



## PRODUCT EVALUATION TERMS AND CONDITIONS

These Product Evaluation Terms and Conditions (the “**Agreement**”) set forth the rights and obligations of Tintri by DDN, Inc., a Delaware corporation having its principal place of business at 9351 Deering Avenue, Chatsworth, CA 91311 (“**Tintri**”), and the entity agreeing to these terms (“**Recipient**”) for the use by Recipient of Tintri Products for testing and/or evaluation purposes.

### **1. Definitions.**

**1.1. “Confidential Information”** means and includes the terms of this Agreement, the Evaluation Product(s) and all confidential or proprietary information of either party, including without limitation, software, know-how, trade secrets, formulas, processes, ideas, inventions (whether patentable or not), designs, schematics and other technical, business, financial, customer, supplier or product information, data or development plans, of any nature and in any form, provided that such information is either identified as “confidential,” “proprietary,” or similar or is disclosed in such circumstances or is of such a nature that a reasonable person would consider such information to be confidential or proprietary.

**1.2. “Documentation”** means the specifications, user manuals and installation instructions that are published by Tintri in connection with the Products, including updated or revised versions provided by Tintri.

**1.3. “Hardware”** means any hardware, together with any related non-software components, delivered by or on behalf of Tintri to Recipient.

**1.4. “Products”** mean, individually or collectively, the Hardware and Software.

**1.5. “Software”** means, individually or collectively, any embedded microcode, firmware or operating system software that is made available with certain of Tintri’s Hardware (“**Embedded Software**”), and any other software that may be made available independently from Hardware (“**Software Applications**”).

**2. Loan of Evaluation Products; Evaluation Period.** Tintri agrees to loan to Recipient, and Recipient agrees to accept the loan of, the Products specified on a “Product Evaluation” order form, or that are otherwise provided to Recipient by Tintri or a Tintri authorized distributor or reseller and that are designated for testing, evaluation, trial or similar temporary use (the “**Evaluation Products**”). Recipient’s right to use the Evaluation Products begin upon delivery and continue for the period of time specified by Tintri or a Tintri authorized distributor or reseller (the “**Evaluation Period**”). If no period of time is specified, the Evaluation Period is limited to thirty (30) days from the date of delivery. There is no charge to Recipient for use of the Evaluation Products during the Evaluation Period.

**3. Potential Purchase of Evaluation Products.** This Agreement does not obligate Recipient to purchase any Evaluation Products. Any purchase of Products by Recipient that are similar or equivalent to the Evaluation Products will be subject to mutual agreement between Tintri and Recipient on price and other applicable terms. Recipient understands and agrees that Recipient will not be allowed to keep possession of any Evaluation Products that are provided to Recipient for Evaluation, even if Recipient wishes to purchase such Evaluation Products. If Recipient wishes to purchase any Evaluation Products, Recipient must return the Evaluation Products to Tintri in accordance with Section 6 – Return and Destruction, and Tintri will provide new Products to Recipient on the terms agreed between the parties.

**4. Delivery, Installation, Risk of Loss and Title.** If the Evaluation Products include Hardware, Tintri will deliver the Hardware Evaluation Products to Recipient at the location(s) specified on an order form or as otherwise agreed to by the parties, at Tintri’s expense. Any Software Applications that are not preloaded on Hardware will be delivered via electronic file transfer protocol (FTP download) and deemed delivered when made available for Recipient to download.

Recipient (i) will be responsible for the installation of the Evaluation Products and any required non-Tintri software and equipment, (ii) will be responsible for any loss or damage to the Evaluation Products from the time the Evaluation Products are delivered to Recipient until the time the Evaluation Products are received by Tintri, (iii) may not relocate any Evaluation Products to, or use any Evaluation Products at, any location other than the location specified on an order form or as otherwise agreed to by the parties, and (iv) will promptly provide Tintri with written notice of any loss or damage to any Evaluation Products. Tintri and its suppliers and licensors shall at all times retain all title to and ownership of the Evaluation Products and all copies thereof.

## **5. License and Restrictions.**

**5.1. License.** Tintri hereby grants to Recipient a personal, non-transferable, non-exclusive right and license to use the Evaluation Products (including any Software updates, upgrades or replacements provided by Tintri) in accordance with this Agreement and any Documentation or instructions supplied by Tintri, solely for Recipient's internal demonstration, test, or evaluation purposes, and not for any other purpose, including without limitation not for production or commercial purposes.

**5.2. Restrictions.** Recipient shall not: (i) copy, modify, make derivative works based on, or publicly display or perform the Products (or any portion thereof); (ii) distribute, sell, rent, lease, transfer or, sublicense the Products (or any portion thereof); (iii) reverse engineer, disassemble, decompile or otherwise attempt to discover the source code or structure, sequence or organization of Products; (iv) analyze, use or otherwise access the Products to build a similar or competitive product or service or to copy its features or functionality; (v) analyze or use the Product for any benchmarking study or other competitive purposes unless Tintri has reviewed and approved of the methodology, assumptions and other parameters of the study; (vi) remove any proprietary notices, labels, or marks on the Product; or (vii) permit or provide assistance to any other party in doing any of the foregoing.

**6. Return and Destruction.** Recipient agrees to return to Tintri any Hardware and/or destroy any Software, including all backup copies, and accompanying Documentation, provided to Recipient as Evaluation Product(s), within fifteen (15) days following the expiration of the Evaluation Period.

**6.1. Hardware Returns.** Any Hardware Evaluation Products must be returned to Tintri in the same condition as when delivered to Recipient (reasonable wear and tear excepted) and in the original Tintri packaging. Tintri will be responsible for all customs and other delivery fees associated with the return of the Hardware. Recipient agrees that it is the sole responsibility of Recipient to ensure that all Recipient data is completely erased from any Evaluation Products prior to returning the Evaluation Products to Tintri. Upon request, Tintri can assist Recipient to erase data from an Evaluation Product. If Recipient wishes to keep any disk drives included in an Evaluation Product, Recipient may purchase such drives on terms and conditions to be agreed with Tintri. If the Evaluation Products are not promptly returned to Tintri after reasonable notice, or are returned other than in the condition received (less reasonable wear and tear), Recipient agrees to pay to Tintri (i) the difference between the list price of the Evaluation Products and their diminished value upon return, and (ii) any applicable taxes associated with the payment of such fees.

**6.2. Software Destruction.** Upon request by Tintri, Recipient will provide Tintri with written certification of Recipient's discontinued use and destruction of all Software Applications and accompanying Documentation.

**7. User Experience Improvement Program.** As part of Tintri's continual efforts to improve its Products, Recipient acknowledges that Products may collect Diagnostic Data (as defined below) and transmit such Diagnostic Data to Tintri to use solely for customer support purposes and to improve customers' experiences with Products. "**Diagnostic Data**" means data solely related to the performance of a Product and does not include any Recipient data stored on the Product other than such performance data. Recipient may disable such collection and transmission of Diagnostic Data at any time, but understands that might have some effect on support options.

**8. Modifications.** In the event that Recipient or its employees, contractors, agents or Recipients request, recommend or otherwise suggest to Tintri changes to the Products ("**Feedback**"), Recipient agrees that all Feedback is and shall be given entirely voluntarily. Feedback, even if designated as confidential by Recipient, shall not create any confidentiality obligation for or upon Tintri. Tintri shall be free to use, disclose, reproduce, license or otherwise distribute and exploit the Feedback provided to it as it sees fit, entirely without obligation or restriction of any kind on account of intellectual property or otherwise.

**9. Confidentiality.**

**9.1. Obligations.** Confidential Information disclosed or made available by a party ("**Disclosing Party**") to the other party ("**Receiving Party**") shall be held in confidence by the Receiving Party and not disclosed to any third party, except as otherwise approved in writing by the Disclosing Party. The Receiving Party shall not use the Disclosing Party's Confidential Information other than as appropriate for the provision by Tintri and use by Recipient of the Products. The Receiving Party shall protect the Disclosing Party's Confidential Information using at least the same degree of care that it uses to protect its own confidential information of similar kind, but in no event less than a reasonable degree of care, and shall limit access to the Disclosing Party's Confidential Information to those of its employees and consultants having a need to know and who are subject to an agreement with the Receiving Party that contains non-disclosure and non-use obligations at least as restrictive as those contained herein.

**9.2. Exceptions.** Notwithstanding the foregoing, a Receiving Party shall have no obligation under this Section 9 with respect to any Confidential Information that (i) was in the public domain or generally known to the public at the time it was provided or made available to the Receiving Party, or subsequently enters the public domain or becomes generally known without breach of this Agreement, (ii) the Receiving Party can show was either known by the Receiving Party prior to the time it was provided or made available by the Disclosing Party, or subsequently received from a third party without breach of confidentiality obligations owed to the Disclosing Party, or (iii) the Receiving Party can show was independently developed by the Receiving Party without the use of the Disclosing Party's Confidential Information (as evidenced by the Receiving Party's written records).

**9.3. Required Disclosures.** Notwithstanding Section 9.2 – Exceptions, the Receiving Party may disclose the Disclosing Party's Confidential Information to the extent such disclosure is required by law, regulation, court order or stock exchange disclosure requirement, provided that the Receiving Party provides the Disclosing Party with reasonable prior written notice of such disclosure (to the extent legally permitted) and cooperates with the Disclosing Party in any lawful action to contest or limit such disclosure.

**10. Warranty Disclaimer.** THE EVALUATION PRODUCTS AND ALL MATERIALS OR INFORMATION PROVIDED OR MADE AVAILABLE IN CONNECTION WITH THESE TERMS ("**MATERIALS**") ARE PROVIDED "AS IS" AND TINTRI DISCLAIMS ALL WARRANTIES RELATING TO THE MATERIALS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES AGAINST INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND WARRANTIES ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE. THE FOREGOING DISCLAIMERS AND LIMITATIONS SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

**11. Limitation of Liability.** TINTRI SHALL NOT BE RESPONSIBLE OR LIABLE UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY (i) FOR ANY LOSS OR INACCURACY OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY, OR (ii) FOR ANY INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING, BUT NOT LIMITED TO LOSS OF REVENUES AND LOSS OF PROFITS. TINTRI'S MAXIMUM AGGREGATE LIABILITY FOR ALL CLAIMS RELATING TO THIS AGREEMENT, WHETHER FOR BREACH OF CONTRACT OR IN TORT, INCLUDING NEGLIGENCE, WILL BE LIMITED TO USD \$10,000. NEITHER PARTY SHALL BE RESPONSIBLE FOR ANY MATTER BEYOND ITS REASONABLE CONTROL. THE PARTIES HAVE AGREED THAT THESE LIMITATIONS WILL SURVIVE AND APPLY EVEN IF ANY LIMITED REMEDY SPECIFIED IN THIS AGREEMENT IS FOUND TO HAVE FAILED ITS ESSENTIAL PURPOSE. THE FOREGOING LIMITATIONS SHALL NOT APPLY TO (a) ANY BREACH OF SECTION 9 – CONFIDENTIALITY, OR (b) THE EXTENT PROHIBITED BY APPLICABLE LAW.

**12. Termination.** The term of this Agreement shall commence on delivery of the Evaluation Products and shall expire at the end of the Evaluation Period, unless terminated earlier in accordance with this Agreement or extended by mutual written agreement of the parties. This Agreement may be terminated by either party at any time for any reason upon ten (10) days' prior written notice to the other party. If Recipient fails to meet any of its obligations under this Agreement, Tintri may terminate this Agreement immediately. Within thirty (30) days of any expiration or termination of this Agreement, Recipient shall return Evaluation Hardware and/or destroy Evaluation Software Applications in accordance with Section 6 – Return and Destruction. All provisions of this Agreement that should, by their nature, survive any expiration or termination this Agreement, shall survive.

**13. General Provisions.**

**13.1. Severability.** If any provision of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, such provision shall be modified to the limited extent necessary to make such provision valid and enforceable and the remaining provisions of this Agreement shall remain in effect and enforceable in accordance with their terms.

**13.2. Waiver.** The failure of either party to exercise any right granted herein or to require any performance of any term of this Agreement or the waiver by either party of any breach of this Agreement shall not prevent a subsequent exercise or enforcement of, or be deemed a waiver of any subsequent breach of, the same or any other term of this Agreement.

**13.3. No Joint Venture or Agency.** Nothing in this Agreement shall constitute or create a joint venture, partnership, or any other similar arrangement between the parties. No party is authorized to act as agent for the other party hereunder.

**13.4. Export Compliance.** Recipient acknowledges and agrees that the Products (and all technical data and software associated therewith) provided by Tintri under this Agreement may be subject to restrictions and controls imposed by the United States Export Administration Act and the regulations thereunder. Recipient represents and warrants that (i) Recipient will not export or provide the Evaluation Products or any software or other information or data provided or made available by Tintri under this Agreement into any country or to any individual (including Recipient's employees and other personnel) in violation of such restrictions or controls, or any other applicable export laws, rules or regulations, and (ii) Recipient is not named on any U.S. government list of persons or entities prohibited from receiving exports.

**13.5. Assignment.** Neither party may assign this Agreement, in whole or in part without the express written consent of the other party; provided, however, that either party may assign this Agreement without the consent of the other party to a successor in interest in connection with a merger, restructuring, or reorganization, or as a sale or transfer of all or substantially all of a party's assets. This Agreement inures to the benefit of, and is binding upon, the parties and their respective legal representatives, permitted successors and permitted assigns.

**13.6. Governing Law, Venue and Dispute Resolution.** This Agreement and performance by the parties hereunder shall be construed in accordance with the laws of (i) the State of California, U.S.A. if Recipient's principal place of business is in the Americas (an "**Americas Recipient**"), or (ii) England if Recipient's principal place of business is anywhere other than in the Americas (a "**ROW Recipient**"), in each case without regard to the (a) conflicts of laws provisions thereof, (b) Uniform Computer Information Transactions Act (which will not apply), or (c) United Nations Convention on Contracts for the International Sale of Goods (which will not apply). For any disputes or causes of action arising hereunder, Tintri and Recipient agree (x) to the exclusive jurisdiction of, and venue in the state and federal courts within the Northern District of California if Recipient is an Americas Recipient, or (y) for such disputes or causes of action to be finally settled by binding arbitration in London, England if Recipient is a ROW Recipient. Any such arbitration between Tintri and a ROW Recipient shall be conducted in English in accordance with the rules of the International Chamber of Commerce by one (1) arbitrator appointed in accordance with such rules. The arbitrator shall allow such discovery as is appropriate to the purposes of arbitration in accomplishing a fair, speedy, and cost-effective resolution of the dispute, and shall be expressly empowered to issue appropriate injunctive relief.

The award of arbitration shall be final and binding upon both parties, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, either party may seek injunctive or other equitable relief to protect its intellectual property rights in any court of competent jurisdiction.

**13.7. Remedies.** Except as expressly stated otherwise in this Agreement, the parties' rights and remedies under this Agreement are cumulative.

**13.8. Equitable Remedies.** Any actual or threatened material breach of this Agreement may cause immediate, irreparable harm for which monetary damages alone could be an inadequate remedy and either party may seek injunctive relief for such breach.

**13.9. Construction.** The headings of Sections in this Agreement are for convenience and are not to be used in interpreting this Agreement. As used in this Agreement, the word "including" means "including but not limited to."

**13.10. Entire Agreement and Order of Precedence.** This Agreement, together with any Product Evaluation order form, constitute the entire agreement between the parties with respect to the subject matter hereof, and supersede all prior and contemporaneous understandings and agreements, whether oral or written, pertaining to the subject matter hereof. In the event of any conflict between this Agreement and the terms set forth in an order form, the terms of this Agreement shall take precedence.

**13.11. No Third-Party Beneficiaries.** There are no third-party beneficiaries to this Agreement.

**13.12. Counterparts.** This Agreement may be executed in one or more counterparts, each in the English language and each of which shall be deemed to be an original instrument, and all such counterparts shall together constitute the same agreement.

Last update: October 2021