APEX Service. Distributor's continued sale of the APEX Service and/or its Customer's continued use of the APEX Service after the date of any modification will be considered as Distributor's and Customer's acceptance of the modified APEX Service and any associated changes to the Service Offering Description.

3.2 **Material Modifications.**

A. **Option to Terminate.** If Dell removes a material feature or materially reduces the functionality of the APEX Service, then Distributor will have the right to terminate the Order for the APEX Service if Customer chooses to terminate its order for the APEX Service with Reseller and Reseller chooses to terminate its order of the APEX Service with Distributor by notifying Dell within 30 days from the date of Dell's modification notice. If Distributor elects to terminate that Order, then termination occurs on: (a) the date Dell receives Distributor's notice of termination; or (b) any later date Distributor specifies in its notice (though this date must not occur more than 90 days after the date Dell receives Distributor's termination notice).

B. **Right to Refund.** Distributor remains responsible for the payment of all fees incurred through the termination date. Dell will promptly refund any prepaid fees for the APEX Service or Related Services that will not be provided as a result of the termination by Distributor under Clause 3.2.A (Option to Terminate). Distributor, Reseller, and Customer are not entitled to any other remedies from Dell once Distributor is in receipt of the refund from Dell.

4. **Orders, Payment, Shipment, Title to APEX System, and Insurance.**

4.1 **Orders.**

A. **Ordering Process.** Distributor may request a Quote for the APEX Service and any Related Services from Dell. Quoted prices are effective until the expiration date of the Quote but may change due to shortages in materials or resources, increase in the cost of manufacturing, or other factors. Distributor orders the APEX Service and Related Services which are subject of a Quote by agreeing to Dell's Quote (through physical signature, electronic signature or clicking to accept) and issuing a purchase order that references Dell's Quote. Distributor's orders are subject to Dell's confirmation, as provided in Clause 4.1.B (Order Confirmation), to Dell credit approval, and to availability, and are cancellable only by Dell. Dell is not responsible for pricing, typographical or other errors in any Quote and may cancel Orders affected by such errors.

B. **Order Confirmation.** Distributor's Orders are subject to Dell's confirmation. An Order is confirmed upon the earlier of: (a) Dell's written confirmation; or (b) as otherwise provided in the Service Offering Description. Dell is not required to provide the APEX Service until (i) Distributor has provided all information Dell needs to process the Order and provision the APEX Service and any Related Services and (ii) the Customer has agreed to the Flow Down Terms. Unless otherwise stated in the Agreement, all Orders are non-refundable and non-cancellable by Distributor.

C. **Payment of Fees.** Distributor must pay all APEX Service and Related Services fees Distributor or Customer incurs. Fees may consist of a committed amount as well as additional amounts, including fees for add-on features that Distributor orders or Distributor, Reseller, or Customer enables, and fees based on actual usage of the APEX Service. Distributor must establish a method of payment to cover all fees when ordering an APEX Service and any Related Services.

D. **Additional Fees.** Dell may invoice Distributor directly for any additional fees arising from an Order. Distributor agrees that Dell may invoice Distributor for fees even if a corresponding purchase order was not received from Distributor.

E. **Customer Evidence.** Dell may request, and Distributor agrees to provide, evidence (excluding confidential terms and pricing) that a final binding purchase order has been placed by the Reseller and Customer for the APEX Services being ordered. Distributor's submitted evidence will be subject to Dell's approval and will not include letters of intent, purchases conditional on a future event, internal distributor documentation, or awards of public tender offers unless they are definitive and binding for the parties.

4.2 **Payment Terms.** Distributor must pay all fees within the time period noted on Dell's invoice or, if not noted, then within 30 days from the date of invoice, subject to maintaining credit approval with Dell, and in the currency agreed in the Order with delay interest accruing after the due date at the rate foresaw in the applicable law. If Distributor defaults on payments due under this Agreement, then Dell may suspend the APEX Service and Related Service.

4.3 Taxes. The fees invoiced for the APEX Service and any Related Services are exclusive of all taxes (including VAT, sales, use, or other equivalent taxes), governmental fees, levies, customs, and duties resulting from Distributor's Order (other than taxes on Dell's income or employees). If Dell is required to collect and remit any taxes, then Dell will add the appropriate amount to Distributor's invoices as a separate line item. Distributor agrees to pay the taxes to Dell in addition to the APEX Service and any Related Service fees. If Distributor is tax exempt, Distributor must promptly provide a valid tax exemption certificate or other appropriate proof of exemption at the time of onboarding to the APEX Console or at Dell's request. If Distributor is required to withhold taxes, Distributor will: (a) provide Dell with 10 days' notice of intent to withhold taxes and the applicable withholding tax rate based on local tax laws and relevant tax treaties; (b) provide Dell with satisfactory evidence (e.g., official withholding tax receipts) of withheld taxes within 60 days from the date Distributor remitted them to the applicable tax authority.

4.4 Invoice Errors. If Distributor finds a material error in an invoice, then Distributor must notify Dell in writing within 10 days from its receipt. Any amounts Dell and Distributor both agree in writing to be correct must be paid before the later of: (a) 14 days following the date of Dell's corrected invoice; (b) the due date of the original invoice; or (c) the due date as provided in the corrected invoice. If Distributor withholds payment on the basis that an invoice is incorrect and Dell finds that the amount is accurate, then Distributor must pay interest on the unpaid disputed amount from the invoice due date until Dell receives payment. Distributor may not offset, defer, or deduct any invoiced amounts that Dell determines are correct following completion of this process.

4.5 Shipment. Dell will ship the APEX System to the Site when included as part of the APEX Service. The terms and process for shipment and delivery of the APEX System will be stated in the applicable Service Offering Description.

4.6 Title to APEX System. Dell owns all rights, title, and interest in the APEX System (including any replaced parts), and the APEX System must be returned to Dell at the end of the Subscription Term (or promptly upon replacement with respect to replaced Equipment or parts). The APEX System will be identified as Dell's and Distributor, Reseller, or Customer will not remove, cover, or alter plates, labels or any other markings placed upon the APEX System by Dell. The APEX System is NOT subject to any of the liens and security interests of Distributor's, Reseller's, or Customer's lender(s). Further, Distributor, Reseller, or Customer cannot use the APEX System as collateral for a loan or as security against any debt. Distributor will immediately notify Dell in writing if Distributor's (or if Distributor is aware Reseller's or Customer's) lenders or creditors or other third parties claim any rights to, or seek to take possession of, the APEX System.

4.7 Risk of Loss. As between Dell and Distributor, the entire risk of loss, theft, damage or destruction of the APEX System transfers to Distributor upon Dell's delivery of such to the Site until the time the APEX System is returned to Dell. If any loss, theft, damage or destruction to the APEX System occurs during the time Distributor bears such risk, Dell shall be relieved of its APEX Service obligations to the extent such event impacts Dell's ability to provide such APEX Service until such time as the APEX System is repaired or replaced. Charges shall continue to accrue during this period of such interruption. If the APEX System is materially damaged, stolen or destroyed, Distributor shall ensure Dell is promptly notified.

4.8 Insurance. Distributor will insure (or cause to be insured) the APEX System with a reputable insurance company against all: (a) liability whatsoever to any third party arising from Distributor's, Reseller's or Customer's use of the APEX System; and (b) loss or damage to the APEX System from all insurable risks for its full replacement cost; and (c) other risks that a prudent person would reasonably insure. In regard to (a) and (b), Dell will be named as both additional insured and loss payee respectively. When requested, Distributor will provide Dell with evidence that the required insurance is in effect. Distributor must immediately notify Dell of any loss claim and Distributor agrees not to settle any insurance claims without Dell's prior written agreement.

4.9 Bankruptcy Rights. If this Agreement is determined to be anything other than a services agreement from Dell to Distributor, then to the maximum extent allowed by applicable laws, Distributor grants Dell a first priority security interest in the APEX System (and all proceeds thereof) and Dell retains the first lien and security interest in the APEX System and all proceeds. Distributor agrees that Dell may file protective documents with government or other authorities in Distributor's jurisdiction of incorporation or other applicable locations in order to inform third parties and lenders that Dell owns the APEX System at the Site (including UCC-1 filings if the Site is located in the United States of America). For the purpose of U.S. bankruptcy law, Distributor agrees that the Agreement is an "Executory Contract" with mutual obligations for both Distributor and Dell.

4.10 Financial Statements. Distributor agrees to (i) furnish Distributor's financial statements (prepared in accordance with generally accepted accounting principles) and other financial information, relating to the Agreement within five (5)

business days as Dell may from time to time reasonably request and (ii) provide Dell with the Customer's financial statements (prepared in accordance with generally accepted accounting principles), and other financial information related to an Order for Customer that Dell may reasonably request ("**Customer Financial Information**"), prior to acceptance of an Order, and within five business days as Dell may otherwise reasonably request from time to time; the provision of (i) and/or (ii) being subject to the applicable confidentiality terms as provided for in the Agreement. Any determination by Dell, at any time, that any information provided pursuant to this paragraph is wrong, misleading, or not authentic, shall constitute an Event of Default pursuant to Clause 6.3.1.A of this Agreement.

4.11 **Distributor Pricing.** Distributor is free to determine and set its own resale pricing to the Reseller of the APEX Service and any Related Services.

5. **Suspension.**

5.1 **Generally.** Dell may suspend all APEX Services and any Related Services subject of a current Order if: (a) Distributor is in material breach of the Agreement (including failure to pay invoices when due) and has not cured that breach within 10 days from Dell's notice; (b) Customer is in material breach of the Flow Down Terms and has not cured that breach within 10 days from Dell's notice; or (c) with immediate effect if Distributor, Reseller, or Customer breaches [Dell's Acceptable Use Policy](#), including all Dell updates to the Acceptable Use Policy during the Subscription Term ("**AUP**"). Dell will give Distributor notice before suspending the APEX Service(s) and any Related Services if permitted by law or, unless Dell reasonably believes that providing notice presents a risk of harm to the APEX Service(s), to other users of the APEX Service(s), or to any person or property, in which case, Dell will notify Distributor as soon as feasible or permitted. Dell will promptly reinstate the APEX Service(s) and any Related Services once Dell agrees that the issue(s) causing the suspension has been resolved.

5.2 **Effect of Suspension.** Distributor must pay all applicable fees incurred before and during any suspension. Distributor will not be entitled to any service credits under an applicable Service Level Agreement or Service Level Objective during any suspension.

5.3 **Termination for Suspension.** If Dell has the right to suspend the APEX Service(s) and any Related Services under Clause 5.1(c) (Suspension - Generally), then Dell also has the right to terminate the APEX Service(s) and any Related Services: (a) immediately upon written notice to Distributor in the event of a breach of the AUP; or (b) as provided under Clause 6.2(c) (Termination) provided that the 30 day cure period is considered to start from the date of Dell's first notice under Clause 5.1(a) or Clause 5.1(b) (Suspension - Generally).

6. **Term and Termination.**

6.1 **Agreement Term.** This Agreement commences on the Effective Date and continues until terminated in compliance with this Clause.

6.2 **Termination.** Distributor may only terminate the Agreement (including any Order) as authorized in this Agreement. Either party may terminate the Agreement (including any Order) for cause, if: (a) the other party becomes insolvent, admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors; (b) the other party becomes subject to control of a trustee, receiver, or similar authority, or to any bankruptcy or insolvency proceeding; (c) the other party commits a material breach of the Agreement and has failed to cure the breach within 30 days from the other party's written notice.

6.3 **Events of Default; Assignment of Customer Agreement**

6.3.1 **Events of Default; Remedies.**

A. **Events of Default.** The occurrence of any of the following in connection with this Agreement shall constitute an Event of Default: (i) Distributor shall fail to pay the APEX Service and any Related Service fee within thirty (30) days of its due date; (ii) Distributor shall fail to perform any provision, covenant, condition or agreement, and such failure shall continue for thirty (30) days after notice thereof; (iii) bankruptcy, receivership, insolvency, reorganization, dissolution, liquidation, or other similar proceedings shall be instituted by or against Distributor, or Reseller, or all or any part of its property opening of an insolvency proceeding against Distributor, or Reseller, to the extent permitted by the law, and it shall consent thereto or shall fail to cause the same to be discharged within sixty (60) days; or (iv) bankruptcy, receivership, insolvency, reorganization, dissolution, liquidation, or other similar proceedings shall be instituted by or against Customer, or all or any

part of its property opening of an insolvency proceeding against Distributor, or Reseller, to the extent permitted by the law , and it shall consent thereto or shall fail to cause the same to be discharged within sixty (60) days (“**Customer Insolvency**”).

B. Remedies. Except when the conditions for assignment of the Customer Agreement as set forth in Clause 6.3.2 below are met, if an Event of Default shall occur, then Dell may exercise any one or more of the following remedies: (i) immediately terminate the Agreement or any Order(s); (ii) by notice in writing to Distributor, declare immediately due and payable, and Distributor shall be obliged to pay immediately, (1) all past due APEX Service fees and other past due amounts plus (2) all APEX Service and Related Service fees for the remainder of the Subscription Term with clause (2) being discounted to present value using the discount rate of the European Central Bank on the Effective Date of the Agreement and (iii) with notice, and in accordance with the applicable law, Dell may enter upon the Site where the APEX System is located, free from all claims by Customer; provided that the parties shall reasonably cooperate to enable Customer to migrate and erase its data and for Dell to recover the APEX System. Distributor shall ensure that the Reseller ensures that the Customer Agreement provides for Customer’s consent to Dell’s recovery of the APEX System in the circumstances and manner described in this Agreement. Distributor shall be responsible for the payment of the actual documented costs and reasonable attorneys’ fees incurred by Dell in retaking possession of the APEX System and/or seeking to recover amounts due. Each remedy herein is cumulative and not alternative, and able to be enforced separately or together.

C. Recovery of APEX System. Distributor shall ensure that the Reseller ensures that the Customer Agreement provides for Customer’s consent to Dell’s recovery of the APEX System in the circumstances and manner described in this Agreement.

6.3.2 Transfer and Assignment of Customer Agreement.

A. Event of Transfer and Assignment. A Customer Agreement shall be transferred and assigned from Reseller to Dell, subject to and in accordance with the terms of this Clause 6.3.2., if any of the following occurs: (i) an Event of Default by Distributor or Reseller, pursuant to Clause 6.3.1.A.(i), (ii) or (iii) of this Agreement, is declared by Dell; (ii) Customer Insolvency as to the Customer that is party to the Customer Agreement; (iii) a Customer’s uncured failure to pay for the APEX Service when due occurs within the first six (6) calendar months of the Subscription Term (“**Customer Non-Payment Event**”); (iv) Customer is in default of the Customer Agreement due to an uncured failure to make any payment when due and Dell has determined in its commercially reasonable discretion that its ability to collect from the Customer will be materially impacted by delaying any further, and Dell or Distributor has requested assignment to Dell, which consent by either party shall not be unreasonably withheld; or, (v) if Dell, Distributor, and Reseller otherwise agree to such assignment of the Customer Agreement, and Customer consents to such transfer and assignment, in writing.

B. Requirements for Transfer and Assignment – Distributor’s Default. In order to provide Customer with uninterrupted services in the occurrence of an Event of Default caused by Distributor, Dell shall take a transfer and assignment of a Customer Agreement pursuant to Clause 6.3.2.A.(i), only if the Customer Agreement meets the requirements set forth in Clause 6.3.2.C(x)-(xi). (Requirements for Assignment – Generally), and the Customer is not in default or material breach of the terms of the Customer Agreement or Flow Down Terms.

C. Requirements for Transfer and Assignment – Customer Bankruptcy, Customer Non-Payment Event, or as Consented to. Dell shall only be required to take a transfer and assignment of a Customer Agreement in relation to the events described in Clause 6.3.2.A.(ii), (iii), and (iv), if: (i) in the case of Clause 6.3.2.A.(iii), Reseller has received no payment from the End User under the applicable End User Agreement ; (ii) Distributor has, or caused Reseller to have, if requested by Dell, promptly provided the Customer with a notice indicating the Customer Insolvency constitutes a default or material breach pursuant to the Customer Agreement; (iii) Distributor has provided Dell prompt notice of every instance of Customer’s uncured failure to pay for the APEX Service and any Related Service; (iv) Distributor has provided, or caused Reseller to have provided, to Dell all applicable Customer contacts and any other information necessary for Dell to conduct cash collection activities and any other associated activities; (v) Distributor is current on all, and have no outstanding overdue, payment obligations pursuant to this Agreement; (vi) Distributor has, or has caused Reseller to have, requested of Dell, in writing, that Dell take a transfer and assignment of the Customer Agreement; (vii) the Reseller, immediately following any Customer Non-Payment Event, has provided to the Customer any notices of non-payment that may be required by the Customer Agreement, and has taken all reasonable steps necessary to collect overdue amounts; (viii) the Reseller provided timely and accurate invoices to the Customer in compliance with the terms of the Customer Agreement; and (ix) any related Customer default or material breach caused by the Customer’s uncured non-payment of amounts due is not directly related to (a) a dispute in regard to the provision of the APEX Service or Reseller’s performance under the any agreement between Reseller and Customer; (b) administrative or operational billing, invoicing and/or collections, and/or

(c) Customer's attempt or intent to terminate, cancel, or otherwise discontinue the Customer Agreement and/or APEX Service for any reason other than its financial ability to pay; (x) the applicable Customer Agreement: (a) unconditionally obligates the Customer to pay for the APEX Service and any Related Service in amounts that equal or exceed the amounts Distributor is obligated to pay Dell for the remainder of the Subscription Term; (b) states the Customer's obligation to pay for the APEX Service and Related Service is unconditional by explicitly stating such obligations are "absolute, unconditional and non-cancellable and shall not be subject to any abatement, reduction, set off, defense, delay or counterclaim for any reason whatsoever;" (c) has a payment structure substantially similar to the payment structure of this Agreement, including but not limited to, containing net 30 payment terms, and providing no ability to cure any non-payment which exceeds 30 days from the payment due date; (d) names Dell (or the affiliate of Dell which is the party to this Agreement) as a third party beneficiary; (e) states that Customer Insolvency, and uncured failure to pay amounts owed when due are each, separately, events constituting default, or material breach, of the Customer Agreement ("**Customer Default**"), that a Customer Default under any single Customer Agreement with the applicable Customer shall constitute a Customer Default under all Customer Agreements with that Customer, and that Reseller's rights in remedy of such Customer Default are equivalent to the rights Dell has in remedy against Distributor in an Event of Default, listed in Clause 6.3.1.B. above, each remedy being cumulative and not alternative, and able to be enforced separately or together; (f) includes Customer's consent to the transfer and assignment of the Customer Agreement to Dell, without notice, upon the occurrence of any Customer Default, such consent to the transfer and assignment to explicitly include consent to Dell's right, upon such assignment, to directly receive payment and seek collections directly from, and exercise and enforce Reseller's remedies directly against, the Customer; (g) may not include the provision of, and, must be billed separately from, any products or services which are not included in the Order under this Agreement; and, (h) meets all the requirements of Clause 2.1.C. above; (xi) the Reseller Agreement provides that the Customer Agreement shall be assigned to Dell upon Dell's notice to the Customer that Dell intends to take transfer and assignment of the Customer Agreement pursuant to the conditions of this Clause 6.3.2.; and, (xii) Dell has not, in its sole discretion, determined that the Customer Financial Information provided pursuant to this Agreement is wrong, misleading, or is not authentic.

D. Giving Effect to Transfer and Assignment. Dell shall not be required to take a transfer and assignment of any Customer Agreement, pursuant to this Clause 6.3.2., if Distributor does not, if requested by Dell, provide to Dell a written agreement to such assignment from the Customer and/or Reseller. If transfer and assignment of the Customer Agreement pursuant to this Clause 6.3.2. is not possible, is determined to be invalid, or is blocked, delayed, or enjoined under any legal process then Dell may exercise any, or all, of its remedies pursuant to Clause 6.3.1.B (Remedies).

E. Requests for Transfer and Assignment in Customer Non-Payment. If Dell has requested, in writing, transfer and assignment of the Customer Agreement pursuant to Clause 6.3.2.A.(iv) and Distributor and/or the Reseller, refuses such assignment, or does not respond to such request within 10 days, Dell shall not be required to take assignment of the Customer Agreement pursuant to Clause 6.3.2.A.(ii), (iii) or (iv).

F. Rights After Transfer and Assignment. If Dell takes a transfer and assignment of a Customer Agreement pursuant to this Clause 6.3.2.: (i) Distributor shall have no rights in, and Distributor shall ensure Reseller has no rights in, any amounts Dell receives or recovers from the Customer; (ii) Distributor shall be obligated to, and Distributor shall ensure Reseller is obligated to, immediately send to Dell any and all payments received from the Customer pursuant to the Customer Agreement after such transfer and assignment; (iii) Dell will excuse Distributor from Distributor's obligation to pay the APEX Service fee for the remainder of the Subscription Term and, by notice in writing to Distributor, declare immediately due and payable, and Distributor shall be obliged to pay immediately, all past due APEX Service and Related Service fees and other past due amounts related to this Agreement; (iv) Distributor, and Reseller, will have no further obligation to invoice or collect payment from Customer, or to recover or return the APEX System, provided that Distributor shall cooperate, and cause the Reseller to cooperate, with Dell and provide all necessary assistance in Dell's efforts to both collect the fees owed by Customer and repossess the APEX System; (v) Distributor shall be obligated to pay Dell, within 30 days of such transfer and assignment, amounts equal to any or all financial incentives, fees, and/or rebates ("**Incentives**") Distributor received from Dell in relation to any Order or to entering into the Agreement (if the event triggering such assignment occurred after the first 6 months of the Subscription Term such amount shall be prorated based on the number of months remaining in the Subscription Term), and Dell shall not be required to pay Distributor any Incentives related to any Order or the Agreement which have not yet been paid to Distributor; and (vi) if Dell subsequently determines that the Customer Financial Information provided pursuant to this Agreement is wrong, misleading, or is not authentic, Dell's consent to such transfer and assignment shall be revoked and/or void, and Dell may exercise any of its remedies pursuant to Clause 6.3.1.B.

6.4 Effects of Termination.

A. **Generally.** When the APEX Service and any Related Services expire, terminate, or are rejected for any reason, Distributor must: (a) stop using the APEX Service and any Related Services and ensure that the Reseller and Customer stop using the APEX Service and any Related Services; (b) return (or ensure that the Customer returns) the APEX System in compliance with the Service Offering Description, or if the Service Offering Description requires Dell to recover the APEX System, then Distributor will reasonably cooperate with Reseller and Customer to provide Dell with prompt access to the Site to recover the APEX System; and (c) return or, if requested by Dell, destroy, any of Dell's Confidential Information in Distributor's possession or under Distributor's control (other than information that applicable law requires Distributor to retain). The Service Offering Description will state when Dell will delete any Customer Content. Distributor is responsible for notifying Reseller, who should notify Customer, that the Customer is responsible for making sure that Customer has copies of all Customer Content that Customer requires prior to the date of any termination.

B. **Additional Recovery Rights.** Distributor agrees that upon expiration or termination for any reason: (a) Dell may seek a court order to enforce Dell's right to recover the APEX System from the Site and Distributor agrees to reasonably cooperate with Dell to enforce Dell's rights with Reseller and/or Customer under any such court order; and (b) Dell is entitled to recover from Distributor the reasonable attorney fees resulting from this enforcement action. Distributor is liable for any return costs and shall reimburse Dell for the reasonable value of the APEX System (or any part thereof) that is not returned or is returned in a condition that evidences damage in excess of reasonable wear and tear.

C. **Refunds.** Distributor may be entitled to a refund of fees Distributor pre-paid to Dell for the APEX Service and any Related Services that will not be provided as a result of a termination in the following cases: (a) If Dell terminates the APEX Service under Clause 8.1(b)(APEX Service Limited Warranty) or 15.2(2) (Indemnification by Dell); and/or (b) If Distributor terminates the APEX Service and/or any Related Services under Clauses 3.2 (Material Modifications) or, if applicable, 6.2 (Termination); or 16.6 (Force Majeure). Any other termination/rejection of the APEX Service and/or any Related Services will not entitle Distributor to any refunds, credits, or exchanges. If: (i) Dell terminates the APEX Service and/or any Related Services due to Distributor's material breach of the Agreement or Customer's material breach of Flow Down Terms or following Dell's suspension of the APEX Service; or (ii) Distributor, Reseller or Customer returns or surrenders the APEX System without Dell's prior permission before the end of the Subscription Term, then Distributor will promptly pay Dell all fees due for the APEX Service and any Related Services through the remainder of the Subscription Term.

D. **Survival.** The provisions relating to payment of outstanding fees, confidentiality, liability, and the Partner DPA (as defined in Clause 11.3 (Data Processing)) so long as Dell continues to process Distributor's "**Personal Data**" (as defined in the Partner DPA), all rights of action accruing prior to termination, along with any other provision of the Agreement that, expressly, or by its nature and context, is intended to survive, will survive termination.

7. **Support Services.**

7.1 **Generally.** The APEX Service includes the support and maintenance services described in the Service Offering Description ("**Support Services**").

7.2 **Site Access.** Dell requires the right to access the APEX System in a timely way and as provided in the Service Offering Description to provide the Support Services or as may be provided in the Quote with respect to any Related Services. Failure to provide (or failure to ensure that Reseller or Customer provides) Dell with timely access to a Site will relieve Dell of the Support Services or Related Service obligations and Dell may also, at Dell's discretion, suspend the APEX Service.

7.3 **Changes.** Distributor, Reseller, or Customer may not relocate the APEX System without Dell's prior written approval. If the applicable Service Offering Description allows Distributor, Reseller or Customer to perform the following actions, then Distributor must notify Dell before Distributor, Reseller or Customer doing so: (a) make changes to the APEX System configuration; or (b) deactivate the remote support features of any components of the APEX System. Dell will review all requests and may approve or deny them in Dell's sole discretion. Additional fees may apply.

7.4 **Access to Customer Content.** When providing Support Services, Dell will not access or use any Customer Content stored on the APEX System unless Distributor, Reseller or Customer has authorized Dell to do so.

7.5 **Replaced Parts.** Distributor will notify Reseller, and require Reseller to notify Customer, that Customer is responsible for removing all Customer Content stored on replaced parts of the APEX System, before their return to Dell. Distributor agrees that Dell has no liability for any Customer Content that Customer did not remove. Distributor may purchase a data deletion service from Dell, if available.

8. Warranty.

8.1 **APEX Service Limited Warranty.** Dell warrants that the APEX Service will be provided in material conformance with the Service Offering Description. If the APEX Service does not comply with this warranty, Dell's entire liability and Distributor's, Reseller's and Customer's exclusive remedies are as follows: (a) Dell will make reasonable efforts to correct the non-conformance as provided in any applicable Service Level Agreement or Service Level Objective, or if none is provided, within a reasonable period of time; and (b) if Dell is unable to correct the non-conformance for reasons for which Dell is responsible, then Dell may terminate the APEX Service and refund Distributor any pre-paid fees for the APEX Service that will not be provided as a result of the termination. Distributor must promptly notify Dell in writing of any non-conformance claims covered by this warranty.

8.2 **Related Services Warranty.** Dell will perform Related Services in a workmanlike manner in accordance with generally accepted industry standards. Distributor must notify Dell of any failure to so perform within 10 days after the date on which such failure first occurs. In such case, Dell will use reasonable efforts to correct such failure within a reasonable period of time. If, after reasonable efforts, Dell is not able to correct such deficiencies for reasons for which Dell is responsible, then Distributor may terminate the part of the Order related to the Related Services for cause by providing written notice to Dell. Dell will refund Distributor any pre-paid fees for the Related Service that will not be provided as a result of the termination.

8.3 **Limitations.** The warranties set forth in this Clause 8 (Warranty) do not apply to any Trial Service or APEX Service provided free of charge and does not cover problems caused by: (i) accident or neglect by Distributor, Reseller, Customer or any third party; (ii) any Third-Party Products, or other third party items or services with which the APEX Service is used; (iii) installation, operation or use not in accordance with Dell's instructions and the applicable documentation; (iv) use in a manner or for a purpose for which the APEX Service was not designed; (v) modification, alteration or repair by anyone other than Dell; or (vi) other causes beyond Dell's control. Except where the APEX System is installed at a Dell provided Colocation Site, Dell has no obligation for any non-compliance caused by elements of the APEX System whose original identification marks have been altered or removed or if the APEX System is installed in an environment for which it was not designed. The APEX Service is not fault-tolerant and is not designed for, and must not be used in, hazardous environments requiring fail-safe performance, including any application where the failure of the APEX Service could lead to death, bodily injury, or physical or property damage (collectively, "**High-Risk Activities**"). Dell expressly disclaims any express or implied warranty of fitness for High-Risk Activities.

8.4 **Warranty Disclaimer. Other than the warranties set forth in this Clause 8 (Warranty), and to the maximum extent permitted by applicable law, Dell: (a) makes no other express warranties; (b) disclaims all implied warranties, including merchantability, fitness for a particular purpose, title and non-infringement; and (c) disclaims any warranty arising by statute, operation of law, course of dealing or performance or usage of trade. Dell does not warrant that the use of APEX Service or performance of the Related Services will be uninterrupted or error-free. Dell is not liable for delays, interruptions, service failures, or other problems inherent in use of the internet and electronic communications or for issues related to non-Dell provided Colocation Sites. Distributor agrees that Distributor is not relying on delivery of future functionality, public comments or advertising by Dell, or product roadmaps when ordering the APEX Service.**

8.5 Distributor shall not make any warranty on Dell's behalf, and Distributor shall indemnify and hold Dell harmless from any claims related to any warranty Distributor grants that is beyond the warranties described in this Clause 8.

9. **APEX Trial Services.** Dell may provide Distributor with the ability to evaluate, or allow a Reseller to allow a Customer to evaluate, free of charge certain APEX Services or a feature of the APEX Service ("**Trial Service**"). Each Trial Service commences on the date Dell first provides Distributor or Customer with access to the Trial Service and the duration of the Trial Service is stated at the time of the order ("**Trial Term**"). For the purpose of Distributor's or Customer's use of Trial Services, Distributor agrees, and will require Reseller to have Customer agree, that:

- (a) Use of a Trial Service is subject to the applicable Service Offering Description;
- (b) Distributor must not disclose to any third party the results of any comparisons that Distributor, Reseller, or Customer make between the Trial Service and any competitive offerings; and

- (c) Except as provided in this Clause 9 (APEX Trial Services) or otherwise stated in the Agreement, Trial Services are “APEX Services” for the purpose of other Clauses of the Agreement.

10. Third-Party Offerings. Dell may offer Third-Party Products for use with the APEX Service through an online marketplace, or using Dell’s then-current Third-Party Product resale programs (e.g. “Extended Technologies Complete”, “Software & Peripherals (S&P)”). Third-Party Products that Distributor orders from Dell through these resale programs are referred to as “**Third-Party Offerings**”. Distributor may offer Third-Party Offerings to Reseller to offer to Customer for Customer’s use, at Distributor’s option, if available. If Distributor chooses to offer Third-Party Offerings to Reseller for Reseller to offer to Customer for Customer’s use, Distributor, Reseller, and Customer are responsible for complying with any terms applicable to the Third-Party Offerings, including any separate fees imposed by the provider of that Third-Party Offering (whether payable to Dell or directly to the third-party provider). Distributor agrees to comply with the standard license, services, warranty, indemnity, and support terms of the third-party manufacturer/supplier (or an applicable direct agreement between Distributor and the third-party manufacturer/supplier) for the Third Party Offering. Even if Dell invoices for them, Dell does not provide support services for Third-Party Offerings. Distributor must contact the applicable third-party directly for support. **Third-Party Offerings are provided “AS IS”. Any warranty, damages or indemnity claims against Dell for Third-Party Offerings are expressly excluded.** Dell may suspend or terminate provision and hosting of any Third-Party Offerings at any time, and that suspension or termination will not be deemed a material change to the APEX Service for the purpose of Clause 3.2 (Material Modifications).

11. Data Protection.

11.1 Security Measures. Without limiting Dell’s obligations under this Data Protection Clause, Dell will provide the APEX Service or any Related Service as applicable in compliance with reasonable and appropriate security measures stated in the [APEX Information Security Measures Addendum](#), including all updates during the Subscription Term (“**AISMA**”). The AISMA and the applicable Service Offering Description define the administrative, physical, technical and other safeguards applied to Customer Content residing in the APEX Service. Distributor agrees, and will cause Reseller to cause Customer to agree, that Customer is responsible for applying appropriate security measures to Customer Content including: (a) controlling access Customer provides to Customer’s personnel and/or End Users; (b) configuring the APEX Service appropriately; (c) ensuring the security of Customer Content (e.g., through encryption) while it is in transit and at rest; and (d) backing up Customer Content consistent with the requirements of Clause 14.2 (Prevention and Mitigation). Distributor acknowledges, and will cause Reseller to cause Customer to acknowledge, that Customer is solely responsible for ensuring that Customer has implemented appropriate security measures for Customer Content and Customer’s intended use of the APEX Service. Distributor acknowledges, and will cause Reseller to cause Customer to acknowledge, that uploading Customer Content to the APEX Service does not constitute a disclosure by Customer of Customer’s Confidential Information to Dell.

11.2 Distributor Security Measures. Through the APEX Console, Distributor may have access to Reseller, Customer and/or End User data. Distributor agrees to implement commercially reasonable technical and organizational security procedures and measures, that are no less stringent than those required of Dell in the AISMA, to preserve the security and confidentiality of such data.

11.3 Data Processing. The Dell [APEX Partner Data Processing Addendum](#), including all updates during the Subscription Term (“**Partner DPA**”) describes the parties’ respective roles for the processing and control of Personal Data the parties may exchange in the performance of this Agreement. Distributor is responsible for providing any necessary legal notices to Distributor’s personnel and/or purchasers, Resellers, Customers, or End Users and obtaining any legally required consents related to Distributor’s use, collection, disclosure, sharing, cross border data transfer and processing of Personal Data.

11.4 Required Disclosures. If Dell is required by a government body or court of law to disclose any Customer Content, Dell will provide Distributor, Reseller or Customer, as appropriate, with notice and a copy of the demand as soon as practicable, unless prohibited by applicable law. Dell will take reasonable steps at Customer’s expense to contest any required disclosure if requested by Customer.

12. Confidentiality.

12.1 Scope. Information disclosed by one party to another in connection with the Agreement will be treated as “Confidential Information” if it is marked or identified as “confidential” or similar designation, or should reasonably be known by the receiver to be confidential. Confidential Information does not include information that is: (a) rightfully in the receiver’s

possession without prior obligation of confidentiality from the discloser; (b) a matter of public knowledge; (c) rightfully furnished to the receiver by a third party without confidentiality restriction; or (d) independently developed by the receiver (including its Affiliates) without reference to the discloser's Confidential Information.

12.2 Protection. The receiver will: (a) use Confidential Information of the discloser only for the purposes contemplated in the Agreement; and (b) protect Confidential Information from unauthorized disclosure to third parties for the following time periods: (i) indefinitely with respect to technical information about a discloser's products and services (including the APEX Service) or any information about unreleased products or services; and (ii) 3 years from the date of receipt for all other Confidential Information. The obligations under this Clause will survive any termination of the Agreement.

12.3 Exceptions. Either party may disclose Confidential Information: (a) to an Affiliate, or to a subcontractor or supplier used by Dell to provide the APEX Service or the Related Service provided that they comply with the foregoing; and (b) if required by a government body or court of law, provided that the receiver gives the discloser reasonable notice, if permitted by law, so that the discloser may contest the disclosure or seek a protective order. In addition, Dell may disclose Confidential Information to relevant Dell resellers or Customers for the purpose of fulfilling Dell obligations to Distributor, Reseller, or Customer or in connection with the Dell Technologies Partner Program or channel sale or marketing activities associated with such program.

12.4 Feedback. Any feedback, enhancement requests, corrections, or suggestions that Distributor provides to Dell in connection with a Trial Service, the APEX Service, or a Related Service ("**Feedback**") is Dell's Confidential Information. Distributor agrees that Dell may use the Feedback without any restriction from Distributor or compensation to Distributor, and Distributor assigns to Dell all rights in, and to, Feedback.

13. Monitoring. Dell monitors the APEX Service and collects telemetry data relating to Distributor's, Reseller's, and/or Customer's use of the APEX Service as further provided in the Service Offering Description. For any telemetry data to which Distributor has access, Distributor will use the data in accordance with the Service Offering Description and this Agreement, including Clauses 11.2 (Distributor Security Measures) and 11.3 (Data Processing).

14. Limitation of Liability.

14.1 Limitation on Damages. The maximum liability of each party (including Dell's suppliers and Dell's Affiliates) for all disputes arising under the Agreement is limited to the greater of: (a) \$50,000 (or the equivalent in local currency); or (b) the amount Distributor paid to Dell for the APEX Service and any Related Services during the 12 months immediately before the events giving rise to any dispute. This limitation applies even if any limited remedy in the Agreement is found to have failed in its essential purpose. In addition, neither party shall be liable to the other for any indirect damages, or for lost profits, loss of revenue, loss or corruption of data, loss of use, or procurement of substitute products or services, even if the party alleged to be liable has knowledge of the possibility of such damages. The foregoing limitations and exclusions do not apply to: (i) Distributor's obligation to pay for the APEX Service and any Related Services, (ii) Distributor's obligation to pay for damage to or loss of the APEX System, (iii) Distributor's violation of the restrictions on use of the APEX Service, (iv) a party's indemnity obligations in the Agreement, (v) a party's violation or misappropriation of the other party's intellectual property rights, (vi) in case of gross negligence or willful misconduct or (vii) where prohibited by applicable law. Dell (and Dell's suppliers and Dell's Affiliates) has no liability for any damages resulting from Distributor's use or attempted use of Third-Party Products, or Free Software or Development Tools (both as defined in the EULA).

14.2 Prevention and Mitigation. In the Reseller Agreement, Distributor will require Reseller to notify Customer that Customer is solely responsible for Customer Content. Distributor will require Reseller to include in the Customer Agreement that Customer will implement IT architecture and processes enabling Customer to prevent and mitigate damages in line with the criticality of the Customer Content for Customer's business and its data protection requirements, including a business recovery plan. Distributor will also require Reseller to include in the Customer Agreement that Customer will: (a) provide for a backup process on a regular (at least daily) basis and backup relevant data before Dell performs any remedial, upgrade or other works on the APEX Service or Customer's IT systems; (b) monitor the availability and performance of Customer's IT environment, including the APEX Service; and (c) promptly react to messages and alerts received from Dell or through notification features of the APEX Service and immediately report any issue Customer identifies to Dell. To the extent that Dell has any liability for loss of Customer Content, Dell will only be liable for the cost of commercially reasonable and customary efforts to recover the lost Customer Content from Customer's last available backup.

14.3 **Limitation Period.** Except as stated in this Clause, all claims must be made within the period specified by applicable law. If the law allows the parties to specify a shorter period for bringing claims, or the law does not provide a time at all, then claims must be made within 18 months after the event(s) giving rise to a dispute occurs.

15. **Indemnities.**

15.1 **Indemnification by Distributor.** Subject to the remainder of this Clause 15 (Indemnities), Distributor will: (a) defend Dell against any Third-Party Claim; and (b) indemnify Dell by paying (i) the resulting costs and damages finally awarded against Dell by a court of competent jurisdiction to the extent such are the result of the Third-Party Claim; or (ii) the amounts stated in a written settlement negotiated and approved by Distributor. Distributor may not, without Dell's prior written consent, settle any Third-Party Claim if that settlement obligates Dell to admit any liability, to make any monetary payment, or to undertake any material obligation, or if that settlement would affect any APEX Service, Related Service or Dell's business practices or policies.

15.2 **Indemnification by Dell.** Subject to the remainder of this Clause 15 (Indemnities), Dell will: (a) defend Distributor against any claim made by a third party to the extent it alleges that the APEX Service purchased from Dell or used by Distributor in compliance with the Agreement infringes that party's patent, copyright, or trade secret enforceable in the country where Distributor ordered the APEX Service from Dell (in this Clause "**Dell Indemnified Claim**"); and (b) indemnify Distributor by paying: (i) the resulting costs and damages finally awarded against Distributor by a court of competent jurisdiction to the extent they result from the Dell Indemnified Claim; or (ii) the amounts stated in a written settlement negotiated and approved by Dell. In addition, should any APEX Service become, or in Dell's opinion be likely to become, the subject of a Dell Indemnified Claim, Dell may, at its option: (1) modify or replace the affected APEX Service with a non-infringing substitute; or (2) terminate the APEX Service and refund any fees Distributor prepaid to Dell for the portion of APEX Service that will not be provided as a result of the termination. Dell will not be liable for any claims or damages due to Distributor's continued sale or use of an APEX Service that Dell has modified, replaced, or terminated as provided herein. Except as otherwise provided by law, this Clause 15.2 (Indemnification by Dell) states Distributor's exclusive remedies for any Dell Indemnified Claim relating to the APEX Service. Nothing in the Agreement or elsewhere will obligate Dell to provide Distributor any greater indemnity.

15.3 **Limitations.** Dell will have no obligation under Clause 15.2 (Indemnification by Dell): (a) if Distributor is in material breach of the Agreement; or (b) for any Dell Indemnified Claim resulting or arising from: (i) any combination, operation or use of the APEX Service with any other products, services, items, or technology that are not Dell-branded, including Third-Party Products and open source software; (ii) Customer Content, Third-Party Products, Trial Services, or APEX Services provided free of charge; (iii) use for a purpose or in a manner for which the APEX Service was not designed, or use after Dell notifies Distributor, Reseller, or Customer to cease this use due to a possible or pending Dell Indemnified Claim; (iv) any modification to, or customized configuration of, the APEX Service performed by any person other than Dell or Dell's authorized representatives; (v) any modification to, customized configuration of, the APEX Service performed by Dell pursuant to Distributor's instructions, designs, specifications or any other information Distributor provided; (vi) use of any version of the APEX Service when an upgrade or newer iteration of the APEX Service made available by Dell would have avoided the infringement; (vii) services Distributor provides (including Dell Indemnified Claims seeking damages based on any revenue or value Distributor derives from Distributor's services or Customer Content); or (viii) any data or information that Distributor, Reseller, Customer, or a third party records on or utilizes in connection with the APEX Service.

15.4 **Mutual Indemnity.** Except to the extent that a claim arises from Distributor's non-compliance with the restriction on High-Risk Activities, each party will defend and indemnify the other party against any third party claim or action for personal bodily injury, including death, to the extent directly caused by the indemnifying party's gross negligence or willful misconduct in the course of performing its obligations under the Agreement.

15.5 **Indemnification Process.** A party's duty to defend and indemnify under the Agreement is contingent upon the other party: (a) sending prompt written notice of the Indemnified Claim to the indemnifying party and taking reasonable steps to mitigate damages; (b) granting to the indemnifying party the sole right to control the defense and resolution of the Indemnified Claim; and (c) cooperating with the indemnifying party in the defense and resolution of the Indemnified Claim and in mitigating any damages. "Indemnified Claim" in this Clause 15.5 (Indemnification Process) means any and all claims indemnified by a party under this Clause 15 (Indemnities). The parties' respective rights to Indemnified Claims under this Clause 15 (Indemnities) are in lieu of any common law or statutory indemnification rights or analogous rights, and each party waives such common law or statutory rights, if allowed by applicable law.

16. General.

16.1 **Governing Law; Jurisdiction.** The Agreement and all disputes in connection with the Agreement and/or the APEX Service are governed by the laws of the State of Portugal. Both parties agree to irrevocably submit to the exclusive jurisdiction of the courts located in the city of Lisbon, and agree to waive any and all objections to the exercise of jurisdiction over the parties by those courts and to venue in those courts. In any event, neither the U.N. Convention on Contracts for the International Sale of Goods, nor the Uniform Computer Information Transaction Act will apply to the Agreement or any dispute.

16.2 **Trade Compliance.** Distributor is subject to and responsible for compliance with the export control and economic sanctions laws of the United States, the European Union and other applicable jurisdictions (collectively, "Applicable Trade Laws"). The APEX Service, Related Service, and any other services are for Distributor's authorized use and sale under this Agreement, and may not be used, sold, leased, exported, imported, re-exported, or transferred except in compliance with the Applicable Trade Laws. Distributor represents and warrants that it is not the subject or target of, or located in a country or territory that is the subject or target of economic sanctions under the Applicable Trade Laws. For further information about geographical restrictions and compliance with Applicable Trade Laws, visit [Dell Trade Compliance](#).

16.3 **Distributor's Responsibility.** Distributor agrees that Distributor will obtain all necessary rights, permissions and consents associated with: (a) technology or data (including personal data) that Distributor provides to Dell; and (b) non-Dell software or other components that Distributor directs or requests that Dell use with, install, or integrate with the APEX Service or Related Service.

16.4 **Independent Contractors, Third-Party Rights.** The parties are independent contractors for all purposes under the Agreement and cannot obligate any other party without prior written approval. The parties do not intend anything in the Agreement to allow any party to act as an agent or representative of a party, or the parties to act as joint venturers or partners for any purpose. No party is responsible for the acts or omissions of any other. There are no third-party beneficiaries to the Agreement under any laws.

16.5 **Audit and Record-Keeping.** Distributor will maintain legible, accurate and complete books and records relating to the Agreement or the sale, licensing, delivery, or end-use of the APEX Service for a period of 5 years from the date of creation, unless mandatory local laws require a longer record retention period. At the end of the retention period, Distributor must dispose of all records appropriately. At Dell's request, Distributor must cooperate and assist Dell with any audit, review, or investigation ("**Audit**") that relates to (i) the Agreement or Distributor's compliance with law; (ii) Distributor's sale, distribution, licensing, or delivery of the APEX Service; (iii) any amounts payable by Dell; or (iv) any amounts due to Dell. In connection with an Audit, Distributor will deliver all records, information, and documents reasonably requested by Dell. Dell has the right to conduct onsite Audits, and Distributor will grant Dell and its employees and representatives reasonable access to information, records, personnel, and customers (including Reseller and Customer agreements and other agreements to verify Distributor's compliance with the Agreement), and provide entry and access to Distributor's premises or other locations (during normal business hours) where such information and records are located. Failure to cooperate with an Audit or provide the information or records requested by Dell is a material breach of this Agreement. Dell will pay the costs of an Audit except where a discrepancy of five (5) percent or more is discovered in the information disclosed by Distributor, in which case Distributor agrees to be responsible for all reasonable costs.

16.6 **Force Majeure.** Except for payment of fees, neither party will be liable for failure to perform its obligations during any period if performance is delayed or rendered impracticable or impossible due to circumstances beyond that party's reasonable control. If any delay or failure lasts longer than 30 days, then the other party may immediately terminate, in whole or in part, the relevant APEX Service and/or any Related Services by giving written notice to the delayed party.

16.7 **Assignment and Subcontracting.** Neither party will assign, transfer or novate the Agreement, or any right or obligation or delegate any performance without the other party's prior written consent, which consent will not be unreasonably withheld. Notwithstanding the foregoing: (a) Dell may use Affiliates or other qualified subcontractors to perform Dell's obligations, provided that Dell will remain responsible for their performance; and (b) Dell may assign rights to payments arising from the APEX Service and any Related Services without Distributor's consent.

16.8 **Waiver and Severability.** Failure to enforce a provision of the Agreement will not constitute a waiver of that or any other provision of the Agreement. If any part of the Agreement is held unenforceable, the validity of the remaining provisions will not be affected.

16.9 Notices. The parties will provide all notices under the Agreement in writing. Distributor must provide notices to the local Dell entity which invoices for the APEX Service. Distributor consents to receiving notices from Dell through the APEX Console or as otherwise provided in the Agreement. Distributor is responsible for collecting Customer input in a timely manner as necessary for Distributor to fulfill Distributor's notice obligations in the Agreement. For clarity, it is Distributor's obligation to notify Dell where required herein, including as provided in the Service Offering Description, regardless whether Reseller or Customer has separately notified Dell.

16.10 References. Distributor agrees that Dell may identify Distributor as an APEX Service and/or any Related Service distributor in promotional or marketing materials provided that such materials do not disclose any of Distributor's Confidential Information.

16.11 Entire Agreement, Conflict and Order of Precedence, Modifications. The following are part of the Agreement: (a) the AUP; (b) the Partner DPA; (c) the AISMA; (d) the Service Offering Description; and (e) the Order. In the event of conflict, they will prevail in the following order: (i) the Service Offering Description (and all documents incorporated into it); (ii) the Agreement; (iii) the AUP; (iv) the Partner DPA; (v) the AISMA; and (vi) the Order. Distributor acknowledges that Distributor has read the Agreement, that Distributor understands it, that Distributor agrees to be bound by its terms, and that the Agreement, is the complete and exclusive statement of the agreement between Distributor and Dell regarding the APEX Service and any Related Services that Distributor is purchasing now. All previous representations, discussions, and writings are superseded by this Agreement and the parties disclaim any reliance on them. All content referenced in the Agreement by hyperlink is incorporated into the Agreement in its entirety and is available to Distributor in hardcopy form upon Distributor's request. The pre-printed terms of Distributor's purchase order or any other document that is not issued or signed by Dell do not apply to the APEX Service and any Related Services. Distributor represents that Distributor did not rely on any representations or statements that do not appear in the Agreement when accepting the Agreement. The Agreement may only be modified in writing signed by both parties; provided, however, that Dell may, in its sole discretion update the AUP, the AISMA, the Flow Down Terms, and the Partner DPA at any time. Dell will provide written notice if any such updates result in a material modification under Clause 3.2 (Material Modifications).

If one or more clauses of this Agreement are affected by nullity or if they are rendered inapplicable by the effect of the applicable law or by a decision imposed on the parties, this will not have the effect of causing the nullity of the whole of this Agreement, nor of altering the validity and mandatory nature of all the other clauses. The parties agree to make the necessary amendments to the affected clause so that it can bring an effect that comes as close as possible to the original will of the parties.