

**PLEASE READ CAREFULLY BEFORE ORDERING OR DOWNLOADING ANY HARDWARE, SOFTWARE OR SUPPORT SERVICES FROM THIS WEBSITE:**

This agreement is a legal agreement between You (**Licensee, Customer or You**) and Loadbalancer.org Limited of Compass House, Compass Road, North Harbour Business Park, Portsmouth, Hampshire PO6 4PS (**Loadbalancer, us or we**) for Loadbalancer Software, Technical Support Services and (if applicable) Loadbalancer Hardware. Orders for any Loadbalancer Hardware, Software or Technical Support Services are subject to these terms and conditions and the placing of an order by You shall be considered as acceptance of these terms and conditions.

**1. INTERPRETATION**

1.1. The definitions and rules of interpretation in this clause 1 apply in these terms and conditions.

- 1.1. **Software Fee:** the fee for the specific Loadbalancer Software program purchased by the Customer.
- Commencement Date:** the date You submit your order for the Loadbalancer Software or Hardware.
- Control:** shall be as defined in section 1124 of the Corporation Tax Act 2010; the expression **change of control** shall be construed accordingly.
- Defect:** an error in the Loadbalancer Software or Hardware that causes it to fail to operate substantially in accordance with the relevant Documentation.
- Documentation:** the documents provided by Loadbalancer for the Loadbalancer Software and Hardware, in either printed text or machine-readable form, including the technical documentation, program specification and operations manual.
- Fees:** the Software Fee, Rental Fee, Technical Support Services Fee and Hardware Fee.
- Hardware Fee:** the fee for the specific Loadbalancer Hardware purchased by the Customer.
- Hardware Warranty Period:** 3 (three) years from the Commencement Date in respect each piece of Loadbalancer Hardware ordered by You.
- Virtual Appliance Platforms:** VMware, Hyper-V and KVM and any other virtual appliance platform notified by us to You from time to time.
- Initial Services Support Term:** the duration of the Technical Support Services as selected by the Customer.
- Intellectual Property Rights:** patents, utility models, rights to inventions, copyright and neighbouring and related rights, trade marks and service marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets), and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.
- Loadbalancer Hardware:** Loadbalancer's hardware purchased by You.
- Loadbalancer Software:** Loadbalancer's software program purchased by You and any subsequent amendments and updates thereto save that where the Customer has purchased Security Services Only Technical Support

	Services the Loadbalancer Software shall not include amendments and updates.
<b>Normal Working Hours:</b>	between 9am and 5pm in the country of Customer.
<b>Open-Source Software:</b>	open-source software as defined by the Open Source Initiative ( <a href="http://opensource.org">http://opensource.org</a> ) or the Free Software Foundation ( <a href="http://www.fsf.org">http://www.fsf.org</a> ).
<b>Premium Working Hours:</b>	24 hours a day.
<b>Renewal Support Period:</b>	the period described in clause 13.
<b>Rental Fee:</b>	the monthly rental fee paid for the Loadbalancer Software where the Customer elects to rent the Loadbalancer Software.
<b>Site:</b>	the Customer's address where any hardware should be delivered as notified to Loadbalancer when the Customer makes an order.
<b>Software Licence:</b>	the licence for the Loadbalancer Software granted under clause 2.
<b>Technical Support Services:</b>	the technical support services to be provided by Loadbalancer under the agreement as detailed in clause 5.
<b>Technical Support Services Fee:</b>	the fee for the Technical Support Services.
<b>Territory:</b>	worldwide.
<b>Trial Period:</b>	A 30 day period during which the Customer may trial the Loadbalancer Software for no fee.
<b>Money Back Guarantee:</b>	A 90 day period following the invoice date, where the Customer may request in writing the termination, return and refund of the related hardware, software or support contract.
<b>VAT:</b>	value added tax chargeable under the Value Added Tax Act 1994 and any similar additional tax or any other similar turnover, sales or purchase tax or duty levied in any other jurisdiction.

1.2. Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

## **2. GRANT AND SCOPE OF LOADBALANCER SOFTWARE LICENCE**

2.1. In consideration of payment by You of the agreed Software Fee (save where the Loadbalancer Software is used during the Trial Period) and You agreeing to abide by the terms of this Software Licence, and subject to You downloading a Virtual Appliance Platform, we hereby grant to You an non-exclusive, non-transferable, non-sublicensable licence to use the Loadbalancer Software and the Documents in the Territory on the terms of this Licence for the full period of copyright (save where the Loadbalancer Software is rented by You) in the Loadbalancer Software commencing on and including the Commencement Date.

2.2. Where the Loadbalancer Software is rented by the Customer, Loadbalancer grants You a non-exclusive, non-transferable, non-sublicensable licence to use the Loadbalancer Software and the Documents in the Territory on the terms of this Licence subject to payment of the Rental Fee.

2.3. You may use the Loadbalancer Software with a Virtual Appliance Platform on Loadbalancer Hardware or third party hardware per individual licence granted and use any Documents in support of the use permitted under this clause 2.3.

2.4. The Customer shall be permitted to use the Loadbalancer Software during the Trial Period and subject to the restrictions contained in clause 2.5

2.5. Except as expressly set out in this agreement or as permitted by any local law, You undertake:

(a) not to copy the Loadbalancer Software or Documents except where such copying is incidental to normal use of the Loadbalancer Software, or where it is necessary for the purpose of back-up or operational security;

(b) not to rent, lease, sub-license, loan, translate, merge, adapt, vary or modify the Loadbalancer Software or Documents;

(c) not to make alterations to, or modifications of, the whole or any part of the Loadbalancer Software, nor permit the Loadbalancer Software or any part of it to be combined with, or become

incorporated in, any other programs (save that it shall be hosted on a Virtual Appliance Platforms); and

(d) not to disassemble, decompile, reverse-engineer or create derivative works based on the whole or any part of the Loadbalancer Software nor attempt to do any such thing except to the extent that (by virtue of section 296A of the Copyright, Designs and Patents Act 1988) such actions cannot be prohibited because they are essential for the purpose of achieving inter-operability of the Loadbalancer Software with another software program, and provided that the information obtained by You during such activities:

(i) is used only for the purpose of achieving inter-operability of the Loadbalancer Software with another software program; and

(ii) is not unnecessarily disclosed or communicated without our prior written consent to any third party; and

(iii) is not used to create any software which is substantially similar to the Loadbalancer Software.

2.6. Any Open-Source Software incorporated within the Loadbalancer Software is licensed in accordance with the applicable licence terms in force for that software and is not subject to the licence terms set out herein.

### **3. HARDWARE DELIVERY**

3.1. Where the Customer orders Loadbalancer Hardware, Loadbalancer shall deliver the items of Loadbalancer Hardware to the corresponding Site(s) during Normal Working Hours (at such dates and times as are reasonably agreed by the parties).

3.2. The Customer shall be responsible for the installation of the Loadbalancer Hardware save where otherwise agreed between the Customer and Loadbalancer.

3.3. Use of Loadbalancer Software contained on the Loadbalancer Hardware shall be in accordance with the licences granted at clauses 2.1 and 2.2 and subject to the restrictions contained in clause 2.5.

### **4. DOCUMENTATION**

4.1. From time to time, Loadbalancer shall provide to the Customer copies of the Documentation containing sufficient up-to-date information for the proper use of the Loadbalancer Software and Hardware. Such Documentation may be supplied in electronic form.

4.2. The Customer may make such further copies of the Documentation as are reasonably necessary for the use of the Loadbalancer Software and Hardware and for training the Customer's personnel in use of the Loadbalancer Software and Hardware. The Customer shall ensure that all Supplier's proprietary notices are reproduced in any such copy.

### **5. SOFTWARE MAINTENANCE, SECURITY AND SUPPORT SERVICES**

5.1. In consideration of payment by You of the Technical Support Services Fee, during the Initial Support Service Period and any Renewal Support Period, Loadbalancer agree to provide the following Technical Support Services in relation to the Loadbalancer Software only:

(a) Where the Customer has purchased "Premium 24/7" Technical Support Services You shall be entitled to security updates and telephone, email, online chat and remote access Support in remedying any Defects during Premium Working Hours;

(b) Where the Customer has purchased "Standard" Technical Support Services You shall be entitled to security updates and telephone, email, online chat and remote access support in remedying any Defects during Normal Working Hours; and

(c) Where the Customer has purchased Security Services Only Technical Support Services You shall be entitled to security updates and telephone, email, online chat and remote access support solely in relation to the installation of security updates for the Loadbalancer Software onto your server.

5.2. During the Trial Period You shall be entitled to telephone, email, online chat and remote access support solely in relation to the installation and configuration of the Loadbalancer Software onto your server.

## 6. PAYMENT

- 6.1. As applicable, the Customer shall pay the full Software Fee and Hardware Fee within 30 days of receipt of the Loadbalancer invoice for the Loadbalancer Hardware and/or Software.
- 6.2. The initial Rental Fee shall be payable by the Customer to Loadbalancer within 30 days of receipt of the Loadbalancer invoice for the Loadbalancer Software and/or Hardware and on monthly basis thereafter.
- 6.3. The Technical Support Services Fee shall be paid annually for the duration of the Initial Services Support Term and the Renewal Support Period.
- 6.4. The Fees are dependent on the model and quantity of Loadbalancer Software or Hardware that is selected by the Customer and the level and duration of Technical Support Service selected by the Customer and the length of the Renewal Support Period.
- 6.5. All payments stated in these terms and conditions are net of tax. Each party shall, in addition, pay to the other the amount of any tax, duty or assessment (including any applicable VAT) which such party is obliged to pay and/or collect from the other in respect of any supply under the agreement.
- 6.6. Loadbalancer may increase the Technical Support Service Fee and Rental Fee at each anniversary of the Commencement Date by giving the Customer at least 30 days' notice prior to any such anniversary.

## 7. INTELLECTUAL PROPERTY RIGHTS.

- 7.1. The Intellectual Property Rights in the Loadbalancer Software, Hardware and the Documentation are, and shall remain, the property of Loadbalancer and Loadbalancer reserves the right to grant a licence to use the Loadbalancer Software and Documentation to any third parties.

## 8. HARDWARE SUPPORT SERVICES AND WARRANTY

- 8.1. In the event that any item of Loadbalancer Hardware is not of a satisfactory quality and/or fails to operate in accordance with the Documentation (a **Defective Item of Hardware**) during the Hardware Warranty Period:
  - (a) the Customer may provide written notice of this fact to Loadbalancer; and
  - (b) promptly thereafter:
    - (i) Loadbalancer shall at its discretion request a return of the unit for diagnosis and repair; or
    - (ii) Loadbalancer shall at its discretion deliver a replacement part to the relevant site; or
    - (iii) Loadbalancer shall at its discretion deliver a replacement unit to the relevant Site; and
    - (iv) the Customer shall return the Defective Item of Hardware to Loadbalancer (at such address as Loadbalancer shall reasonably specify).
- 8.2. Where such notice is given during the Hardware Warranty Period:
  - (a) Loadbalancer shall be responsible for the cost of delivering the replacement item of Hardware to the relevant Site;
  - (b) The Customer shall be responsible for the cost of returning the Defective Item of Hardware to Loadbalancer; and
  - (c) Loadbalancer shall be entitled to charge the Customer for the reasonable value of the replacement Hardware where the Customer does not return the Defective Item of Hardware.
- 8.3. During the Hardware Warranty Period, Loadbalancer shall ensure that support is available by telephone and/or email (during Normal Working Hours) to provide assistance to the Customer in respect of the following:
  - (a) remedying Defects in Loadbalancer Hardware; and
  - (b) providing advice on the use of the Loadbalancer Hardware.
- 8.4. Subject to clause 11.5, Loadbalancer shall use reasonable endeavours to correct Defects in Loadbalancer Hardware notified to it by the Customer in a timely manner appropriate to the seriousness of the circumstances.
- 8.5. Some Loadbalancer Hardware may be supported by a third party, for example when supplied on Dell Hardware. In these circumstances the hardware warranty lies with the hardware manufacturer.

8.6. If the customer has purchased next day hardware replacement for Loadbalancer manufactured Hardware. Loadbalancer shall endeavour to ship similar replacement hardware within 24 hours where possible, with no guarantee of delivery time.

## **9. THE CUSTOMER'S OBLIGATIONS**

9.1. The Customer shall co-operate with Loadbalancer in any manner reasonably required by Loadbalancer in order to carry out the Technical Support Services (including provision of information and data, making available suitably qualified employees and contractors of the Customer and, subject to Loadbalancer's compliance with the Customer's normal security requirements):

(a) provide access to the Customer's systems for the purpose of carrying out diagnostics and correction of Defects, provided that such access shall be direct or remote, at the Customer's option, and that, in the latter case, it will be subject to Loadbalancer's compliance with any additional requirements for security and encryption techniques or software which may from time to time be specified by Loadbalancer;

(b) provide such further access for Loadbalancer's staff to the Site(s) as is necessary to carry out Loadbalancer's obligations under the agreement. The Customer shall obtain for Loadbalancer all permissions necessary to obtain such access;

(c) when Loadbalancer's staff are working at the Site(s), provide facilities and supplies reasonably required by Loadbalancer (such as power and computer consumables).

9.2. The Customer shall comply, as soon as reasonably practicable, with all Loadbalancer's reasonable requests for information or assistance.

## **10. WARRANTIES**

10.1. Loadbalancer warrants and represents that:

(a) the Loadbalancer Hardware will be free from Defects during the Hardware Warranty Period;

(b) it has the right to license all Intellectual Property Rights in and to the Loadbalancer Software and Documentation to the Customer and to provide the Technical Support Services to the Customer; and

(c) none of the Loadbalancer Software or Documentation supplied by Loadbalancer under the agreement infringes the Intellectual Property Rights of any third party.

## **11. LIMITATION OF LIABILITY**

11.1. Neither party excludes or limits liability to the other party for:

(a) fraud or fraudulent misrepresentation;

(b) death or personal injury caused by negligence;

(c) a breach of any obligations implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982; or

(d) any matter for which it would be unlawful for the parties to exclude liability.

11.2. Subject to clause 11.1:

(a) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law (including implied warranties or conditions of satisfactory quality and fitness for a particular purpose) are, to the fullest extent permitted by applicable law, excluded from the agreement; and

(b) Loadbalancer's total aggregate liability in contract, tort (including negligence and breach of statutory duty howsoever arising), misrepresentation (whether innocent or negligent), restitution or otherwise, arising in connection with the performance or contemplated performance of the agreement or any collateral contract shall be limited to 100% of the Fees paid in the 12 months preceding the event (or the first of a series of events) which gave rise to the claim(s).

11.3. In the agreement, time is not of the essence.

11.4. The sole remedy for breach of the warranty under clause 10.1 (a) shall be correction of Defects by Loadbalancer in accordance with clause 8 of this agreement and Loadbalancer shall not be liable for any indirect or consequential loss or damage or any loss of profits, business interruption, loss or corruption of

data or information or loss of business opportunity, goodwill or reputation arising under or in connection with the Loadbalancer Software or Loadbalancer Hardware.

- 11.5. Loadbalancer does not warrant or guarantee that it will be able to rectify all Defects.
- 11.6. Loadbalancer does not warrant that the use of Loadbalancer Software will be uninterrupted or error-free.
- 11.7. The Customer acknowledges that any Open-Source Software provided by the Supplier is provided "as is" and expressly subject to the disclaimer in clause 11.1.
- 11.8. You acknowledge that the Loadbalancer Software has not been developed to meet your individual requirements, and that it is therefore your responsibility to ensure that the facilities and functions of the Loadbalancer Software as described in the Documents meet your requirements.
- 11.9. Loadbalancer shall not be liable in respect of any failure or delay in performing its obligations, including any Defects, to the extent that such failure, delay or Defects result from any unauthorised modifications, use or improper installation of the Loadbalancer Hardware and/or Loadbalancer Software by or on behalf of the Customer.
- 11.10. Loadbalancer shall not be liable in respect of any failure or delay in performing its obligations, including any Defects, to the extent that such failure, delay or Defects result from any defect in or operability of a Virtual Appliance Platform or any other third party software or hardware used in conjunction with the Loadbalancer Hardware or Loadbalancer Software.

## **12. ASSIGNMENT AND SUBCONTRACTING**

- 12.1. Each party confirms it is acting on its own behalf and not for the benefit of any other person.
- 12.2. The agreement is personal to the parties and neither party shall assign, transfer, mortgage, charge, sub-contract, declare a trust of or deal in any other manner with any or all of its rights and obligations under the agreement without the prior, written consent of the other party.

## **13. DURATION AND TERMINATION**

- 13.1. The Technical Support Services shall, unless otherwise terminated as provided in this clause 13, commence on the Commencement Date and shall continue for the Initial Services Support Term and, thereafter, this agreement shall be automatically renewed for successive periods of 12 months (each a **Renewal Support Period**, unless:
  - (a) either party notifies the other party of termination, in writing, before the end of the Initial Subscription Term or any Renewal Support Period, in which case this agreement shall terminate upon the expiry of the applicable Initial Subscription Term or Renewal Support Period; or
  - (b) otherwise terminated in accordance with the provisions of this agreement;
- 13.2. Where the Loadbalancer Software is rented by the Customer, the Software Licence shall continue subject to payment of the Rental Fee.
- 13.3. The Money Back Guarantee covers all hardware, software & services. The Customer can make a written request within 90 days of any invoice to request a return, cancelation and full refund. Hardware returns may incur a reasonable re-stocking fee.
- 13.4. Without prejudice to any rights that have accrued under the agreement or any of its rights or remedies, either party may at any time terminate the Technical Support Services and the Loadbalancer Software Licence with immediate effect by giving written notice to the other party if:
  - (a) the other party fails to pay any amount due under the agreement on the due date for payment and remains in default not less than 14 days after being notified in writing to make such payment;
  - (b) the other party commits a material breach of any term of the agreement (other than failure to pay any amounts due under the agreement) and (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so;
  - (c) the other party repeatedly breaches any of the terms of the agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of the agreement;
  - (d) the other party suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business;

(e) the other party suspends, or threatens to suspend, payment of its debts, or is unable to pay its debts as they fall due or admits inability to pay its debts or (being a company) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

(f) the other party sells any or all of its business; or

(g) there is a change of Control of the other party.

13.5. Other than as set out in these terms and conditions, neither party shall have any further obligation to the other under the agreement after its termination.

13.6. Any provision of these terms and conditions which expressly or by implication is intended to come into or continue in force on or after termination of the agreement (including clauses shall remain in full force and effect.

13.7. Termination or expiry of the agreement shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination or expiry (including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination or expiry).

13.8. On termination of the Software Licence and/or Technical Support Services for any reason each party shall immediately pay any outstanding unpaid invoices and interest due to the other party.

13.9. On termination of the Software Licence for any reason the Customer shall immediately and permanently erase/destroy all copies of the Loadbalancer Software.

#### **14. ENTIRE AGREEMENT**

14.1. These terms and conditions constitute the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to their subject matter.

14.2. Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in these terms and conditions. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in these terms and conditions.

#### **15. VARIATION**

No variation of the agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

#### **16. THIRD PARTY RIGHTS**

No person other than a party to this agreement shall have any rights to enforce any term of the agreement.

#### **17. FORCE MAJEURE**

Neither party shall be in breach of the agreement nor liable for delay in performing, or failure to perform, any of its obligations under the agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances, the time for performance shall be extended by a period equivalent to the period during which performance of the obligation has been delayed or failed to be performed. If the period of delay or non-performance continues for 60 days, the party not affected may terminate the agreement by giving 30 days' written notice to the affected party.

#### **18. NOTICES**

18.1. Any notice required to be given under these terms and conditions shall be in writing and shall be delivered by hand or sent by commercial courier to the other party's registered office from time to time.

18.2. Any notice shall be deemed to have been duly received:

(a) if delivered by hand, on the date and at the time the notice is left at the proper address;

(b) if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed.

18.3. A notice required to be given under these terms and conditions shall not be validly given if sent by e-mail.

18.4. The provisions of this clause 18 shall not apply to the service of any proceedings or other documents in any legal action.

**19. GOVERNING LAW AND JURISDICTION**

19.1. The agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

19.2. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the agreement or its subject matter or formation (including non-contractual disputes or claims).

Company:

Title:

Signature:

Email:

Date: