



All references to Egenera in these Terms and Conditions should be read as “Contractor (immixTechnology, Inc.), acting by and through its supplier, Egenera.”

TERMS AND CONDITIONS FOR EGENERA PRODUCTS AND SERVICES

Title. Egenera will at all times retain ownership of all Egenera Software and Documentation, and any copies thereof.

Warranty. Egenera Hardware: Egenera warrants that the Egenera Hardware delivered hereunder shall be free from defects in material and workmanship and shall function in accordance with Egenera’s publicly available written specifications in effect at the time of shipment for a period of either one (1) year from the date of installation or thirteen (13) months from the date of Delivery by Egenera, whichever occurs first. Egenera Hardware Product upgrades are warranted from the date of Delivery until the end of the original limited warranty period of the related Egenera Hardware Product.

Notwithstanding the foregoing, Egenera’s sole and exclusive responsibility under this limited warranty will be, at its option, to either replace or repair any Egenera Hardware Product that fails to conform to this limited warranty, provided Reseller has promptly reported the nonconformance to Egenera in writing and Egenera has, upon inspection, found such Egenera Hardware Product to be nonconforming. In the event Egenera agrees to replace the Egenera Hardware Product, it is Reseller’s responsibility to promptly return the nonconforming Egenera Hardware to Egenera at Egenera’s expense, including the cost of freight, transit insurance, and any applicable tariffs and duties. Replacement spare parts are likewise warranted for the remainder of the original Egenera Hardware Product’s limited warranty period, or ninety (90) days, whichever is greater. If, after what Egenera considers a reasonable number of attempts, Egenera is not able to repair or replace the Egenera Hardware Product so that it functions in accordance with this warranty, Egenera shall credit Reseller’s account in an amount equal to the price Reseller paid for the nonconforming Egenera Hardware Product, accept such Hardware Product’s return, and reimburse Reseller its freight charges, duties, tariffs and in-transit insurance premiums associated with such return. All replaced/returned Hardware or parts will become Egenera’s property and title thereto shall pass upon receipt. These shall be Egenera’s sole and exclusive obligation and liability regarding the Egenera Hardware Products.

Egenera Software: Egenera warrants that the media containing each Egenera Software Product shall be free from defects in material and workmanship and that each Egenera Software Product shall substantially conform to Egenera’s publicly available written specifications in effect at the time of Delivery for a period of either one (1) year from the date of installation or thirteen (13) months from the date of Delivery, whichever occurs first. Egenera shall, at its option and expense, repair or replace such media that it finds to be defective and shall use reasonable efforts to remedy any such nonconformance in the Egenera Software Product that is reported by Reseller in writing during the limited warranty period. If after what Egenera considers a reasonable number of attempts, Egenera is not able to remedy the Egenera Software Product so that it functions in accordance with this limited warranty, Egenera shall credit Reseller’s account in an amount equal to the price Reseller paid for the nonconforming Egenera Software Product and accept such Software Product’s return. These shall be Egenera’s sole and exclusive obligation and liability regarding the Egenera Software Products and media.

The limited warranties above do not apply to problems that arise from (i) accident or abuse, (ii) interoperation with other non-Egenera products, (iii) improper installation or modification by anyone other than Egenera, or (iv) use of the Products in an environment or in a manner or for a purpose for which the Product was not designed, or (v) Reseller’s or its Customer’s failure to implement all previously supplied Maintenance Updates or Software Upgrades.

Egenera does not warrant that the operation of the Products will be uninterrupted or error free or that all defects can be corrected. Egenera currently provides all support for certain Red Hat, Inc. (“Red Hat”) Third Party Software provided by Egenera, and until notified otherwise, Reseller and its Customers should contact Egenera rather than Red Hat for support of those products unless the Customer or Reseller has contracted directly with Red Hat for the support of those products. Third Party Products are provided by Egenera “AS-IS”.



Egenera shall exercise reasonable commercial efforts to provide standard Egenera Services, including Maintenance Updates and Software Upgrades that are provided as a component thereof, ordered by Reseller on its Demonstration system. Services shall be provided in a professional, workman like manner and in accordance with generally accepted industry standards. Certain geographical imitations and common carrier schedules may affect Egenera response times.

THE ABOVE WARRANTIES ARE IN LIEU OF ANY OTHER WARRANTY, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, OR ANY WARRANTY OTHERWISE ARISING OUT OF ANY PROPOSAL, SPECIFICATION, SAMPLE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE. THERE IS NO IMPLIED WARRANTY OF NONINFRINGEMENT. EGENERA NEITHER ASSUMES NOR AUTHORIZES ANY PERSON TO ASSUME FOR IT ANY OTHER LIABILITY. No representation or other affirmation of fact, including, but not limited to, statements regarding capacity, suitability, for use or performance of the Products, whether made by Egenera employees or otherwise, shall be deemed to be a warranty of any purpose or give rise to any liability of Egenera whatsoever unless contained in this Agreement.

Limitation of liability. IN NO EVENT SHALL EGENERA BE LIABLE FOR ANY DAMAGES RESULTING FROM LOSS OF USE, DATA, PROFIT, SOFTWARE OR BUSINESS, OR FOR ANY SPECIAL, EXEMPLARY, INDIRECT, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER ARISING IN AN ACTION OF CONTRACT, TORT OR OTHER LEGAL THEORY, EVEN IF EGENERA KNEW OR SHOULD HAVE KNOWN ABOUT THE POSSIBILITY OR EXISTENCE OF SUCH DAMAGE OR LOSS.

EXCEPT AS PROVIDED IN **INFRINGEMENT INDEMNITY**, EGENERA'S LIABILITY FOR DAMAGES FOR ANY CAUSE WHATSOEVER, AND REGARDLESS OF THE FORM OF ACTION (IN CONTRACT OR IN TORT), SHALL BE LIMITED TO RESELLER'S PROVEN DIRECT DAMAGES IN AN AMOUNT NOT TO EXCEED THE PRICE RESELLER PAID FOR THE PRODUCT(S) OR SERVICE THAT CAUSED THE DAMAGES OR ARE THE SUBJECT MATTER OF THE CAUSE OF ACTION. No action arising out of or in connection with this Agreement or any transaction hereunder may be brought by either party more than eighteen (18) months after the cause of action has arisen.

Licenses. Per FAR 12.212 the items provided to the government are considered Commercial computer software or commercial computer software documentation. The following license terms control the acquisition of these items and the Terms and Conditions, SLA, and maintenance agreement attached hereto as Schedules 'A' and 'B' and incorporated herein by reference, constitutes the only rights acquired by the government.

Inspection/Acceptance. The Contractor (immixTechnology, Inc.) can only, and shall only tender for acceptance those items that substantially conform to the software manufacturer's ("Egenera") published specifications. Therefore, items delivered shall be considered accepted upon delivery. The Government reserves the right to inspect or test any supplies or services that have been delivered. The Government may require repair or replacement of nonconforming supplies or re-performance of nonconforming services at no increase in contract price. If repair/replacement or re-performance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights-

- (1) Within the warranty period; and
- (2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.



SCHEDULE A
EGENERA, INC. END USER TERMS AND CONDITIONS

1. **Certain Definitions.** The following terms have the meanings set forth below in this Section 1:

"**Egenera Hardware**" means the Egenera-labeled hardware, including spares, parts and hardware components, acquired by you from Egenera or one of its authorized distributors.

"**Egenera Software**" means the Egenera-owned software, in object code form, including certain of the firmware that is embedded in the Egenera Hardware and improvements, enhancements, revisions, updates or upgrades provided by Egenera or one of its authorized distributors, and certain related documentation (including CD-ROM duplicates), accompanying the Egenera Hardware or licensed to you from Egenera or one of its authorized distributors for use on Egenera Hardware.

"**Egenera Products**" means Egenera Hardware and Egenera Software.

"**Herein**", "**hereunder**", "**hereby**" and words of similar import include both these Ts&Cs and the Master Purchase Agreement of which these Ts&Cs are part.

"**Licensed Software**" means any Egenera Software and Third Party Software, including user and other related documentation (including user manuals and any technical and training related documentation) and improvements, enhancements, revisions, and updates, and any Software Upgrades and Maintenance Updates that may be provided by directly or indirectly Egenera from time to time.

"**Maintenance Update**" means a generally available software patch, bug fix, and update provided by Egenera that is intended to correct errors in the Egenera Software.

"**Products**" means Egenera Hardware, Egenera Software and unless differentiated, Third Party Software.

"**Open Source Software**" means Third Party Software that is licensed under the terms of various published open source software license agreements (such as the GNU Public License) or copyright notices accompanying such software.

"**Services**" means Egenera's installation, support and training services generally available from time to time from Egenera or its authorized service providers, excluding any services Egenera may provide as part of its limited warranty coverage.

"**Software Upgrade**" means either (i) a generally available "Major Release", which is intended to provide significant functionality enhancements as well as incorporate cumulative Maintenance Updates since the most recent release of the Egenera Software, or (ii) a generally available "Minor Release", which is intended to provide incremental functionality enhancements as well as incorporate cumulative Maintenance Updates since the most recent release.

"**Third Party Software**" means software provided by Egenera or one of its authorized distributors or service providers that is labeled as being provided by a third party and/or is owned other than by Egenera. Linux™ software is an example of both Third Party Software and Open Source Software.

2. **Limited License.** Egenera or its third party suppliers own and shall retain all title to, ownership of and all applicable rights in patents, copyrights, trade secrets, trademarks, trade names and all other intellectual property and proprietary rights in and to the Licensed Software. Subject to the terms and limitations of these Ts&Cs, you are hereby granted a non-exclusive, non-transferable, non-sublicensable, limited license to use, in object code form only, the Licensed Software solely for your own internal use and only on, and the associated documentation only with, the Egenera Hardware for which it was supplied. This license is not a sale of any rights in the Licensed Software.



2.1 **Copies.** You may make a reasonable number of copies of software included in the Licensed Software (exclusive of the documentation supplied therewith) solely for backup or archival purposes or when copying is an essential step in the authorized use of the associated Products.

2.2 **Additional Restrictions.** Except to the extent expressly permitted in this Section 2 or applicable law, you may not: (a) modify, translate, reverse engineer, decompile, disassemble, otherwise attempt to obtain the source code of, or create derivative works based on or otherwise tamper with, any Licensed Software or any firmware, circuit board, or integrated circuit; (b) copy (including copying onto a bulletin board or similar system) the Licensed Software (c) rent, lease, time share, grant a security interest in, or otherwise transfer or sublicense rights to, any Licensed Software; (d) modify, disable, attempt to circumvent or otherwise interfere with any software procedures or other mechanisms that enforce use restrictions and/or that may disable the functionality of such software upon violation of the terms of this license (and you acknowledges that any attempt to do so may be a violation of applicable law); (e) remove, alter or fail to retain any proprietary notices or labels on any Licensed Software or any copies thereof; or (f) disclose or otherwise make available any Licensed Software in any form to any third party.

2.3 **Responsibility for Personnel.** You shall be fully responsible to Egenera for your corporate affiliates', employees', agents', consultants' and independent contractors' compliance with the terms and conditions of this license, and any non-compliance by any of them shall be deemed to be a violation of the terms of this license by you.

2.4 **License Termination.** Reserved.

2.5 **Third Party Software.** You agree that your use of Third Party Software is subject to additional license terms and conditions applicable to such Third Party Software, copies of which are available from Egenera on request. Certain Third Party Software supplied by Egenera is Open Source Software and as such is governed by (and your use thereof is subject to) open-source software license agreements supplied with or copyright notices accompanying such Open Source Software, such as the GNU Public License. Egenera makes no claim of ownership of Open Source Software. Any terms of these Ts&Cs that conflict with the terms of any license agreements or copyright notices for Open Source Software shall not apply to such Open Source Software to the extent of such conflict.

3. Services.

3.1 **Term, Renewal and Pricing.** The initial term of any support Services purchased at the time of a Product order shall commence upon Acceptance (as that term is used in the Master Purchase Agreement of which these Ts&Cs are part) of the applicable Egenera Product. You may at your option renew support Service(s) at the end of their initial term for a renewal term of similar duration at the same price(s) agreed upon for the initial term. Egenera may otherwise change the features, fees and components of the Services effective at the commencement of any renewal term by giving you notice of such changes prior to the expiration of the then-current term. The fees charged for Services shall be paid in advance of the commencement of the applicable term. The features, components and response times are subject to local availability and may vary by geography. If a Product's applicable limited warranty or Service coverage has lapsed, Egenera may at its election provide and charge for support Services on a per-event, time-and-materials basis. Any request by you to reestablish support Services after a period of time in which such Services were not provided may be subject to your payment of a recertification fee specified by Egenera at the time. Services may be provided by Egenera directly or by one of its authorized third-party service providers.

3.2 **Your Obligations.** You are responsible for supplying and maintaining an appropriate environment (including power, network and telephone connections, etc.) for the Products, providing Egenera with remote access to each system you purchase from Egenera and providing an IP address, login and password for Egenera to establish access to such system. Failure to provide remote access may affect Egenera's response and resolution time. If such remote access is not provided and as a result an Egenera support engineer is required on site, Egenera shall invoice you and you shall pay Egenera's prevailing time and material charges, inclusive of all travel related expenses, for the on-site service. Egenera may require your assistance in recreating a Product problem. You agree to provide sufficient, free and safe access to your facilities and systems to enable Egenera to fulfill its obligations. You agree to allow Egenera to install mandatory engineering changes (such as those required for safety) on a Product. The inability to recreate the problem and to provide such assistance as may be necessary may prevent Egenera from resolving the problem.

3.3 **Upgrades and Updates.** Egenera's limited warranty coverage includes Maintenance Updates but does not include Software Upgrades. During or after the applicable Egenera Software limited warranty period, you may purchase Egenera's



standard support Services in order to obtain Egenera's most current Software Upgrades. Egenera provides support Services for only the two most recent Major Releases of Egenera Software (i.e., the then-current Release and one Major Release back).

3.4 **Professional Services.** Any unique or nonstandard custom software design, development, and related support and/or integration, project management, and consulting services that you may Order hereunder shall be more fully described in a mutually agreed upon written "**Professional Services Work Order**", and otherwise be subject to the terms and conditions hereof.

4. **Limited Warranty.**

4.1 **Egenera Product Limited Warranty.** Egenera warrants that the Egenera Products will, for a period of one (1) year after the date on which the Egenera Products are first delivered to you, substantially and materially perform in accordance with Egenera's publicly available written specifications in effect at the time of such delivery. The limited warranty period for non-standard custom software provided as part of a Professional Services Work Order is sixty (60) days from the date of acceptance. Egenera Hardware upgrades are warranted until the end of the original warranty period of the Egenera Hardware to which they are added. Any replacement Egenera Hardware part provided as part of Egenera's limited warranty coverage will be warranted for the greater of the remainder of the replaced original part's limited warranty period and ninety (90) days. All replaced parts shall be returned to and become the property of Egenera. If a replaced part is not received by Egenera within thirty (30) calendar days of your receipt of its corresponding replacement part, Egenera will invoice you and you shall pay the list price of the replacement part. Egenera is responsible for the shipping and insurance charges on replacement and replaced parts shipped to and from you as part of Egenera's limited warranty coverage. Egenera's sole and exclusive liability and obligation under this limited warranty shall be as follows: if, during an applicable limited warranty period, you report in reasonable detail in writing and Egenera subsequently verifies that an Egenera Product does not conform to its limited warranty described in this Section 4.1, then Egenera shall at its option (a) provide replacement parts and service necessary to repair the Egenera Hardware and use reasonable efforts to modify the Egenera Software to make it conform to its limited warranty, (b) replace the nonconforming Egenera Product with Egenera Product that conforms to this limited warranty, or (c) if unable to make such repair or replacement after a reasonable number of attempts, refund the net amount Egenera was paid for the nonconforming Product in exchange for its return.

4.2 **Egenera Services Limited Warranty.** Services shall be provided in a professional, workmanlike manner and in accordance with generally accepted industry standards. Egenera's sole and exclusive liability and obligation under this limited warranty shall be as follows: if you notify Egenera in writing within thirty (30) days after the date a Service was rendered, and Egenera subsequently determines, that Egenera has failed to provide the Service or a component thereof in accordance with this limited warranty, then Egenera shall at its option (a) reperform the Service, or (b) if after a reasonable number attempts, Egenera is unable to provide the Service so that it conforms to this limited warranty, refund to you the net amount Egenera was paid for the non-conforming portion of the Service.

4.3 **Exclusions.** The limited warranties set forth in this Section 4 do not apply to problems that arise from accident or abuse, interoperation with other non-Egenera-labeled products, improper installation or modification other than by Egenera, use in an environment or in a manner or for a purpose for which a Product was not designed, third party software not supplied by Egenera or your failure to implement all previously supplied Maintenance Updates or Software Upgrades. Egenera does not warrant that the operation of the Products will be uninterrupted or error free, or that all defects can be corrected. Third Party Software is provided by Egenera "AS-IS". With respect to Egenera's BladeFrame® product lines, Egenera shall not be responsible for (and its limited warranty coverage and support Services shall not apply to) any problems or errors that arise or result from or relate to your running or having run any software on the Control Blades™ of such products other than (a) software provided as part of Egenera's base BladeFrame software package (including upgrades thereof or updates thereto provided by Egenera) or (b) other software specifically approved by Egenera in writing for running on such Control Blades.

4.4 Egenera makes the warranties described in this Section 4 solely to the first End User to which Egenera or its authorized distributor delivers the Products; these warranties are not for the benefit of any other party; and no End User rights under this Section 4 are assignable or transferable, directly or indirectly, by operation of law or otherwise.



4.5 EXCEPT FOR THE EXPRESS LIMITED WARRANTIES SET FORTH IN THIS SECTION 4, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EGENERA (a) PROVIDES THE PRODUCTS OR SERVICES WITHOUT ANY WARRANTY OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, AND (b) ON BEHALF OF ITSELF AND ITS THIRD PARTY SUPPLIERS EXPRESSLY EXCLUDES AND DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, OR NON-INFRINGEMENT AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE. You acknowledge that the Products are not designed, licensed or intended for use in the operation or maintenance of any nuclear facility, mass transit system, aviation system, life support or monitoring system or other inherently dangerous application. Egenera and its licensors disclaim any express or implied warranty of fitness for such uses, and neither Egenera nor its licensors shall be liable to you, in whole or part, for any claims arising from any such use.

5. Infringement Indemnity.

5.1 Egenera shall defend you against any third party-claim that an Egenera Product infringes any copyright, trade secret, or U.S. patent issued on or before the date on which the Egenera Product is delivered to you, and pay the resulting costs and damages finally awarded against you by a court of competent jurisdiction, provided you (a) promptly notify Egenera in writing of such claim, (b) provide Egenera with the ability to participate in any proceedings and settlement of claim, and (c) reasonably cooperate in response to an Egenera request for assistance. Egenera shall not be responsible for any costs, expenses, or compromise incurred or made by you without Egenera's prior written consent. Should any Egenera Product become, or in Egenera's opinion be likely to become, the subject of such a claim, Egenera may at its option and expense (x) procure for you the right to make continued use thereof, (y) replace or modify such so that it becomes non-infringing, or (z) request return and upon receipt thereof refund the price Egenera was paid for the applicable Egenera Product as depreciated by an equal amount over the lifetime of the Egenera Product, taking into account the expected useful life of the Egenera Product, the duration of the your use of same, and generally accepted accounting practices.

5.2 Egenera shall have no liability if the alleged infringement is based on: a combination with non-Egenera Products; use for a purpose or in a manner for which the Product was not designed; use of any older version of the Egenera Software when use of a newer Egenera revision that Egenera has made generally available to its customers would have avoided the infringement; any modification made by you or any third party after delivery by Egenera; any modifications or custom software development made by Egenera pursuant to your specific instructions or specifications; any intellectual property right owned or licensed by you or any of your Affiliates; or Third Party Software in its form prior to any modifications made by Egenera.

5.3 THIS SECTION 5 STATES YOUR SOLE AND EXCLUSIVE REMEDY AND EGENERA'S SOLE AND EXCLUSIVE OBLIGATION AND LIABILITY WITH RESPECT TO ANY ALLEGED INFRINGEMENT. Anything herein to the contrary notwithstanding, Egenera's obligations and undertakings under this Section 5 are solely for the benefit of the first End User to which to which Egenera or its authorized distributor delivers the Products, and no End User rights under this Section 5 are assignable or transferable, directly or indirectly, by operation of law or otherwise.

6. Confidentiality. Each party agrees that it shall not disclose, use, modify, copy, reproduce or otherwise divulge any Confidential Information of the other party other than to those of its subsidiaries and its and its subsidiaries' employees, agents and contractors who have a bona fide need to know for the purposes of fulfilling such party's obligations hereunder and are under a duty of non-disclosure with respect to such information at least as protective of the disclosing party's information as those set forth herein. Confidential Information means information in any form disclosed or made available by the disclosing party to the receiving party in the course of performing obligations under this Agreement that a reasonable person would consider to be confidential or proprietary in nature, and the Products. The receiving party shall use the same degree of care to prevent the unauthorized disclosure of the other party's Confidential Information as the receiving party uses to safeguard its most valuable proprietary information, but in no event less than a reasonable degree of care. The prohibitions contained in this Section 6 shall not apply to information (a) already lawfully known to the receiving party free of any restriction or obligation to keep it confidential, (b) independently developed by the receiving party without reference to the disclosing party's Confidential Information, (c) that is or becomes generally known to the public through no fault of the receiving party, or (d) subsequently disclosed to the receiving party by a third party who rightfully discloses such information without restriction and free of any obligation to keep it confidential. The receiving



party may disclose the disclosing party's Confidential Information when required law or the valid order or regulatory or other requirement of a governmental entity or court of competent jurisdiction. In such cases the receiving party must give the disclosing party prompt prior notice, disclose only that portion of the Confidential Information that is legally required to be furnished, and reasonably cooperate with the disclosing party in its efforts to obtain a protective order or assurances of confidential treatment thereof.

7. Limitation of Liability.

7.1 TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL EGENERA OR ITS THIRD-PARTY SUPPLIERS BE LIABLE FOR ANY DAMAGES RESULTING FROM LOSS OF USE, DATA, PROFIT, SOFTWARE OR BUSINESS OR FOR ANY SPECIAL, EXEMPLARY, INDIRECT, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER ARISING IN CONTRACT, TORT OR UNDER ANY OTHER THEORY, EVEN IF EGENERA OR SUCH SUPPLIER KNOWS OR SHOULD HAVE KNOWN ABOUT THE POSSIBILITY OR EXISTENCE OF SUCH DAMAGE OR LOSS.

7.2 EXCEPT IN CONNECTION WITH DEATH, PERSONAL INJURY, DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY OR FRAUD, EGENERA'S AGGREGATE LIABILITY FOR DAMAGES FOR ANY CAUSE WHATSOEVER, AND REGARDLESS OF THE FORM OF ACTION (IN CONTRACT OR IN TORT OR OTHERWISE), SHALL BE LIMITED TO YOUR DIRECT DAMAGES IN AN AMOUNT NOT TO EXCEED THE NET AMOUNT EGENERA WAS PAID FOR THE PRODUCT(S) OR SERVICE(S) THAT CAUSED THE DAMAGES OR ARE THE SUBJECT MATTER OF THE CAUSE OF ACTION. No action arising out of or in connection with these Ts&Cs or any transaction hereunder may be brought by you more than eighteen (18) months after the cause of action has arisen.

7.3 The limitations set forth in this Section 7 shall apply to all causes of action under or relating to these Ts&Cs and/or your purchase and use of Products and Services, including any claim against any subsidiary, stockholder, affiliate, officer, director, employee or agent of Egenera.

8. General.

These Ts&Cs are the final, exclusive and complete agreement with respect to the subject matter hereof and shall control and prevail in the event of any conflict or inconsistency between them and any other terms and conditions that purport to govern your use of the Products or Egenera's warranty or indemnification obligations relating thereto, including but not limited to any terms or conditions appearing on the face or reverse side of any purchase order, acknowledgment, confirmation or other writing that are different from or in addition to those specified herein, even if such purchase order is accepted and acknowledged by Egenera. If any provision of these Ts&Cs is held invalid, the remainder of these Ts&Cs shall continue in full force and effect. These Ts&Cs may be modified only by written agreement signed by an authorized officer of Egenera.

You may not export or re-export the Product except in compliance with the United States Export Administration Act and the related rules and regulations and similar non-U.S. government restrictions, if applicable. You shall comply in all respects with all applicable export and re-export restrictions applicable to the Products or related materials and neither party shall be liable hereunder if the export of the Products is prohibited. The Licensed Software and accompanying documentation are deemed to be "commercial computer software" and "commercial computer software documentation," respectively, pursuant to DFAR Section 227.7202 and FAR Section 12.212(b), as applicable. Any use, modification, reproduction, release, performing, displaying, or disclosing of the Licensed Software by the U.S. Government shall be governed solely by the terms of these Ts&Cs.