



## INTELLIFLASH™ END USER SUPPORT SERVICES AGREEMENT

This IntelliFlash End User Support Services Agreement (the “Agreement”) governs the provision of certain product-related support and services by IntelliFlash by DDN, Inc. or any affiliate of IntelliFlash by DDN, Inc. (“Vendor” or “IntelliFlash”) for IntelliFlash™ products including those services marketed as IntelliCare support. The customer that purchases support or professional services (“Customer”) accepts this Agreement by any of the following: submitting an order that Vendor accepts, accepting this Agreement at the time of registration, or receiving Support Services. The person accepting this Agreement for Customer represents that he or she has the authority to bind Customer to this Agreement.

### 1. PROVISION OF PRODUCT SUPPORT

1.1 **Contract.** Customer shall designate a point of contact for the Support and Professional Services it orders. Customer’s point of contact may be changed by accessing Vendor’s support website.

1.2 **Support and Support Descriptions.** Customer has or may purchase or license Vendor products (hereinafter referred to as the “Products”), from an authorized reseller, for internal use and may desire to receive the support services described herein (“Support”) for such Products. Subject to this Agreement (including Customer’s payment of the applicable fees) and upon Vendor’s acceptance of an order for Support (“Order Document”), Vendor shall make reasonable efforts to provide the Support described in the applicable then-current support description posted on Vendor’s support web site (e.g., <https://www.intelliflash.io/support/>) (each, a “Support Description”). Vendor may change a Support Description for a Product at any time by posting a new Support Description on its support web site. This Agreement only covers support described in a Support Description. No other support will be provided under this Agreement.

1.3 **Technical Assistance.** Vendor will make reasonable efforts to provide customer with the technical assistance described in the applicable Support Description by phone, email or through Vendor’s support web site for incidents related to a Product’s failure to meet Vendor’s published specifications. Unless otherwise indicated in the applicable Support Description, Support does not include on-site assistance. “Response targets” identified in a Support Description are only targets and are not binding on Vendor.

1.4 **Hardware Replacement.** If advance replacement of a defective Product is included in the applicable Support Description, Customer must return the defective Product according to Vendor’s then-current return-material authorization process to the location designated by Vendor and within the time period specified by Vendor (or within 30 days of the date on which the replacement Product is shipped, if no time period is specified). Hardware returns that are improperly packaged or do not include the required information (including RMA number) maybe refused and returned to the Customer at its expense. Vendor may invoice Customer for the then-current list price of any Product not returned to Vendor within the required time. Customer is responsible for removing all information and data that Customer has stored on any memory, including but not limited to hard disk drives and solid state drives (“drives”) before Customer returns the drives for repair or replacement. Customer is responsible for ensuring that it removes any kind of removable media (e.g., tapes) prior to returning any drives. Vendor may utilize new or refurbished parts to replace hardware. Refurbished parts will be “like new” according to standards set by Vendor.

1.5 **On-site Field Technician.** If included in the applicable Support Description, upon Customers request, Vendor will use its commercially reasonable efforts to dispatch a field service technician (“FST”) to the affected Customer site in accordance with the terms and timeframes detailed in the applicable Support Description. On-Site FST is limited to hardware replacement only. Vendor does not provide on-site software assistance. On-site FST dispatch may not be available for some products, or in some geographic regions, and if desired for on-going support, may require a set-up period before it is made available to Customer. During such “set up” period, Vendor will use commercially reasonable efforts to



provide to Customer the closest available service then available with respect to such Product line, or in such geographic region. All on-site services are provided in the regional time zone where Vendor's records show the Product is located.

1.6 **Software Fixes and Updates.** For Support Descriptions that include software bug fixes, patches and/or certain updates (together, "Updates"), Vendor will make available to Customer those Updates that are made generally available for no additional fee to its customers entitled to support. Unless otherwise indicated in writing by Vendor, Support does not include software updates that provide new features or functionality.

**Exclusions.** Vendor shall have no obligation to provide Support in the event: (a) Customer has not paid the Support fee for the applicable Product(s), (b) Customer modifies the Product(s) without Vendor's written authorization, (c) Customer has failed to perform normal preventative maintenance in accordance with Vendor's recommendations, (d) the problem is due to Customer's negligence, or hardware or software not provided by Vendor, (e) the problem is due to Customer's failure to implement an Update made available by Vendor, (f) the problem is the result of installation in an unsupported environment, (g) the problem is caused by third-party technology, including but not limited to changes to Customer's operating system or hardware environment, (h) the problem is due to damage to the Product not caused by Vendor, (i) Vendor has declared end-of-support or discontinued support for the Product, or (j) there are other causes not within Vendor's control. In the event the Products are used or refurbished and/or Customer is not the original user of the Products, Customer may be required to ship such Products to Vendor for recertification prior to Vendor providing Support and pay Vendor's then-current recertification fee.

## **2. PROFESSIONAL SERVICES**

If Customer purchases IntelliFlash Professional Services, the specific deliverables, and terms and conditions for such Professional Services will be outlined in the applicable Professional Services agreement.

## **3. TERM & SUPPORT PERIODS**

The initial Support subscription will commence on the date set forth on the Ordering Document and continue for the applicable term specified, but no less than one (1) year, and upon expiration will automatically renew for additional one year periods, unless either party provides written notification of cancellation to the other party at least thirty (30) days prior to the current term. Non-renewal of Support does not constitute termination of this Agreement. Reinstatement of lapsed Support, if any, is subject to IntelliFlash's then-current support services reinstatement policy and fees in effect on the date the reinstatement is granted.

## **4. INTELICARE LIFETIME STORAGE SYSTEM REFRESH OR LIFETIME STORAGE CONTROLLER REFRESH PROGRAMS**

Customer may opt to purchase IntelliFlash's Lifetime Storage System Refresh or Lifetime Storage Controller Refresh programs as part of its Support in accordance with the terms of this Agreement and the program documentation published by IntelliFlash on its support website (<https://www.intelliflash.io/support/>). Under these programs, provided Customer purchases and pays the applicable fees designated in the Ordering Document for either the Lifetime Storage or Lifetime Storage Controller programs with the initial Product purchase (programs not available for less than a three year term), and provided Customer purchases three additional years of eligible Support for the applicable Product (either under a Lifetime or Premium program), IntelliFlash will, at the beginning of the three year renewal, upgrade the applicable Product or controller, as applicable, to the then-current IntelliFlash product or controller that most closely matches, in IntelliFlash's reasonable discretion, such applicable Product's or controller's features. As a condition to the Product or controller upgrades, Customer must take receipt of the upgraded product(s) or controller(s) within 90 days from notice (via electronic means to Customer's designated contact) that a Product or controller upgrade is available, and return the existing Product(s) or controller(s) to IntelliFlash



within 45 days from receipt of the upgraded product(s) or controller(s). Customer may receive upgraded product(s) or controller(s) not more than once every three years with respect to a given originally purchased Product. IntelliFlash will not increase the renewal rate offered to Customer for eligible Support above the rate for the initial Support for the applicable Product purchased by Customer (after applying the same Support term and applicable pre-renewal in-rack configuration for the applicable Product), provided that such Support remains generally available for the applicable Product at the time of renewal. Notwithstanding the foregoing, in the event of a severe inflation event (defined as annual inflation in excess of seven percent 7% as measured by the Producer Price Index), the parties will negotiate, in good faith, reasonable adjustments to the renewal rate in an amount not to exceed the inflation over the period since the last renewal. This Section 4 imposes no obligation to Customer to renew Support. IntelliFlash may modify the Lifetime Storage or Lifetime Storage Controller programs from time to time. If IntelliFlash makes substantive modifications to this program that have a negative impact on Customer, an existing Product will be governed by the terms in effect immediately prior to such modification until the later of: (i) the date the Customer next receives upgraded product(s) or controller(s) under this Section 4, or (ii) the expiration of the original or last renewal Support term, with respect to the applicable Product, after which the modified program terms will apply to such Product. IntelliFlash may terminate the program under Section 4 with respect to future Product purchases at any time.

## **5. FEES**

5.1 Customer will purchase Support either directly or through an authorized reseller. Payment for Support will be due before the applicable Support period begins as set forth in the Ordering Document. All fees are non-refundable.

5.2 Customer is responsible for any applicable sales, use, or value added or similar taxes payable with respect to provision of Support to Customer, or arising out of or in connection with this Agreement, other than payroll taxes for Vendor employees and taxes imposed on Vendor's income.

## **6. RELATIONSHIP OF THE PARTIES.**

Vendor is an independent contractor and neither Vendor nor its personnel shall be deemed employees of Customer. Vendor reserves the right to determine the manner in which it performs Support. Except as set forth in the applicable Support Description, and subject to Customer's normal business hours and security requirements, Vendor shall be solely responsible for determining the times and locations at which Vendor performs Support. Vendor may, in its sole discretion, replace or reassign Vendor personnel designated to perform Support.

## **7. CUSTOMER OBLIGATIONS AND SERVICE CONDITIONS**

7.1 Customer shall provide information reasonably requested by Vendor, including but not limited to current information on the Product identifier, serial numbers, license keys, operating system configuration, product location and key contact information for each Product location. Customer shall provide Vendor with updates on such information on a quarterly basis and as additional Products are deployed, moved or taken out of production service. Customer must notify Vendor of a change in the location of a Product at least 30 days (and up to 90 days in certain jurisdictions) before the Product is moved.

7.2 Customer shall also provide Vendor with access to Customer's materials, systems, information, facilities, and employees, including without limitation, remote access, as Vendor may reasonably require in order to deliver Support. Customer consents to the collection and processing of the data it provides to IntelliFlash in connection with Support. Such data will be processed pursuant to the Privacy Policy of DataDirect Networks, Inc. ("DDN"), an affiliate of IntelliFlash, which is published on DDN's web site and available upon request.



7.3 Customer is responsible for procuring and maintaining third-party software and hardware required for the use of Products or receipt of Support.

7.4 Vendor is not responsible for any delay associated with Customer's failure to satisfy its obligations in this Agreement.

7.5 Customer may be required to purchase Support at the same level to cover all similar Products that it has purchased or acquired.

## **8. TERMINATION**

In the event of a material breach of this Agreement by either party where no other remedy is specified, the non-breaching party may terminate this Agreement by giving the breaching party written notice of the breach and the non-breaching party's intention to terminate. Any obligation to provide Support will automatically terminate 30 days following such notice, unless the breaching party cures or makes substantial progress, in the non-breaching party's reasonable discretion, in curing the breach before the expiration of the 30-day period. Any obligation to provide Professional Services will automatically terminate upon delivery of the notice of termination.

## **9. LIMITED WARRANTIES**

9.1 **Limited Warranty.** Vendor warrants to Customer that Vendor will provide Support, as applicable, in a competent and professional manner. Customer's sole remedy for breach of the foregoing warranty shall be Vendor's re-performance of the non-conforming work.

9.2 **Limitations on Warranties.** Except as specifically set forth in this section, Vendor does not warrant that Support will meet Customer's requirements. THERE ARE NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OR MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR IMPLIED WARRANTY ARISING OUT OF THE COURSE OF PERFORMANCE, COURSE OF DEALING, OR USAGE OF TRADE.

## **10. LIMITATION OF LIABILITY**

10.1 **Exclusion of Certain Claims.** IN NO EVENT SHALL EITHER PARTY BE LIABLE (WHETHER IN TORT OR CONTRACT, UNDER STATUTE OR OTHERWISE) FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES, INCLUDING WITHOUT LIMITATION DAMAGES FOR LOST PROFITS, BUSINESS INTERRUPTION, LOSS OF INFORMATION AND THE LIKE, ARISING OUT OF ITS PERFORMANCE OR NONPERFORMANCE OF THIS AGREEMENT, EVEN IF VENDOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10.2 **Limitation.** Vendor's liability arising out of this Agreement shall in no event exceed the fees paid by Customer to Vendor during the twelve (12) month period prior to when such liability arose under this Agreement.

## **11. CONFIDENTIAL INFORMATION**

11.1 **Confidential Information.** For purposes of this Agreement, "Confidential Information" means information obtained by either party ("Receiving Party") from the other party ("Disclosing Party") in connection with the Disclosing Party's business and includes, but is not limited to, information about trade secrets, computer programs, designs, technology, proprietary software, algorithms, circuits, mask works, layouts, ideas, know-how, processes, formulas, compositions, data, techniques, improvements, inventions (whether patentable or not), works of authorship, business and product development plans, the salaries and terms of compensation of employees, customers and other information concerning the Disclosing Party's actual or anticipated business, research or development, or any such information marked or



designated in writing as “confidential,” “proprietary,” or any other similar term or designation or that was or is disclosed in a manner that a reasonable person would understand that such information is confidential and proprietary. Customer agrees without limitation that IntelliFlash’s prices, quotes, discounts and proposals to Customer are IntelliFlash’s Confidential Information.

11.2 **Restrictions on Use.** In the absence of a valid confidentiality agreement between the parties, or upon the expiration or termination thereof, the following provisions shall apply. For period of five (5) years from the date of disclosure, the Receiving Party agrees to keep all Confidential Information in strictest confidence and trust and to take all reasonable precautions to protect against its disclosure or misuse. The Receiving Party will not disclose any Confidential Information except to its employees or contractors with a need to know for purposes of delivering or receiving Support. The Receiving Party shall not, however, be required to treat as confidential any Confidential Information which: (a) is in the public domain by reason of prior publication not directly or indirectly resulting from any act or omission of the recipient or its employees or subcontractors, or (b) was already properly known to the recipient (other than in connection with this Agreement) without restriction on use or disclosure at the time of disclosure under this Agreement. All Confidential Information shall be returned to the Disclosing Party upon request and upon termination of this Agreement.

11.3 **Feedback.** Customer, on behalf of itself and its respective successors in interests and permitted assigns, hereby grants to Vendor a non-exclusive, royalty-free, paid-up, worldwide, perpetual, irrevocable license to make, use, sell, have made, offer to sell, import or otherwise exploit or commercialize any ideas suggestions or recommendations that Customer provides to Vendor to improve the Products or Support.

## 12. **MISCELLANEOUS**

12.1 **Amendments and Waivers.** Any term of this Agreement may be amended or waived only with the written consent of the parties.

12.2 **Precedence.** If there is a conflict between the main body of this Agreement and a Support Description or Ordering Document, this Agreement will prevail to the extent of the conflict.

12.3 **Sole Agreement.** This Agreement, including each applicable Support Description and Ordering Document, constitutes the sole agreement of the parties with respect to its subject matter and supersedes all oral agreements, prior writings and other printed terms with respect to such subject matter.

12.4 **Notices.** Any notice required or permitted by this Agreement shall be in writing and shall be deemed sufficient upon receipt, when delivered personally or by an industry recognized and reputable delivery service (e.g. UPS), or forty-eight (48) hours after being deposited in US mail as certified or registered mail with postage prepaid.

12.5 **Choice of Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of California without regard to conflicts of law provisions. The United Nations Convention on Contracts for the International Sale of Goods shall not apply. Customer consents to the state and federal courts in Santa Clara County to be the exclusive jurisdiction and venue to resolve any dispute arising in connection with this Agreement.

12.6 **Force Majeure.** If performance of this Agreement, or any obligation hereunder except for the making of payments, is prevented, delayed, restricted or interfered with by reason of strike, fire, flood, weather, earthquake, governmental acts or other causes or events beyond either party’s reasonable control, the other party shall be excused from performance.

12.7 **Assignment.** Vendor may assign or subcontract its rights and/or obligations, in whole or in part, to another Vendor entity or a third party without the prior consent of Customer. Customer may not assign its



rights and/or obligations without Vendor's prior written consent and any such attempt to assign shall be void. Customer's right to receive Support is not transferrable.

12.8 **Severability**. If one or more provisions of this Agreement are held to be unenforceable under applicable law, then such provision shall be excluded from this Agreement, the balance of the Agreement shall be interpreted as if such provision were so excluded and the balance of the Agreement shall be enforceable in accordance with its terms.

12.9 **Export and Import Compliance**. Customer acknowledges that the Products and software, and technology provided by Vendor are subject to export and import controls under the laws and regulations of the United States, the European Union and other countries, and Customer will comply strictly with all such export control and import laws and regulations. Without limiting the generality of the foregoing, Customer certifies that it will conduct appropriate screening and it will not: (i) export, re-export, transfer or divert any of the Products, software and technology to any person, entity (e.g. Specially Designated Nationals and Denied Persons) or destination that is restricted or embargoed under any such export control laws and regulations; or (ii) export, re-export, transfer, divert, any of the Products, software, or technology for activities, directly or indirectly, related to the proliferation of nuclear, chemical or biological weapons or missiles, or in any other military application, except as authorized under all applicable export control laws and regulations. Customer further agrees that the Products, software, and technology may include encryption functionality and are therefore subject to additional export and import restrictions and that Customer is responsible for complying with any and all restrictions and regulatory requirements.

Last update: November 2019